

# 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.

## 1.2 Prevention

### Crime prevention

According to the *Guidelines for the Prevention of Crime ECOSOC Resolution 2002/13, Annex*, crime prevention “comprises strategies and measures that seek to reduce the risk of crimes occurring, and their potential harmful effects on individuals and society, including fear of crime, by intervening to influence their multiple causes.” Effective crime prevention requires increasing the risks and punishments for those committing the crime, and reducing its rewards. Accordingly, criminal justice measures are important components of a comprehensive response to effectively prevent trafficking in persons and smuggling of migrants, alongside measures to a) reduce vulnerability of individuals and communities, and b) to reduce opportunities for offenders to commit crimes including through measures relating to demand and c) to create a climate in which the crime and the attitudes that put people at risk are seen as unacceptable.

The UNTOC and Protocols contain prevention measures including awareness raising, border controls, carrier provisions, document provisions, training and addressing demand. UNODC’s human rights-based and gender-sensitive approach, requires that these measures proactively promote, respect and protect human rights and advance gender equality. Upholding the do no harm principle means that prevention measures should not detract from enjoyment of human rights, whether by victims of trafficking, smuggled migrants, witnesses, accused persons, convicted persons, or others. Guarding against harm also means making sure that crime prevention efforts do not detract from other prevention work, such as efforts to improve access to livelihoods, to counter discrimination and vulnerability, and to provide people vital pathways and opportunities to migrate safely or seek asylum.

### Restrictions of movement

Particular human rights and gender issues arise when movement of vulnerable populations is restricted in the name of preventing trafficking in persons and smuggling of migrants. Such interventions can have rights reductive and gender-discriminatory implications, and have been frequently shown to increase the risk and vulnerability of people to being pushed into the hands of organized crime networks. An example is policies that restrict cross-border movement to prevent trafficking of would-be migrants that instead divert them into irregular migration channels that may be facilitated by smugglers or traffickers. Another example is efforts to intercept and disrupt smuggling operations, that prevent people from fleeing conflict, violence or persecution in the absence of safe and regular options for doing so, forcing them into the hands of more organized criminal networks. These outcomes are contrary to the purposes of the Trafficking in Persons and the Smuggling of Migrants Protocols. The measures set out in article 11 of both to ‘strengthen’ borders, are aimed at preventing and detecting traffickers and smugglers. These and other provisions must be interpreted and applied in accordance with the respective savings clauses (article 14 and 19 of the Trafficking and Smuggling Protocols respectively). Any regulation of entry of non-nationals across the borders of a State as a part of prevention strategies must therefore be in accordance with due process, *non-refoulement* and the prohibition of collective expulsions.

### Non-discrimination

Importantly, prevention measures must themselves be non-discriminatory. Gender dimensions are present in the context of discriminatory migration and asylum policies. As the Committee on the Elimination of Discrimination against Women has pointed out, such policies may impact on women

and girls fleeing from crisis or conflict zones, including through increased border control, refusal or entry, pushbacks, expulsions or detention, that heightens vulnerability to exploitation, including due to their increased need to use the services of smugglers and other criminal networks to facilitate their movement and evade border controls<sup>38</sup>. Examples of discriminatory policies include those introduced under the auspices of preventing exploitation and abuse that serve instead to prevent women from migrating for work or migrants from changing employers, entrenching the discrimination against them and their vulnerability to exploitation<sup>39</sup>.

The OHCHR Recommended Principles and Guidelines on Human Rights at International Borders states (at paragraph 8) that:

The principle of non-discrimination shall be at the centre of all border governance measures. Prohibited grounds of discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation or gender identity, health status, and economic and social situation. Any differential treatment of migrants at international borders shall be in lawful pursuit of a legitimate and proportionate aim. Specifically, measures taken to address irregular migration, or to counter terrorism, human trafficking or migrant smuggling, shall not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the basis of prohibited grounds, and regardless of whether or not they have been smuggled or trafficked.

### Promoting worker rights and safer migration pathways

Sustainable Development Goal 8 concerns the promotion of sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. Such measures remove incentives for labour exploitation, and abusive working-conditions that can impact migrant smuggling and trafficking in persons. Targets in pursuit of that goal include the eradication of forced and child labour and trafficking, protecting labour rights including those of migrant workers, and increasing access to financial services. Goal 8 also explicitly promotes gender equality, with indicators that refer to 'full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value' (8.5) and protection of labour rights and promotion of safe and secure working environments 'for all workers, including migrant workers, in particular women migrants, and those in precarious employment' (8.8).

Demand for labour or services of trafficked or otherwise exploited persons is reduced or removed where workers are organised and where labour standards for wages, working hours and conditions, health and standards are routinely and effectively monitored and enforced. Accordingly, policies and practices that promote safe migration in line with economic and demographic realities, complemented by policies and practices that protect the rights of workers, including the right to organize, reduce incentives, opportunities and demand for traffickers and smugglers.

<sup>38</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, UN Doc. CEDAW/C/GC/38 (6 November 2020) [24]

<sup>39</sup> Rebecca Napier-Moore, Protected or put in harm's way? Bans and restrictions on women's labour migration in ASEAN countries (ILO and UN Women, 2017)

## International labour laws relevant to prevention of trafficking and smuggling

Criminal justice responses to trafficking in persons and smuggling are inextricably linked to social justice approaches. International Labour Organization (ILO) Conventions are relevant towards improving labour standards and thereby reduce the opportunity for exploitation including in the context of trafficking in persons. In the context of migration that may involve victims of transnational trafficking, and indeed migrants risking the use of unscrupulous smugglers to access exploitative labour markets, Objective 6 of the *Global Compact for Safe, Orderly and Regular Migration*, becomes relevant in explicitly pointing to facilitating fair and ethical recruitment and safeguarding conditions that ensure decent work, as important components of migrant worker protection. The eight fundamental ILO Conventions are:

- Freedom of Association and the Protection of the Rights to Organize Convention, 1948 (No. 87)
- Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29) and its 2014 Protocol
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Significantly, the Protocol of 2014 to the Forced Labour Convention, 1930, refers explicitly to forced labour as well as trafficking in persons for the purpose of forced labour. The Worst Forms of Child Labour Convention, 1999 (No. 182) explicitly requires the elimination of trafficking of children. Additional ILO Conventions that are of significant importance, particularly to addressing trafficking in persons, include:

- Labour Inspection Convention, 1947 (No. 81)
- Migration for Employment Convention (Revised), 1949 (No. 97)
- Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
- Private Employment Agencies Convention, 1997 (No. 181)
- Domestic Workers Convention, 2011 (No. 189)

For more information on ILO Conventions, see *Rules of the Game: An Introduction to the standards-related work of the International Labour Organization* (ILO, 2019).

Among the relevant human rights are:

- The right to work and to just and favourable conditions of work (UDHR art 23; ICESCR arts 6, 7, 10; CRPD art 27; ILO Core Labour Conventions and ILO Declaration on Fundamental Principles and Rights at Work)
- The prohibition of slavery, forced labour and trafficking of persons (UDHR, art 4; ICCPR art 8; CEDAW art 6; CRC arts 34-36)
- Equal rights of women in relation to employment (CEDAW art 11; ILO Conventions No. 100 and No. 111)
- Prohibition of child labour (CRC art 32, ILO Convention NO. 182)
- Equal labour rights of migrant workers (ICRMW art 25)

## Addressing vulnerability

States have a legal obligation to prevent human rights violations, including those that lead to vulnerability to human trafficking and migrant smuggling. The focus here is on the persons vulnerable to falling into the hands of criminals rather than vulnerability to perpetrating crime. Many of the same issues that make people vulnerable to trafficking and smuggling, however, also apply to low-level traffickers and smugglers. People may become involved in smuggling of migrants because they lack viable alternative sources of income and come from marginalized communities where migrant smuggling is less stigmatized and perceived as less harmful than other crimes (such as drug smuggling). Such actors may subsist on income they derive from their role in smuggling, without fully understanding the organized criminal dimensions of their activities. People who are investigated and prosecuted as traffickers may also hail from marginalized and vulnerable groups. Traffickers may even be prior or concurrent victims of trafficking themselves; experience as a victim of trafficking or other serious crime can increase vulnerability to becoming a trafficking offender<sup>40</sup>.

Several measures can be taken to address the factors that render people vulnerable to both crimes. In the case of children, comprehensive measures are needed to address their special needs and particular rights, including birth registration, passport and visa regulations in relation to children, improved access to educational opportunities, and protection of children from violence and abuse. In short, UNODC's criminal justice response should be integrated as part of the multi-disciplinary and nuanced response required, taking into consideration inter-connected factors such as economic disparity, conflict and displacement, environmental factors, poverty,

natural and manmade disasters; disability; and discrimination based on factors such as sex, age, ethnicity and gender.

Gender-based approaches to addressing vulnerability include addressing those factors that make men, women, boys and girls vulnerable to human trafficking and migrant smuggling, especially considering the existence of factors that make women and girls disproportionately vulnerable to human trafficking. In its recent General Comment on trafficking in women and girls in the context of migration, the Committee on the Elimination of Discrimination against Women includes as a root cause of trafficking (and sexual exploitation) "(a) systemic gender-based discrimination creating the economic and social injustice experienced disproportionately by women and girls; (b) situations of conflicts and humanitarian emergencies, including, consequent displacement; (c) discrimination in migration and asylum regimes; and, (d) the demand that fosters exploitation and leads to trafficking<sup>41</sup>." The Committee on the Elimination of Discrimination against Women also drew attention to the plight of women and girls living in rural and remote areas, who are particularly vulnerable to being trafficked and forced into labour as well as into child and/or forced marriage and other harmful practices. Among the factors the Committee pointed to, are the economic hardships of rural life, unpaid work burdens due to stereotypical gender roles, inequality, as well as barriers to access to social services and identity documents owing to lack of infrastructure and services. The Committee stressed the need to economically empower rural women and raise their awareness of risks, as well as by ensuring that legislative and policy responses to trafficking address the challenges rural women and girls. It also pointed to the need to provide gender-sensitive training to the judiciary, police, border guards and other law enforcement officials and social workers in

<sup>40</sup> See Female victims of human trafficking for sexual exploitation as defendants: A case law analysis (UNODC, 2020) 20, 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>41</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, UN Doc. CEDAW/C/GC/38 (6 November 2020) [18]

rural areas<sup>42</sup>.

### Addressing demand in the context of trafficking in persons

Guideline 7 of the OHCHR Recommended Principles and Guidelines on Human Rights and Trafficking in Persons emphasizes that prevention strategies should take into account demand as a root cause of trafficking, including by 'analysing the factors that generate demand for exploitative commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues.' The obligation to address the demand that fosters exploitation is also captured in article 9(5) of the Trafficking in Persons Protocol.

In the context of trafficking, there is significant interest in the factors that contribute to demand for products produced and services provided by victims of trafficking. Given the diversity of forms that trafficking can take, addressing demand requires different responses that must be based on clear and evidence-based understandings. For instance, demand for brides fuelling trafficking into forced marriage requires wholly different measures to those required to tackle forced labour resulting from demand for cheap goods by reducing labour costs. In the former case, complex economic, social, cultural, societal and structural factors must be confronted, including poverty, discrimination, gender inequality and violence against women<sup>43</sup>. In the latter, demand can be addressed by reducing profits - and therefore incentives - for traffickers. Examples include measures to ensure fair and ethical recruitment of workers to reduce their vulnerability to exploitation, and in many cases it will also be appropriate to engage consumers (whether individuals or public or private entities), to purchase goods and services that have not been produced or

42 See Committee on the Elimination of Discrimination against Women, General Recommendation No. 34 on the rights of rural women, UN Doc CEDAW/C/GC/34, 4 March 2016.

43 Interlinkages between Trafficking in Persons and Marriage: Issue Paper (UNODC, 2020) 89, available at: [https://www.unodc.org/documents/human-trafficking/2020/UNODC\\_Interlinkages\\_Trafficking\\_in\\_Persons\\_and\\_Marriage.pdf](https://www.unodc.org/documents/human-trafficking/2020/UNODC_Interlinkages_Trafficking_in_Persons_and_Marriage.pdf)

provided by exploited people.

The linkage between poor enforcement of **labour laws and protections** for workers and that can result in their exploitation emphasises the role that robust labour laws, policies and practices plays in preventing trafficking. Here, making the cost of non-compliance outweigh the cost of compliance is a strong method to address the demand for exploitable labour. The implementation of the International Labour Law framework, including by ensuring that recruitment practices are fair and ethical (and comply with ILO's General principles and operational guidelines for fair recruitment and the Dhaka Principles on Migration with Dignity), and strengthening the role that labour inspectors play in entering places of work, can prevent bad labour from descending into situations of forced labour and human trafficking<sup>44</sup>.

Many countries have also taken steps to address exploitation in the **supply chains** of large corporations. Here, those States that host corporate headquarters bear significant responsibility, including by introducing legislation with reporting requirements that apply extraterritorially to operations and supply chains abroad. Examples of legislative responses include the California Transparency in Supply Chains Act (2010), the UK Modern Slavery Act (2015), the Duty of Vigilance law of France (2017), and the Modern Slavery Act (2018) of Australia among others.

Such legislation sets out due diligence and transparency requirements for companies fulfilling certain criteria, calling for disclosure and transparency of certain categories of information on particular issues, such as modern slavery, child labour or forced labour and/or across a range of issues, including labour and human rights issues. Such

44 Also see: E4J University Module Series: Module 7: Prevention of trafficking in persons, <https://www.unodc.org/e4j/en/tip-and-som/module-7/key-issues/demand-side-strategies-discouraging-or-prosecuting-demand.html> and Preventing Trafficking in Persons by Addressing Demand (ICAT, 2014).

requirements are more effective where they are mandatory, supported by mechanisms to monitor and enforce them, and result in legal consequences for non-compliance. The effective implementation of the UN Guiding Principles on Business and Human Rights can further serve to prevent human rights abuses in business practices and proactively engage them in their protection, including by providing access to remedies for people whose rights have been abused.

States have been repeatedly called upon to also address the demand for trafficking in persons for the purpose of **sexual exploitation**, particularly of women and girls, by putting in place or enhancing preventative measures including legislative and punitive measures to deter exploiters of trafficked persons (including public officials), and providing better protection for victims, particularly women and girls.<sup>45</sup> The Committee on the Elimination of Discrimination against Women calls on States to address demand as a root cause of trafficking, including by confronting cultural attitudes, beliefs, norms and stereotypes regarding male domination and the need to assert male control or power, patriarchal gender roles, male sexual entitlement, coercion and control that drive demand for sexual exploitation of women and girls<sup>46</sup>. The General Assembly has also called on governments to eliminate sex tourism demand, especially for children, through all possible preventative actions including legislative measures, policies and programmes, and encourages UNODC and others to promote travellers to support the fight against trafficking. The Committee on the Elimination of Discrimination against Women has emphasized that a gender-transformative approach is needed to confront the structural and systemic conditions that deprive women and girls of their fundamental

rights and increase their risk of being trafficked<sup>47</sup>. Beyond the situation of women and girls, trafficking prevention efforts must pursue equal enjoyment of human rights by people of all genders.

### **Addressing demand in the context of smuggling of migrants**

Demand is also fuelled by factors such as economic hardship, conflict, and persecution that may mean that people must be mobile in order to seek out safety or even asylum. In these cases, where safe and regular options are lacking, demand for smuggling services to facilitate both leaving a place and entering another, may increase. In cases where people have no choice but to use smuggling services, smugglers may be able to increase the fees they demand. Threats to human security therefore increase demand for smugglers, in some places, resulting in people considering smuggling services to be part of legitimate businesses, with smugglers providing valuable services to people in need. The fact that smugglers sometimes deliver their 'clients' safely to their destination means that awareness raising campaigns that simplistically portray all smugglers as violent and dangerous criminals may lack veracity and be largely ineffective. In other cases, smugglers may drive demand by smugglers themselves, who market their services and particular destinations to a target audience of would-be migrants.

Prevention measures to address demand for smuggling services then, requires efforts to effectively managed migration policies, economic development and livelihood opportunities in countries of origin, and humanitarian protection measures to allow provide people with viable choices to being smuggled.

<sup>45</sup> See for instance, General Assembly resolution 71/167 of 19 December 2016 on Trafficking in Women and Girls.

<sup>46</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, UN Doc. CEDAW/C/GC/38 (6 November 2020) [29-30]

<sup>47</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, UN Doc. CEDAW/C/GC/38 (6 November 2020) [49]

## Prevention challenges for UNODC

UNODC has a key role in supporting States to fulfill their obligations to prevent trafficking and smuggling, while upholding human rights. In practice, protection of rights can pose prevention challenges as smugglers exploit State protection policies to achieve their ends. For instance, smuggling *modus operandi* may abuse asylum procedures, or smuggle pregnant women, children, or other vulnerable people who should not be detained, or by instructing migrants to injure themselves to force rescue and assistance, thereby facilitating their onward smuggling. Smugglers may instruct that vessels be scuttled to force States to rescue them, rather than act to intercept and prevent smuggling incidents at sea. The cold reality that criminals will leverage obligations under international law for their criminal purposes, points to the importance of UNODC's work to support States to prevent these crimes and uphold their sovereignty, without compromising their human rights obligations.

Another challenge emerges from the corruption and/or complicity of State agencies to the perpetration of trafficking in persons and smuggling of migrants. Not acknowledging this reality can serve to endorse or perpetuate harm caused to individuals, including victims, migrants, perpetrators and others who are affected by State corruption.

It is important to understand that UNODC's crime prevention approach is only one component of a wider range of interventions required to combat trafficking in persons and smuggling of migrants. Other actors are working to address the factors that create and exacerbate vulnerability to both crimes that exist outside of the crime prevention framework, including by addressing the human rights violations that result in vulnerability to both crimes. In some cases, criminal justice approaches may not be appropriate. For instance, in situations of parents who sell their

daughter into a marriage or exploit their son in street begging in an effort to secure their child's survival and their own, may not always be effectively or appropriately addressed by criminal prosecution. Caution should also be exercised in efforts to approach conflict prevention through a crime prevention lens; a purely criminal justice approach may detract from humanitarian needs in conflict settings.<sup>48</sup>

Conflict and humanitarian emergencies also exacerbate both trafficking and smuggling, as a wider pool of vulnerable people become available to criminals for exploitation and demand for smuggling services to flee conflict increases. Particularly in relation to trafficking in persons, the Committee on the Elimination of Discrimination against Women and Girls points to the fact trafficking of women and girls is exacerbated during and after conflict and humanitarian emergencies, for a range of reasons including the "normalization" of gender-based violence, including conflict-related sexual violence, as an aggravating factor of pre-existing structural gender discrimination against women and girls. Given the inter-linkage between conflict, and trafficking and smuggling, conflict prevention is a means of trafficking and smuggling prevention. Noting the gender dynamics at play, Security Council Resolution 1325 (2000), that formally initiated the Women, Peace and Security Agenda, points to the importance of women in the prevention and resolution of conflicts and the importance of their equal participation and full involvement in all efforts to promote and maintain peace and security. The Resolution also emphasizes the importance of mainstreaming a gender perspective into peacekeeping operations<sup>49</sup>.

<sup>48</sup> Trafficking in persons in conflict contexts: What is a realistic response from Africa? (Enhancing Africa's Response to transnational organized crime, 2019)

<sup>49</sup> Thematic Paper on Countering Trafficking in Persons in Conflict Situations (UNODC, 2018) 64

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

<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 an erroneous perception that preventing migration serves to prevent trafficking in persons and smuggling of migrants	Many victims are trafficked through regular migration channels, or are trafficked internally. Preventing migration can serve to increase demand for smuggling services. Efforts to prevent irregular migration can undermine the right to seek asylum
Gender-responsive approaches are not taken to the design of prevention strategies and activities	Prevention activities that are not gender-responsive are often not calibrated to targeted beneficiaries and are therefore ineffective

## 1.3 Identification and referral

In the context of human trafficking, identification should ideally be aimed at identifying vulnerabilities to trafficking and exploitation rather than only identifying evidence that trafficking in persons as set out in the Trafficking in Persons Protocol has taken place. Identifying people before they are trafficked and exploited supports early access to support. For those who have already fallen victim of trafficking, their identification is a central human rights obligation of States. As noted in the OHCHR Recommended Principles and Guidelines on Human Trafficking and Human Rights, “a failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights” (guideline 2). The State must have procedures in place by which to strengthen its capacity to identify victims of trafficking, in a way that is human rights compliant in its design and application. Here, the role of national **referral mechanisms** in ensuring that victims are not only identified, but are appropriately referred to appropriate service providers is key to protecting their rights.<sup>50</sup>

Gender dimensions must be taken into consideration to strengthen identification of victims of trafficking. For instance, there may be barriers to identifying female victims of trafficking for sexual exploitation where they exist in mixed populations along side other women in the sex industry. In the context of trafficking into forced marriage, factors relating to the private setting of the exploitation and potential involvement of family members may dissuade victims from self-identifying or coming to the notice of authorities. Identification must take into account the special needs of women and children yet not be based on assumptions that only women and girls, or people of certain nationalities are victims of trafficking. Such assumptions can

result in failure to identify people, for instance, men or boys, or people along specific routes or in specific sectors, or who otherwise do not fit the assumed ‘profile’ of who is a victim of trafficking. Accordingly, actors who play a role in identification and referral (including public and private recruitment agencies, employers, police, border and immigration officers, embassy and consular officials, labour inspectors, social workers, healthcare providers and child protection actors) must be provided with trauma-informed, gender and child sensitivity training that counters stereotypical and discriminatory attitudes.

Identification must also be responsive to crises and conflict; the stakeholders who are likely to encounter victims of trafficking and others in need of protection may change at the onset of conflict, requiring a different set of actors to be engaged and equipped with necessary skills. Humanitarian workers and peacekeeping personnel should be equipped with indicators adapted to identify victims of trafficking among the persons they encounter. Importantly, services that identified potential victims may be referred into may be absent or have as a result of crises of conflict, meaning that referral mechanisms must be modified and be continually updated in line with realities on the ground.

Identification of victims of trafficking raises complex human rights considerations. On the one hand, failure to identify victims of trafficking can amount to continued abuse of their rights. For this reason, a presumption that a person who may be a victim of trafficking is a victim should apply, until further screening takes place to rule out this possibility. On the other hand, poorly conducted identification can be detrimental to rights, for instance, where they are conducted in a way that does not respect the privacy of people involved, or results in actions taken beyond identification

<sup>50</sup> For more on national referral mechanisms, see National Referral Mechanisms: Joining efforts to protect the rights of trafficked persons: A practical handbook (OSCE, 2004)

of victims of trafficking. Examples include raids of places of work that are conducted using unnecessary force, without respect for the dignity of the persons on the premises, and that result in detention or deportations of persons identified as living and working in the country irregularly. In this context, the Committee on the Elimination of Discrimination against Women “condemns the use of anti-trafficking interventions to justify violence against specific groups of women, particularly in the case of violent raids and entrapment operations by law enforcement authorities conducted with a view to dismantling trafficking networks.<sup>51</sup>” In some cases, where raids are carried out in brothels in countries where prostitution is illegal, those who are not identified as victims of trafficking may instead be charged with offences relating to involvement in the sex industry.

There have been reports of violence against women or children being perpetrated by authorities carrying out such raids<sup>52</sup>. Forcible removals of people from the places where they live and / or work may result in them having to leave behind their savings, their possessions or even their children. Persons who are removed may subsequently be detained prior to deportation, for prolonged or indefinite periods in shelters (as discussed in [Tool 1.4](#)).

Rights abuses and violations can also occur where people are identified as being victims of trafficking against their wishes and interests, including when they do not consider themselves to be victims. By way of example, many rights groups are pushing back against counter-trafficking work they consider to be harmful to human rights.<sup>53</sup> In cases where poor work conditions are conflated with situations

of trafficking the result may be that, far from having their rights upheld, workers - many of whom are migrants - instead lose their livelihood and may be placed into protection and criminal justice processes against their will. Identification and referral procedures should consider the specific needs and wishes of potential victims of trafficking in persons and act in their best interests. In order to do no harm to victims and potential victims of trafficking in identification and referral processes, national referral mechanisms in place must be rights-based, gender-sensitive, victim-centered and trauma-informed.

There are a number of reasons that trafficked people may not wish to be identified as such, including the possibility of long-term detention in closed shelters, mandatory return to country or place of origin, stigmatization, lack of understanding of identification and protection processes, or a simple lack of victim support services that meet their needs. These negative outcomes speak to the need to respect the agency of rights holders and to take human rights-based and gender-sensitive approaches that empower people to participate in the decisions that affect them.

### **Identification of children among trafficked or smuggled people**

International human rights law imposes special responsibilities on States in relation to identifying children who may be in need of assistance and support. At the national level, UNODC should work to ensure that child protection laws and frameworks for identification apply equally to children irrespective of their nationality. To ensure that children in need of protection are identified, States should apply a presumption that a person who may be a child is treated as a child until an age determination can be made. The paramount rule that applies to all situations involving children is the best interests of the child, as contained in the Convention on the Rights of the Child (CRC). States parties

<sup>51</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, UN Doc. CEDAW/C/CC/38 (6 November 2020) [46]

<sup>52</sup> Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions (GAATW, 2018); Collateral Damage: The Impact of anti-trafficking measures on human rights around the world (GAATW, 2007).

<sup>53</sup> Anti-Trafficking Review: Special Issue - Sex Work. Issue 12, April 2019, (GAATW, 2019)

cannot prioritize other considerations, such as law enforcement agendas against traffickers or smugglers, or border and migration management objectives over the best interests of the child.

Because the CRC applies to all children who are in the jurisdiction or control of the State, children who are non-citizens are as entitled to protection as nationals<sup>54</sup>. Child rights apply regardless of whether or not a child is determined to be a victim of trafficking. It is thus important to ensure that the process of identifying children as victims of trafficking is not used to deny them rights to which they are entitled simply by being children. At the national level, UNODC should work to ensure that child protection laws and frameworks for identification apply equally to children irrespective of their nationality. Identification approaches should be gender-responsive; in many countries, males who are victims of trafficking may be less likely to identify themselves as such. Men and boys may not be identified as victims where authorities are less willing to investigate crimes against them. This speaks to the need for gender-sensitive approaches to identification and referral.

### **Identification through screening interviews**

For all trafficked persons and smuggled migrants in need of protection, identification often takes place through screening interviews, including as to whether a person needs protection as an asylum seeker. Consideration should be given to how these screening interviews can be conducted in a way that is human rights based and gender responsive, including by avoiding potential profiling biases that can mean some victims are not recognized as such. Ideally, as stated at the outset, identification and screening should not only aim to recognize people who have been trafficked, but also detect vulnerabilities to trafficking so that early support can be provided and their exploitation prevented.

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<sup>54</sup> Human Rights and Human Trafficking: Fact Sheet No. 36. (OHCHR, 2014) 7

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

<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
Men and boys who are victims of trafficking are not identified	Identification systems may be weakened if they are informed by deficient or inaccurate profiles of who can be a victim of trafficking  Identification processes must be inclusive and allow for all victims of trafficking to be identified so that women and girls and men and boys can be identified along trafficking routes
Gender-sensitive approaches are not considered important in the identification and referral of trafficked persons or others in need of protection and assistance	Where gender-sensitive approaches are not taken, victims of trafficking may not effectively identified or may be misidentified.  Where gender-sensitive approaches are not taken, there law enforcement procedures may be exposed to risks of accusations of misconduct / misconduct maybe be more likely
Persons who may be in need of protection and assistance are deported without being appropriately and accurately identified and referred	If potential victims of trafficking or smuggled migrants are deported without being identified, potential evidence and intelligence is lost, meaning that traffickers and smugglers can continue their crimes with impunity.

## 1.4 Protection and assistance

Provision of sufficient protection and assistance to persons in need of it is an obligation that finds a strong basis in international law. Yet, there are also significant human rights risks where approaches to protection and assistance do not accord with that framework. What constitutes sufficient protection and assistance depends on individual needs and circumstances, and is guided by the International Human Rights Framework, UNTOC, the Trafficking in Persons Protocol and the Smuggling of Migrants Protocol. Importantly too, protection and assistance must be informed by gender perspectives that are essential to ensure that protection and assistance services are tailored to individual needs.

The criminal justice architecture of the UNTOC and the Protocols primarily concern protection and assistance in the context of a crime taking place and being pursued for prosecution. Article 24 to 26 of the UNTOC require that States Parties take measures to assist and protect victims of crime and cooperate with other enforcement authorities to protect victims and witnesses of crime (article 25(1)). There is an emphasis on protecting victims from retaliation and intimidation. The UNTOC speaks to the obligation of States parties to establish appropriate procedures for compensation and restitution (article 25(2)) and to enable the views and concerns of victims to be presented during the different stages of criminal proceedings, in a manner not prejudicial to the rights of the defence (article 25(3)).

### Protection from threats to life and safety

At the outset, victims of trafficking and smuggled migrants must be removed from situations where their lives or safety are in danger and have their immediate medical needs attended to. In the case of trafficking, the principle of protecting lives and safety was upheld by the European Court of Human Rights

in the case of *Rantsev v Cyprus and Russia*, which confirmed that if State authorities were aware or ought to have been aware of a risk of trafficking then failure to take appropriate measures, within the scope of their power to remove an individual from that situation or risk, amounts to a violation of that person's rights<sup>55</sup>.

In the case of migrant smuggling, article 16(1) of the Smuggling Protocol specifically requires States Parties to take measures - including legislation if necessary - to protect the rights of smuggled migrants, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. This principle is restated again in the context of rescuing lives at sea (article 8). States parties are also obliged to protect migrants from violence (article 16(2)), and to assist migrants whose lives or safety are endangered by being smuggled (article 16(3)) on the basis of non-discrimination (article 19(2)) and taking into account special needs of women and children. In practice, these obligations require that border, immigration, law enforcement and other officials take positive actions to protect the lives and safety of migrants who are endangered. It also requires that the actions they take do not compromise migrants' rights.

### Protection and assistance of victims of trafficking

Guideline 6 of the OHCHR Recommended Principles and Guidelines on Human Rights and Trafficking in Persons (extracted in full at the end of this section) calls on States to ensure that victims are protected from further exploitation and harm, have access to adequate physical and psychological care that is not conditional on their willingness to cooperate in legal proceedings.

<sup>55</sup> The European Court of Human Rights (*Rantsev v Cyprus and Russia*, Application no. 25965/04, Judgment of 7 January 2010, para 286.

A key human rights principle underlying protection and assistance of victims of trafficking is that such protection and assistance should be on the basis of informed consent, and that victims should not be coerced or forced into receiving any services.<sup>56</sup> While there may be nuances in applying this principle in cases where victims do not have legal capacity to consent, in general the principle may include not subjecting victims to mandatory testing for HIV/AIDS or other diseases<sup>57</sup>. It is also important that provision of protection and assistance set out in article 6 of the Trafficking in Persons Protocol is not conditional on the victim's willingness to cooperate with criminal justice authorities<sup>58</sup>, nor on those who trafficked them being charged with a trafficking offence. A victim of trafficking is entitled to assistance whether or not a case is taken against the trafficker(s).

In relation to the special needs of women and children, consideration must be given to that the intersecting forms of discrimination that women may face - whether as migrant workers, as indigenous women or other identity factors - are also addressed and factored into the design of programmes and projects to protect and assist them. Engaging victims in the design of protection and assistance services helps to ensure that those needs are understood. Indeed, it is crucial that victims are involved in the development of the services that they are provided and be given an opportunity to provide feedback on them to the extent of their capacity<sup>59</sup>. This involvement is necessary to ensure that victims recover and are socially included, but also to ensure that scarce resources are allocated to services that are needed and wanted. UNODC should therefore

ensure that any protection and assistance interventions it supports are informed by beneficiaries' views, and not dictated by donors or other stakeholders whose agendas may not be based on human rights or gender equality. For instance, where donors have an interest in supporting closed shelters that may compromise rights of those accommodated within them, or denying services such as sexual and reproductive health services for female victims contrary to human rights, UNODC should actively engage with those donors to strengthen their understanding of human rights based approaches to protection and assistance, and guard against those that seek to protect victims from re-trafficking by restricting their rights or freedoms.

In respect of children, what is in their best interests (article 3, CRC) is also supported by the right of the child to be consulted (CRC article 12(1)(2)), meaning the child's views must be sought and taken into consideration in accordance with his or her age and maturity level. As with adults: (1) care and support for children must not be conditional on their cooperation with authorities; (2) they must not be coerced into receiving protection and support; (3) non-citizen children must be entitled to care on an equal basis to citizens; (4) they must be provided with information about their situation and entitlements; their views must be respected and given due weight; and (5) their privacy must be protected from arbitrary interference. In accordance with special needs, a legal guardian, organization or authority may need to be appointed to represent them<sup>60</sup>. Guideline 8 of the OHCHR Recommended Principles and Guidelines on Human Rights sets out special measures for children. Further, Guideline 7.1 of the UNICEF Guidelines on the Protection of Child Victims of Trafficking (2006) emphasize the right that child victims have to immediate care and protection including security, safe accommodation, food, access to social and

<sup>56</sup> Recommended Principles and Guidelines on Human Trafficking and Human Rights (OHCHR, 2010) guideline 6

<sup>57</sup> Here it can be noted that while mandatory testing of persons for COVID-19 amounts to a limitation to their rights, it may be a justifiable limitation on public health emergency grounds, where necessary, not arbitrary and in accordance with law.

<sup>58</sup> Human Rights and Human Trafficking: Fact Sheet No. 36 (OHCHR, 2014) 14

<sup>59</sup> A Toolkit for guidance in designing and evaluating counter-trafficking programmes: Harnessing accumulated knowledge to respond to trafficking in persons (ICAT, 2016)

<sup>60</sup> Guidelines on the Protection of Child Victims of Trafficking (UNICEF, 2006)

health services, psychological support, legal assistance and education.

### **Rights-based approached to developing specialized services**

In some contexts, there is a risk that the development of specialized services for certain categories of people, such as trafficked persons or vulnerable migrants in need of protection, can inadvertently result instead in their denial of other services. This can result for instance, where identified victims of trafficking are placed in a specific service track that does not align with social protections available outside of that framework; access to skills training may be limited to courses provided or organized by the victim support agency caring for the victim, rather than all courses available in that location. Another example is where smuggled migrants in need of support are processed through immigration channels that do not interact with protection and assistance services. Therefore, it is imperative that the development of specialized services does not inadvertently result in denial of access to local protection systems, including asylum systems and child protection systems.

Conflict, humanitarian disasters, health pandemics and other crises can exacerbate vulnerability to trafficking and smuggling, and damage the mechanisms in place to protect people affected by them. Low-resourced countries unable to provide protection and assistance services before such events are acutely impacted, as protection and assistance needs increase while capacity to meet them diminishes. While victims of trafficking and smuggled migrants have the same rights to protection and assistance the State's capacity to fulfill its obligations may be severely impaired, highlighting the role of UNODC and other UN agencies in filling gaps<sup>61</sup>.

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<sup>61</sup> Thematic Paper on Countering Trafficking in Persons in Conflict Situations (UNODC, 2018) 49

## Recommended principles and guidelines on human rights and human trafficking

### Guideline 6: Protection and support for trafficked persons

The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available.
2. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.
3. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling. Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.
4. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality. Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.
5. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.
6. 5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.
7. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard.
8. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).
9. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

Source: *Recommended principles and guidelines on human rights and human trafficking*, United Nations, (UN doc. E/2002/68/Add.1)

## Deprivation of liberty of smuggled migrants

The obligation of States to respect human rights is particularly fraught in the context of immigration **detention**, which in some instances amounts to deprivation of liberty contrary to international law. The Smuggling Protocol acknowledges that some States will subject smuggled migrants to detention; its article 16 protection provision sets out that where smuggled migrants are detained, States “shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers” (article 16(5)).

International law requires that any detention not be arbitrary (ICCPR article 9; CRC, article 40(1); ICRMW article 16(4)). The Human Rights Committee’s General Comment No. 35 explains that “Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time<sup>62</sup>.” Where detention is considered necessary, States should take steps to ensure that conditions are humane and in line with minimum standards and good practice, so it is in the least restrictive setting for the shortest period of time necessary to prepare for the return or removal of a person.

The Working Group on Arbitrary Detention has stated the principle that migrants in vulnerable situations or at risk - including survivors of trafficking, torture or other serious violent crimes - must not be detained<sup>63</sup>. In its revised deliberation on the deprivation of liberty of migrants, the Working Group addressed the particular issue of detained children. It emphasized that detaining children on the

basis of their parents’ migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child. The Committee on the Protection of the Rights of All Migrant Workers and their Families (CMW) and the Committee on the Rights of the Child have also addressed the principle of non-detention of migrant children<sup>64</sup>.

## International obligations in detention

In short, any detention of smuggled migrants must accord with international law and the obligations therein. These can be summarized as follows:

- Any deprivation of liberty of migrants on the basis of their migration status should be a measure of last resort
- Where detention takes place, it should be for the shortest period of time and in accordance with due process safeguard and conditions that meet relevant human rights standards
- Immigration detention of migrants who have special needs should be avoided
- Children should never be detained or separated from their families in accordance with the best interest of the child<sup>65</sup>.

## Deprivation of liberty of victims of trafficking

There are instances where victims of trafficking are deprived of their liberty contrary to international law. This can happen as a result of their misidentification; their non-willingness to cooperate in criminal proceedings pending

<sup>64</sup> See CMW General Comment No. 5 (2020) on migrants’ rights to liberty and freedom from arbitrary detention. Also see the CMW’s joint general comment No. 3/No. 22 of the Committee on the Rights of the Child (2017) on the general principles regarding the human rights of children in the context of international migration; its joint general comment No. 4/No. 23 of the Committee on the Rights of the Child (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return; its statements on ending immigration detention of children (2014).

<sup>65</sup> Revised Deliberation No. 5 on deprivation of liberty of migrants, Working Group on Arbitrary Detention, 7 February 2018; Principles and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (OHCHR, 2018), 11-13, 37; Recommended Principles and Guidelines on Human Rights at International Borders (OHCHR, 2014); General Comment 35, Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35 (16 December 2014) [18].

<sup>62</sup> General Comment 35, Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35 (16 December 2014) 18

<sup>63</sup> Revised Deliberation No. 5 on deprivation of liberty of migrants, Working Group on Arbitrary Detention, 7 February 2018

return to their countries of origin; because they have participated in certain activities (for instance work that may be illegal or irregular); or because they are placed in shelters from which they are unable to leave as a matter of policy. States often seek to justify detention in shelters on the basis of irregular immigration status, but victims of domestic trafficking have also been subject to detention in their own country. Detention violates human rights law if it is not specifically provided for in law or is contrary to law; is imposed in a discriminatory manner (for instance, is applicable only to women and girls); is imposed for a prolonged, unspecified or indefinite period; is unjust, unpredictable or disproportionate; is not subject to judicial or administrative review that can confirm its legality and continued necessity, and allow for release where grounds for its continuance do not exist<sup>66</sup>.

Victims are sometimes placed in State or non-State shelters, often without their consent or after they have retracted their initial consent. In extreme cases, shelters may be locked or surrounded by high fences and barbed wire to prevent victims from leaving giving the impression that there is a punitive element to their detention. In some cases, laws, policies and practices surrounding shelters for victims of trafficking may be discriminatory in purpose or effect, for instance, where women and girls are routinely placed in shelters against their will in the absence of due process, while on the other hand, men and boys are denied access to assistance and support for want of shelters to accommodate those in need. The activities or skills training programmes on offer in those settings may also confirm gender stereotypes, by offering some activities to females and other activities to males<sup>67</sup>.

Such practices are contrary to international law. Protection and assistance services should be offered on an informed and voluntary basis. Victims should not be kept or detained in shelters or other facilities against their will. In exceptional cases where freedom of movement is restricted on the basis of security, such limitations should be on an exceptional basis and for a limited time.

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<sup>66</sup> See Anne T. Gallagher and Marika McAdam, *Freedom of movement for victims of trafficking (ASEAN-ACT, 2020)* 8

<sup>67</sup> For more on detention of victims in shelters, see Marika McAdam, *Continuing to pay the price for freedom: the ongoing detention of victims after their trafficking experience (ASEAN-Australia Counter Trafficking, 2020)*

**Table: Example of advocacy points [Tool 3.7](#) on protection and assistance**

<b>Human rights / gender concern</b>	<b>Advocacy point to address concern</b>
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
Victim / witness protection and assistance is not considered to be worth investing TIP / SOM allocated resources into.	Persons who are protected and assisted in accordance with their human rights and in line with gender-sensitive approaches, are more likely to cooperate with authorities in criminal justice processes. For instance, victims who are detained contrary to their rights may be less willing to cooperate.
There is resistance to seeking feedback of victims of trafficking / smuggled migrants on protection and assistance services	If victim feedback is not sought, there is a risk that scarce resources will be wasted on services that are not wanted or needed and will fail to show effective results.
Paternalistic approaches are taken to providing assistance services to victims of trafficking, particularly women and girls.	Victims of trafficking are not objects of protection but are subjects of human rights. Unless they are actively engaged in developing assistance plans, the assistance they receive may be unwanted and ineffective. Women and girls are not empowered by paternalistic approaches that make assumptions about what is beneficial for them on the basis of their gender
There are insufficient protection and assistance services available for men and boys who are victims of trafficking	A gender analysis of the dynamics of trafficking and the responses thereto is required to ensure that services are available to all victims of trafficking who are in need of them, including people of all genders.
Donors pressure project managers/project staff to undertake activities that are not compliant with human rights, gender-sensitive and child-friendly approaches	Implementing activities that are not human rights-based, gender-sensitive and child-friendly are often ineffective in therefore do not represent good value for donor investment

## 1.5 Return and reintegration

The Smuggling of Migrants Protocol sets out a framework for returning smuggled migrants (article 18), and article 8 of the Trafficking in Persons Protocol concerns facilitating and accepting the safe repatriation of victims who are nationals or permanent residents. All persons have a right to return to their countries. This right can be damaged where (1) the countries of return do not admit them or support their readmission by the confirmation of their identities and issuance, where necessary, of the necessary travel and identity documents, or (2) where countries returning them interfere with their return, for instance, by detaining them in immigration facilities or shelters. Human rights concerns emerge when returns are carried out that should not take place, and in the process of return.

### Human rights considerations in carrying out returns and reintegration

In relation to the latter, human rights violations can result when people are returned in ways that do not respect their human rights and dignity<sup>68</sup>, such as when physical restraints are unnecessarily used. The return process should be safe and voluntary, taking into account the special needs of the returnee, and respecting their dignity. Yet there have been situations of non-nationals being returned in conditions that have resulted in psychological and physical harm, or even death.

Rights violations can also result where trafficked and smuggled people are returned to situations that made them vulnerable at the outset. UNODC should also be aware of programs that seek to protect victims from re-trafficking by restricting their options, in particular through actively discouraging the option of safe migration; such approaches may rather make them vulnerable. Accordingly, the success of a reintegration process should not

be measured against victims being returned to and remaining in their home communities.

Where people are returned, there are risks that they may be returned in ways that violate their right to privacy, resulting in risk of retaliation from traffickers or smugglers. Violations of privacy in return processes can also result in stigmatization from their family or community. For instance, victims of trafficking in sexual forms of exploitation may be stigmatized in ways that mean they are unable to integrate or to find work when they return home. Similarly, smuggled migrants may be stigmatized for their 'failed' attempt to be smuggled to another country, which results instead in them being returned home, often with smuggling debts to pay. For these reasons, social inclusion is a key component of a rights-based approach to returns, of both victims of trafficking and smuggled migrants. Social inclusion can be understood as "a process of improving the terms of participation in society for people who are disadvantaged - through enhanced opportunities, access to resources, voice, and respect for their rights<sup>69</sup>." In the case of victims of trafficking legislation may allow options for non-citizen victims of trafficking to remain in the country temporarily through special categories of visas that allow them to remain for a period of reflection, and or to participate in criminal justice processes. In other cases, victims may be able to remain on a more permanent basis.

### Human rights considerations preventing returns

In relation to returns that should not take place, international law prohibits collective expulsion (as noted above), and thus guarantees due process and individual assessments of persons before such returns are carried out. The principle of *non-refoulement* is recognized as

<sup>68</sup> For more on the return of victims of trafficking, see Guiding Principles on Human Rights in the Return of Trafficked Persons (OSCE / ODIHR, 2014)

<sup>69</sup> Trafficking in Persons, especially women and children, Report of the Special Rapporteur on trafficking in persons, especially women and children, UN. Doc. A/HRC/41/46 (23 April 2019) 4

constituting a norm of international customary law. In regard to asylum seekers and refugees, international refugee law establishes a prohibition on the return of refugees to any place where they face persecution under Article 33(1) of the 1951 Convention relating to the Status of Refugees.

The absolute prohibitions on torture and cruel, inhuman or degrading treatment or punishment in article 7 of ICCPR and article 3(1) of the CAT, also uphold this principle. Article 3(1) of the CAT states that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. In the case of trafficked persons, being trafficked does not in itself amount to a valid ground for claiming refugee status. However, some victims may qualify for international protection if what they would be subject to upon their return would amount to persecution for one of the reasons contained in the definition provided for in the 1951 Refugee Conventions, if the State does not provide effective protection. In

addition to prohibitions on returning a person to situations where they face persecution, or violations of the right to life or the prohibition against torture, States are also obligated to protect victims from re-victimization. Fulfilling this obligation may require that States not returned trafficked persons to a place where they are at risk of being re-victimized, subject to stigma, threats, intimidation, violence and retaliation.

Smuggled migrants and trafficked persons in need of international protection should be given the full opportunity to make a claim for asylum, including by being provided with information required and access to systems through which to make asylum claims. Return decisions must take a case-by-case approach to determine these issues; some people may need to be resettled elsewhere rather than be returned home. As with any decision relating to a child, decisions about return must accord with the child’s best interests.

**Table: Example of advocacy points [Tool 3.7](#) on return and reintegration**

<b>Human rights / gender concern</b>	<b>Advocacy point to address concern</b>
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
Human rights-based, gender-sensitive and child-friendly return and repatriation of victims of trafficking and smuggled migrants is not prioritized	Victims of trafficking / smuggled migrants who are not returned / repatriated in accordance with human rights obligations may result in evidentiary opportunities (e.g. testimonies) being lost. Ineffective return / repatriation may result in re-trafficking / re-smuggling that does not disrupt either crime

## 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.<sup>70</sup>

<sup>70</sup> 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:**

<b>Location</b>	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.
<b>Persons present</b>	<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>
<b>T r a u m a - sensitivity</b>	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.

<b>Consent</b>	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.
<b>Content</b>	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.
<b>Use of interpreters</b>	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 proceedings<sup>71</sup>.

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 girls<sup>72</sup>, 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

<sup>71</sup> 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.

<sup>72</sup> 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**

<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
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

## 1.7 Criminal justice and other data

As part of the wider effort to strengthen investigative capacity, increased effort is being invested into strengthening criminal justice data on smuggling of migrants and trafficking in persons and to disaggregate this data in ways that can offer useful insights as a basis on which to design appropriate responses. Police or prosecutors may collect data about perpetrators of crime and ongoing cases, as well as about victims. Border and immigration officials may record entries or exits, and attempts to irregularly cross borders. Service providers may also have case management data pertinent to services offered and provided to victims of trafficking or smuggled migrants in need of assistance. Where data is brought together it may offer a wider picture both within a given country or even more broadly across routes or regions.

The ability of such data to offer actionable insight depends on common understandings of crimes such as trafficking in persons and smuggling of migrants in line with international definitions, as well as phenomena such as what constitutes an irregular border crossing or facilitation thereof. Data is also more useful to shape response where it has been disaggregated in the same ways and is sufficiently nuanced to capture the various dimensions of the phenomenon. An important component of this is that gender-sensitive research and data collection efforts be deployed to learn about the role of people of all genders in both crimes, the drivers that lead to their involvement and the impact on these crimes on their lives, in order to develop targeted, evidence-based and gender-sensitive responses. Data on modes of coercion and control are also important to gather, including to show the gendered differences between means of control of victims of labour exploitation and sexual exploitation that can inform gender-sensitive responses. In the case of trafficking in persons, sexual orientation

and gender identity is generally not captured in trafficking victim, yet a growing body of research suggests that LGBTQI+ individuals are at higher risk of becoming victims of trafficking.

Depending on the context, the methods involved, and who is gathering data or conducting research, there may be legal and ethical requirements that must be adhered to in designing the data collection methodology, protecting the data that is collected, and in imposing conditions on how the data can be shared and with whom. This latter consideration is pertinent in the context of international cooperation, which may require criminal justice data to be shared across borders. Key human rights considerations relevant to data collection are privacy, data protection and confidentiality. Failures in these respects can have severe human rights implications. There have been situations where police have revealed the identity of trafficked persons to media, resulting in their stigmatization or even retaliation against them by traffickers. Where identities of informants become known, their lives and safety may be in danger. Beyond violating rights, the failure to safeguard the privacy of people involved in criminal justice processes can dissuade reporting of crime and undermine effective functioning of the criminal justice system in general. Information that is relevant to trafficking in persons settings affected by conflict should be securely and efficiently shared with UN entities, State and non-State actors that can effectively use it to identify and address trafficking.

**Table: Example of advocacy points [Tool 3.7](#) on criminal justice and other data**

<b>Human rights / gender concern</b>	<b>Advocacy point to address concern</b>
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
Authorities believe that adherence to human rights obligations in data collection and protection hampers effective data collection	Data that is collected in ways that are in accordance with human rights principles are more accurate and therefore offer a stronger evidence base for response
Data collecting authorities do not collaborate in or harmonize data collection efforts and approaches	Where data collection is harmonized with domestic, regional and international counterparts and partners, data is easier to share and aggregate, towards informing evidence-based and collaborative response
Compliance with ethical requirements, privacy and confidentiality laws in data collection is not considered necessary or important	Data that is not collected in compliance with ethical requirements, privacy and confidentiality laws may not be accepted by counterparts elsewhere. Data privacy / confidentiality requirements may result in retaliation against victims, disposal of evidence, and / or hiding of assets, detrimentally impacting responses against TIP / SOM. Data quality may be reduced / impaired where potential subjects are not willing to participate owing to concerns about data collection approaches.

OHCHR outlines key principles of relevance to ensuring that approaches to data are human rights based (extracted in the table below) that should be considered alongside any applicable legal and ethical requirements.

**Table: Human rights and gender-based approach to data**

Approach	Key principles	TIP and SOM specific considerations
<p><b>Participation:</b> Participation of relevant population groups in data collection exercises, including planning, data collection, dissemination and analysis of data</p>	<ul style="list-style-type: none"> <li>■ Consider a range of processes that facilitate and encourage participation</li> <li>■ Identify and address potential barriers to participation including in relation to language, culture, gender, social status and vulnerability</li> <li>■ Clearly communicate how participatory processes are conducted and the outcomes of these exchanges shared</li> <li>■ Ensure that the views of vulnerable or marginalized groups, and groups who are at risk of discrimination, are represented</li> <li>■ Maintain knowledge holdings and institutional memory in relation to information gathered through participatory processes</li> </ul>	<ul style="list-style-type: none"> <li>■ Relevant populations may be incarcerated or detained, whether for perpetrating TIP and SOM-related offences, for irregular migration or involvement in activities that may be illegal, or in the case of victims of trafficking, for criminal activities resulting from being trafficked, increasing the need to cooperate with authorities including to uphold the principle of non-punishment of victims of trafficking.</li> <li>■ Relevant populations may have been deported or returned <a href="#">Tool 1.5</a>, raising challenges as to how to access them when they are no longer in the jurisdiction, requiring international cooperation to achieve their participation.</li> <li>■ Relevant populations may be reticent to participate owing to concerns about being identified as being in irregular situations, or due to fear of persecution, increasing the need for protection of confidentiality and anonymity</li> </ul> <p><b>See: Planning and design checklist <a href="#">Tool 3.1</a>; Strategy and policy risk assessment and mitigation <a href="#">Tool 3.2</a>; Monitoring checklist <a href="#">Tool 4.1</a> and evaluation checklist <a href="#">Tool 4.2</a></b></p>

Approach	Key principles	TIP and SOM specific considerations
<p><b>Data disaggregation:</b> Disaggregation of data allows data users to compare population groups, and to understand the situations of specific groups. Disaggregation requires that data on relevant characteristics are collected</p>	<ul style="list-style-type: none"> <li>■ More detailed data than national averages is key in identifying and understanding inequalities</li> <li>■ Data should be disaggregated by key characteristics identified in international human rights law (including gender)</li> <li>■ Collection of data to allow disaggregation may require alternate sampling and data collection approaches</li> <li>■ Birth registration is foundational for robust data sets that allow accurate disaggregation</li> <li>■ Conclusions should not be drawn in the absence of comparative data. For example, data may show that trafficked persons from a given community have low education but this might be true for the community overall.</li> </ul>	<ul style="list-style-type: none"> <li>■ Inconsistent definitions and poor understanding of trafficking in persons and smuggling of migrants may mean that relevant data is not collected, or not appropriately disaggregated.</li> <li>■ Prosecution of traffickers under other laws, while sometimes the most effective response, may create difficulties in capturing data on the victims concerned.</li> <li>■ Lack of documentation or fraudulent / falsified documentation among smuggled and trafficked persons hampers data collection</li> <li>■ Lack of birth registration as a vulnerability factor to trafficking means that some migrant populations may not be registered</li> </ul> <p><b>See: Planning and design checklist <a href="#">Tool 3.1</a>; Monitoring checklist <a href="#">Tool 4.1</a> and evaluation checklist <a href="#">Tool 4.2</a></b></p>

Approach	Key principles	TIP and SOM specific considerations
<p><b>Self-Identification:</b> For the purposes of data collection, populations of interest should be self-defining. Individuals should have the option to disclose, or withhold, information about their personal characteristics. They should be clearly informed about the purpose of data collection and the risks involved in collection of their data</p>	<ul style="list-style-type: none"> <li>■ Data about personal characteristics should be provided by the individuals to whom the data refers (at the individual’s discretion)</li> <li>■ Data collection activities should be conducted in accordance with the human rights principle of ‘doing no harm’.</li> </ul>	<ul style="list-style-type: none"> <li>■ People who have been trafficked may not identify themselves as having been trafficked, and may not recognize that they are trafficked even when identified</li> <li>■ Groups who are subjected to data collection activities should be involved in the design of those activities to ensure that their needs and rights are protection and no harm is done.</li> <li>■ Smuggled migrants may have little incentive to identify themselves as having been smuggled, and may be seeking asylum for personal circumstances that they may not wish to disclose.</li> </ul> <p><b>See: Planning and design checklist <a href="#">Tool 3.1</a></b></p>
<p><b>Transparency:</b> Data collectors should provide clear, openly accessible information about their operations, including research design and data collection methodology. Data collected by State agencies should be openly accessible to the public</p>	<ul style="list-style-type: none"> <li>■ Official Statistics are part of the public’s right to information</li> <li>■ Information about how data is collected should be publicly available</li> <li>■ Data should be disseminated as quickly as possible after collection</li> </ul>	<ul style="list-style-type: none"> <li>■ Where state agencies collect data in relation to law enforcement operations on crimes of human trafficking and migrant smuggling, data may be classified. This speaks to the need to ensure that law enforcement officials have sufficient capacity <a href="#">Tool 3.4</a> to collect and share data in a way that upholds privacy and confidentiality, so it can be transparent without jeopardizing investigations and prosecutions.</li> </ul> <p><b>See: Monitoring Checklist <a href="#">Tool 4.1</a>; Evaluation Checklist <a href="#">Tool 4.2</a> and strategy and policy indicators <a href="#">Tool 4.3.1</a>.</b></p>

Approach	Key principles	TIP and SOM specific considerations
<p><b>Privacy:</b> Data disclosed to data collectors should be protected and kept private, and confidentiality of individuals' responses and personal information should be maintained</p>	<ul style="list-style-type: none"> <li>■ Privacy and confidentiality must be considered alongside access to information</li> <li>■ Ensure that any risk of violation of privacy is explained to participants, and that they can give, refuse or withdraw consent</li> <li>■ Information that identifies individuals or discloses an individual's personal characteristics should not be made public as a result of data dissemination</li> <li>■ Data collectors must have robust data protection mechanisms and procedures</li> <li>■ When personal data is released, this should only be done with the permission of the individual concerned (or their appropriate representatives)</li> </ul>	<ul style="list-style-type: none"> <li>■ Where privacy is violated in relation to data collected on persons who have been trafficked, stigmatization can result, with individuals not being accepted by their families or communities following their trafficking experience.</li> <li>■ Where smuggled migrants have paid smugglers in a bid to seek asylum, violations of their privacy may raise the risks that they will be harmed, whether in the country they are seeking asylum or upon return if their asylum claims are unsuccessful.</li> </ul>
<p><b>Accountability:</b> Data collectors are accountable for upholding human rights in their operations, and data should be used to hold States and other actors to account on human rights issues</p>	<ul style="list-style-type: none"> <li>■ Data can, and should, be used to hold human rights actors to account</li> <li>■ National Statistical Offices are human rights duty-bearers and are accountable for respecting, protecting and fulfilling human rights</li> </ul>	<ul style="list-style-type: none"> <li>■ Data collection can offer insights into State actions that violate human rights of victims of trafficking and smuggled migrants (such as interference with their freedom of movement, <i>refoulement</i> of persons who may be in need of protection, or treatment of children contrary to their rights).</li> <li>■ Similarly, data may reveal that persons charged with trafficking or smuggling offences are not treated in accordance with their rights. Such data should be appropriately acted upon to hold duty bearers to account.</li> </ul>

Source: Columns one and two extracted from: A Human Rights-Based Approach to Data (OHCHR, 2018)

## **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.

## 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.<sup>76</sup>

### 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 trafficking<sup>77</sup>.

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

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

<sup>77</sup> 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 Rules<sup>78</sup>). 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 women<sup>79</sup>. 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.<sup>80</sup>

<sup>80</sup> 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](https://www.unodc.org/documents/human-trafficking/2020/final_Female_victims_of_trafficking_for_sexual_exploitation_as_defendants.pdf)

<sup>78</sup> 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

<sup>79</sup> 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.<sup>81</sup> On the other hand, research has also suggested that female criminal behavior has been perceived as a less serious problem than male criminal behavior<sup>82</sup>. 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.

<sup>81</sup> 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>

<sup>82</sup> 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. Vitaly, 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 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: Table: Example of advocacy points [Tool 3.7](#) on sentencing**

<b>Human rights / gender concern</b>	<b>Advocacy point to address concern</b>
<p>User to specify issue that arose in advocating for a human rights-based / gender sensitive approach:</p>	<p>User to outline arguments that persuaded stakeholders of the value of human rights-based / gender sensitive approach</p>
<p>Sentences against smugglers are not effective, dissuasive and proportionate to the gravity of the offence and do not take into account aggravating factors</p>	<p>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.</p>
<p>The death penalty is provided for in domestic legislation (on trafficking in persons/smuggling of migrants) and / or is applied in practice</p>	<p>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.</p>