



# Voluntariness

## Women on the victim-offender spectrum in organised crime

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### Summary

The victim-offender spectrum of human trafficking is characterised by blurred lines and complex circumstances. Recognising varying degrees of voluntariness in individual cases of women along this spectrum would allow legislators and the justice system to understand the complicated contexts in which women intersect with trafficking, where culpability is not always clear-cut. States have a responsibility to develop legislation, policy and strategies that reflect this nuance and enable more effective interventions for those who fall anywhere on this spectrum.

### Key points

- Women's roles in human trafficking exist on a spectrum that ranges from victim to victim-offender to offender.
- Recognising degrees of voluntariness along this spectrum can help clarify women's roles and levels of culpability in trafficking contexts.
- State responses should be tailored appropriately and focus on non-punitive protections for those closer to victim than offender on the spectrum.

## Introduction

The United Nations Convention against Transnational Organized Crime (UNTOC) is the main international legal instrument for fighting organised crime.<sup>1</sup> UNTOC and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol) address the intersection between women and organised crime and recognise the various ways organised crime affects women.<sup>2</sup>

The ways gender, and women specifically, are provided for in these international instruments are intended to be inclusive and to accommodate the particular vulnerabilities women experience.

However, the transnational organised crime of trafficking in persons (or human trafficking) reveals gaps between the intentions of the international conventions and the nuanced realities of women caught up in this crime. These realities reflect that women can be victims and offenders of human trafficking, and that sometimes they can be both. The path to becoming a victim or offender is not always clearly defined, nor is the transition from one to the other.

### Women can be victims and offenders of human trafficking, and sometimes they can be both

While the literature and debates may reflect this complexity, the current wording of UNTOC and the Palermo Protocol does not make provision for these tensions and uncertainties. As such, these instruments may not provide an adequate resource from which states can develop effective responses to human trafficking.

The paper begins by examining the significance of terminology in framing these issues, then explores the drivers of human trafficking and the roles women play within trafficking networks. It then looks at how major global instruments perceive women in the trafficking paradigm, before outlining some of the gaps and challenges in the current framing.

Next, the paper introduces the concept of 'voluntariness' as a way of broadening the often narrow view of women solely as victims of trafficking. It outlines some of the legal strategies employed by some states to navigate the complex roles women play in human trafficking. Finally, the paper shows how mainstreaming gender in the implementation of UNTOC and the Palermo Protocol could embed the concept of voluntariness and enable more nuanced and effective responses to the victim-offender spectrum inherent in human trafficking.

## Methodology

An in-depth international literature review was conducted on the drivers of human trafficking and women's roles within trafficking networks. Legal literature and international instruments that relate to women, gender and trafficking were scrutinised to ascertain women's rights and protections, as well as defences, in relation to their involvement in human trafficking.

Focus group discussions and reviews were held with key stakeholders from non-governmental organisations, academia and practitioners working in the field of organised crime and gender mainstreaming to gain insights into the main findings of the literature review. These formed the basis of the arguments laid out in this paper.

While the paper has an African lens, the research is also applicable at an international level.

## Terminology: the implications of language

The blurred lines and lack of clarity in the key terminology used to describe, explain and analyse the roles that women are subjected to, or play, in human trafficking have shaped the ongoing debate influencing research, policy and legislation on the issue. This is particularly relevant to how women's agency and vulnerability to sexual exploitation and trafficking are understood. While terminology may seem trivial in

the context of trafficking, it has real-life implications for how states respond, including legislation, policy, punishment, prevention and interventions, as well as women's access to legal and health services.

Drawing on the arguments posed by several advocacy and support organisations, a range of definitions emerge that reflect the complexity of this terrain.

## Trafficking in persons

The Palermo Protocol was the first global, legally binding instrument to contain a definition of trafficking in persons, as follows:

... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>3</sup>

The consent of a victim of trafficking (as defined above) is irrelevant if any of the means set out above have been used.

## Sex trafficking

The purpose of human trafficking is exploitation. When that exploitation is sexual in nature, it is referred to as 'sex trafficking.'

The United Nations defines 'sexual exploitation' as:

... [a]ny actual or attempted abuse of [someone's] position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.<sup>4</sup>

The North American Polaris Project, which works to combat and prevent trafficking in North America, defines sex trafficking as 'the crime of using force, fraud or coercion to induce another individual to sell sex.'<sup>5</sup> The Polaris Project states that in 'many cases, people in sex trafficking situations do not see themselves as victims while they are being trafficked. They have been so expertly manipulated or "groomed" that they believe they are making their own choice to engage in commercial sex.'<sup>6</sup> They point out that 'not all adult commercial sex is trafficking,' but that 'choice exists on a *spectrum*.'<sup>7</sup>

However, the Global Network of Sex Work Projects argues that the term 'sex trafficking' should be avoided, as it conflates 'sex work' with 'human trafficking' and perpetuates 'the harms caused to sex workers by anti-trafficking initiatives that do not recognise sex work as distinct from exploitation.'<sup>8</sup>

## Prostitution and sex work

At the nub of the terminology debate is the tension between using the terms 'prostitution' and 'sex work,' and how each relates to 'trafficking.'

'Prostitution' commonly refers to the involuntary and exploitative subjection of women to sexual activities. The Coalition Against Trafficking Women describes prostitution as a particular form of sexual exploitation involving the commodification of someone 'to be bought, sold and exchanged for money or social and political currency.'<sup>9</sup>

'Sex work,' by contrast, commonly refers to the consensual and voluntary provision of sexual services, as a legitimate form of labour. The Global Network of Sex Work Projects uses the term 'sex work' to describe 'the consensual provision of sexual services between adults, which takes many forms, and varies between and

within countries and communities ... Sex work includes the exchange of sexual services for money, goods, or reward, either regularly or occasionally.<sup>10</sup>

Many argue that the term 'sex work' should not be conflated with 'trafficking,' where the latter involves force or coercion. The African Sex Workers Alliance, which supports the rights of sex workers throughout Africa, distinguishes between 'sex work,' an activity involving consenting adults, and trafficking and sexual exploitation, which entail human rights violations.<sup>11</sup> Similarly, the Open Society Foundation argues that conflating sex work and trafficking is counterproductive and even harmful.<sup>12</sup> It points out that 'sex worker organizations oppose exploitation, and many argue that the most effective way to address exploitation, including human trafficking, is to strengthen workers' rights and address economic injustices.'<sup>13</sup>

Others, however, disagree, arguing that the term 'sex work' legitimises and glosses over the violence and harm inherent in prostitution.<sup>14</sup> Embrace Dignity, a South African women's rights group, argues that because prostitution is 'inherently exploitative' and 'an act of violence against women and marginalised people,' it cannot be considered a legitimate form of work.<sup>15</sup> Because of this, prostitution and sex trafficking are necessarily interconnected.

The debates surrounding terminology are not only based in theory, but have come to illustrate different acts, motivations, levels of consent, coercion and voluntariness and even degrees of perceived stigma.

## Women and human trafficking: drivers and roles

### Drivers

The dynamics of human trafficking, and the roles women play within it, are 'complex, messy, and [resist] easy explanations and solutions.'<sup>16</sup>

A growing body of literature has begun to identify the pathways that lead women into trafficking – as victims, victims who become offenders and offenders. The pathways can be shaped by both external factors such as economic conditions, societal norms, family or partner influence and migration status, as well as internal factors such as self-esteem, coping strategies, risk-taking and ambition. These factors can shift based on the context within different countries.

Mlambo and Ndebele identified poverty and inequality as root causes of human trafficking in Africa, with victims vulnerable to being exploited while trying to meet their economic needs.<sup>17</sup> This is supported by Motseki and Mofokeng, who found that a multitude of economic factors, particularly in rural communities, contribute to trafficking in South Africa.<sup>18</sup> A study in Nigeria identified the burden of poverty suffered by women as contributing to their exposure to trafficking.<sup>19</sup> In Zimbabwe, human trafficking is mainly driven by an on-going economic crisis that drives unemployment and shortages of essential goods.<sup>20</sup> Huda et al found that, in Bangladesh, poverty and limited employment opportunities were pathways to forced and involuntary prostitution as a way to obtain financial support and security.<sup>21</sup>

Social and cultural factors also contribute to human trafficking. Fayomi argues that women's pathways to human trafficking in Nigeria, as both victims and offenders, are heavily influenced by the country's systemic patriarchal structures, including discrimination, subservience and the invisibility of women.<sup>22</sup> Motseki and Mofokeng point to the demand for sexual services and the growth of the sex entertainment industry as driving trafficking as a lucrative business.<sup>23</sup> This is also reflected in Kiremire's examination of sex trafficking in Zambia, where she found that traffickers prey on the most vulnerable in society and use them for financial profit.<sup>24</sup>

Vulnerability resulting from poor socio-economic status plays a significant role in shaping pathways into trafficking. A scoping review of literature on sex trafficking in Canada (2000–2023) found that traffickers exploited women and girls who had migrated for work but lost their jobs, leaving them vulnerable to deportation.<sup>25</sup> In Bangladesh, traffickers, pimps and madams took advantage of the vulnerability of poor women with little support and autonomy, forcing them into prostitution by creating coercive circumstances in which they had limited or no power.<sup>26</sup> In 2021, Mugari and Obioha examined the Southern African context of trafficking, identifying trends, push and pull factors and obstacles to effectively controlling human

trafficking in Zimbabwe and South Africa.<sup>27</sup> South Africa's 'pull factors' are associated with its position as an economic hub in Southern Africa and the perception that it offers better job and economic opportunities.<sup>28</sup>

Weak state responses allow trafficking to flourish. Bello and Olutola have described South Africa's anti-trafficking legislation as 'at best a stop-gap strategy' that ignores the root causes of the crime.<sup>29</sup> They also argue that law enforcement officials lack the capacity to carry out responses effectively.<sup>30</sup> Similarly, Britton and Dean found that national policies in Southern Africa focus on a criminal justice response to trafficking and ignore preventative responses that can begin to address the causes of, and contributors to, trafficking, including gender inequality and economic development.<sup>31</sup> Moses has outlined how patterns of corruption involving officials from the Department of Home Affairs and the police in South Africa have hampered efforts to combat trafficking effectively.<sup>32</sup> Mlambo and Ndebele highlighted 'corruption and porous borders' as factors contributing to human trafficking in Africa.<sup>33</sup>

## Roles

Women are primarily the victims of human trafficking activities. In 2022, women and girls accounted for 61% of detected trafficking victims worldwide, with adult women making up 39% of that total.<sup>34</sup> The majority of these women are trafficked for the purpose of sexual exploitation.<sup>35</sup> Even when women are trafficked for reasons other than sexual exploitation, such as forced labour, begging and domestic servitude, traffickers will often subject victims to sexual violence as a means of coercion and control.<sup>36</sup>

Women can also operate as part of human trafficking networks. However, despite growing evidence, there is still a dearth of information about women's roles in enabling, facilitating, procuring or proactively organising human trafficking. There is also a lack of nuanced analysis of women as both victims and offenders or solely as offenders. This is curious considering the available data on the number of women arrested for trafficking regionally and globally.

Based on recent statistics, more women are playing roles in human trafficking than previously understood and more women are involved in human trafficking and smuggling than in any other form of transnational organised crime.<sup>37</sup>

Between 2010 and 2012, the United Nations Office on Drugs and Crime (UNODC) found that women represented 28% of those convicted of human trafficking offences.<sup>38</sup> In 2020, the UNODC published the following regional statistics for women involved in human trafficking:

- Sub-Saharan Africa: 25% of those prosecuted and 44% of those convicted
- North America: 31% of those prosecuted and 19% of those convicted
- South America: 45% of those prosecuted and 36% of those convicted
- East Asia and the Pacific: 49% of those prosecuted and 56% of those convicted<sup>39</sup>

These relatively high rates may reflect both the wide range of roles women are playing in human trafficking and the approach taken by law enforcement.<sup>40</sup> Although details on roles within trafficking networks are lacking, the UNODC points out that women often occupy lower ranking, more visible positions, making them 'easily detected by law enforcement.'<sup>41</sup>

The limited research that exists on women offenders has outlined various roles for them in the human trafficking business.

The 'madam,' often described as being in an authoritative position, typically runs a brothel and may act as a 'mentor, protector and teacher.'<sup>42</sup> A madam's relationship with her victims is often a contractual one, whereas male pimps cement their relationships with coercion.<sup>43</sup> Women also occupy managerial roles in trafficking networks, where their responsibilities include bookkeeping, overseeing earnings, forging passports, coordinating transport to destination countries and monitoring victims once they are in the brothels.<sup>44</sup>

More women are involved in human trafficking and smuggling than in any other form of transnational crime

A female family member, usually in a more senior position, such as an older sister, aunt or mother, is seen as an 'authority figure'.<sup>45</sup>

The 'partner-in-crime' is a woman who typically 'voluntarily' works in partnership with a male offender, who could be a boyfriend, spouse or business partner.<sup>46</sup> Female perpetrators of trafficking are often viewed in relation to their association with male perpetrators. The UNODC found that many women offenders are often related to, or in a relationship with, their traffickers.<sup>47</sup> Wijkman and Kleemans found that male traffickers leverage their female counterparts' femininity when committing the crime and use the women to protect themselves from prosecution.<sup>48</sup>

The 'handler' has been identified as the most 'traditional' type of female trafficker who recruits, grooms, harbours or guards and transports victims.<sup>49</sup> Some handlers were once victims of trafficking themselves.<sup>50</sup> Female recruiters are believed to gain victims' trust more easily than male recruiters.<sup>51</sup> The 'girilla pimp,' on the other hand, uses threats, force and violence to control other women.<sup>52</sup>

A victim to whom the pimp has given additional responsibilities is known as 'the bottom' or the 'bottom bitch'.<sup>53</sup> Her responsibilities include earning the trust of new recruits, teaching them how to handle clients, showing them how to pose and post online adverts and disciplining them, sometimes through violence.<sup>54</sup> The 'bottom bitch' usually fits into one of three categories: (a) the longest-serving sex worker, (b) the highest earner, or (c) the most trusted associate of the pimp with an inclination to protect the pimp or advance his objectives before care of self.<sup>55</sup>

Siegel and De Blank examined the context of mobility within the trafficking industry in the Netherlands and argued that the line between being a victim and an offender can be blurry.<sup>56</sup> Some women took on roles, such as guards, out of fear of punishment or retaliation, while others agreed to play supporting roles to increase their income or out of loyalty to other group members.<sup>57</sup> The authors also recognised that some women voluntarily engaged in human trafficking with their partners, whether intimate or business, and that the division of labour and profit within these partnerships could vary widely.<sup>58</sup>

## A more nuanced understanding is needed of how women respond to previously being exploited

Lo Iacono's research exploring the vertical mobility of Nigerian women involved in trafficking found that '[w]hen a woman realizes she has been exploited for a long time, she decides that it is finally her turn to reap the rewards. She moves on to the organisational side of the trafficking business and begins to exploit other women herself'.<sup>59</sup> For example, a woman who has paid off her debts and, instead of voluntarily leaving the trafficking system, chooses to remain and engage in trafficking activities as a recruiter.<sup>60</sup> Some women may feel that adopting the role of business partner is their only opportunity to have a comfortable

life and secure future.<sup>61</sup> This is particularly the case if the women are illegal immigrants in the destination country and their status prevents them from accessing legal recourse and other necessary services, such as medical and psychosocial support.<sup>62</sup> African women may also be motivated by the 'business opportunities [of human trafficking] or their social context'.<sup>63</sup>

The UNODC argues that women are often being sexually exploited while carrying out trafficking activities, which further blurs the line between victim and offender.<sup>64</sup> Broad supports this, contending that, for some women, 'experiences of exploitation form the basis of ... [their] involvement'.<sup>65</sup> This is even more the case when the woman is in a relationship with a male trafficker, which can play a role in the woman's level of vulnerability (on the spectrum of victim to offender) and ultimately influence whether their acts can be considered voluntary.<sup>66</sup> A more nuanced understanding is needed of how women respond to previously being exploited within the trafficking process, especially 'when the pressures to cooperate with the trade are acute'.<sup>67</sup>

It is clear from the above, that 'women are no longer passive actors, as once believed or perceived'.<sup>68</sup> Instead, their roles continue to evolve, although the 'extent of their active engagement' can be questioned, and it may be challenging to decipher whether that engagement is voluntary or coerced.<sup>69</sup> This indicates the need



for a nuanced understanding of the spectrum of roles women can play – ones that are or are not voluntary or start as voluntary and become involuntary or start as involuntary and become voluntary. It also raises the question of whether a progression from victim to offender can exist in a context where coercion is central to the success of the trafficking trade.

## The positions taken by global instruments

State responses to human trafficking are guided by international conventions and protocols, which are often domesticated into national legislation, policy, strategies and actions plans. It is worth considering how these global instruments conceptualise women's roles in human trafficking. This is a first step in understanding what states need to consider when developing responses that address the needs of all women involved, from victims to offenders.

### UNTOC

Although nearly all countries have signed the UNTOC and ratification levels for its Protocols remain high,<sup>70</sup> they have not provided a straightforward solution to the complex problem of transnational organised crime. Criminal markets covered by the Protocols continue to grow, 'as part of an increasingly interconnected criminal ecosystem.'<sup>71</sup> This is particularly the case when it comes to gender and the roles of women in transnational organised crime.

The Convention focuses on those involved in perpetrating transnational organised crime and neither conceptualises nor defines the roles of women. Instead, the language is general in nature and 'women' can be read into the language of the Articles.

### The Palermo Protocol

The Palermo Protocol explicitly recognises the victimhood and vulnerability of women to trafficking. It identifies poverty, underdevelopment and lack of equal opportunity as the 'factors that make persons, especially women and children, vulnerable to trafficking.'

The Protocol's definition of 'trafficking in persons' makes clear reference to how the transfer, transportation, recruitment, harbouring or receipt of persons must have taken place (see definition above).

The gendered language of the Convention and the Palermo Protocol is binary, using the pronouns 'his' or 'her' or 'himself' or 'herself' when referring to criminalised acts by individuals, their extradition, detention or serving of sentences. However, the Convention does not specifically mention 'gender' or 'women.'<sup>72</sup> It neither defines nor conceptualises the specific role of women.

While the Convention focuses on 'organised criminal groups' or those involved in perpetrating the crimes, the Protocol shifts the focus back to the predominant victims of trafficking. In doing so, some of the more complex roles played by women within organised criminal groups are not recognised or accounted for.

## The Committee on the Elimination of All Forms of Discrimination against Women

The Committee on the Elimination of All Forms of Discrimination against Women issued General Recommendation no. 38 on trafficking in women and girls in the context of global migration in 2020 and Guidelines on General Recommendation no. 38 in 2023.

Recommendation no. 38 accepts the Palermo Protocol's definition of trafficking in persons and focuses on states' obligations to prevent the exposure (of women) to trafficking. It emphasises that an effective response requires engagement with the larger protection framework provided by other human rights treaties.<sup>73</sup>

The language used in the recommendation portrays women as victims who are vulnerable, susceptible to trafficking and in need of special and dedicated care and protection. It does not engage with the roles of women as offenders in trafficking activities.

The Guidelines on General Recommendation no. 38 reiterate that trafficking in persons particularly and disproportionately affects women, once again framing women primarily as victims of trafficking. The Guidelines also make specific reference to women being trafficked for prostitution.

## Special Rapporteur on trafficking in persons, especially women and children

The three most recent reports produced by the Special Rapporteur address common themes relating to the roles of women in trafficking, their vulnerabilities and the types of trafficking they experience.<sup>74</sup>

Women's vulnerabilities are noted to be intersectional, involving factors such as race, ethnicity, socio-economic status and disabilities and tied to patriarchal norms and power imbalances due to structural discrimination. Women are also vulnerable in conflict and post-conflict settings and as a result of climate change. These circumstances cause women to migrate to escape dangerous or volatile situations or to find better work opportunities, but migration may also subject them to exploitation and trafficking.

The reports note that the types of trafficking women experience the most, referred to as 'gendered forms of trafficking,' include sexual exploitation and slavery, forced labour, forced marriage, domestic servitude and debt bondage, forced pregnancy, prostitution and pornography. With respect to their roles as offenders in trafficking, women are most often linked to owning and managing brothels; however, the focus on women as offenders (engaging actively or enabling trafficking) is limited.

The Special Rapporteur recommends that states decriminalise sexual services and other behaviours that do not constitute exploitation, thereby implicitly encouraging the decriminalisation of sex work.<sup>75</sup> To this end, the Special Rapporteur emphasises the implementation of the non-punishment principle in laws and policies to protect the rights of victims during criminal proceedings.<sup>76</sup> The principle upholds that:

Trafficked persons should not be subject to arrest, charge, detention, prosecution, or be penalised or otherwise punished for illegal conduct that they committed as a direct consequence of being trafficked.<sup>77</sup>

## Special Rapporteur on violence against women and girls, its causes and consequences

The Special Rapporteur's report on prostitution and violence against women and girls in 2024 includes sexual exploitation and prostitution as forms of trafficking and discusses women as victims in the trafficking system.<sup>78</sup>

Central to the discussion of women as victims is how technology has been used to expand the ways in which women can be trafficked, including through online platforms such as pornographic websites and social media and by advertising victims online. These methods also increase the reach of trafficking activities.

There is no discussion of women as offenders.

## Gaps and challenges in international instruments

There are several gaps and challenges in these international instruments, reports and recommendations when it comes to responding to the full spectrum of women's involvement in human trafficking.

The documents refer almost exclusively to women as victims of trafficking.<sup>79</sup> The Palermo Protocol, for example, refers explicitly to those who have been trafficked (perceived to be mostly women) as victims. This contrasts with the Protocol Against the Smuggling of Migrants by Land, Sea and Air, which refers to those who have been smuggled (perceived to be mostly male economic migrants) as 'objects of smuggling' or 'persons'.<sup>80</sup>

This oversimplified, gendered differentiation between trafficking and smuggling overlooks the complex factors driving people's involvement and roles in smuggling and trafficking and does not account for people having agency over their lives.<sup>81</sup> It also does not account for the line between, and point at which, an individual goes from willingly engaged in smuggling to unwillingly trafficked, or from unwillingly trafficked to reluctantly involved in trafficking to willingly involved in trafficking. These lines are blurred at best.



There is little to no acknowledgement of women assuming active roles within trafficking networks. This shows an absence of engagement with the more complex and nuanced issue of women's functional involvement in trafficking, particularly along a victim-offender spectrum or even simply as offenders.<sup>82</sup>

Tensions over the issue of consent (which is fundamental to where women are positioned on the spectrum of victim to offender) are not resolved – and may have been exacerbated – by the Palermo Protocol. This is a central concern because the 'way in which consent is understood will inevitably operate to either expand or contract the range of practices identified as trafficking and, thereby, the categories of person identified as having been trafficked or having perpetrated trafficking crimes.'<sup>83</sup>

In its current definition, the Protocol not only states under Article 3(a) that trafficking shall include some form of 'threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person' (emphasis added). It goes on to state, in Article 3(b), that the victim's consent will be irrelevant where any of the means described in Article 3(a) have been used. Consent is therefore an integral element of the definition.

There is little to no acknowledgement of women assuming roles within trafficking networks

Debates around the element of consent in the definition of trafficking began even before the Palermo Protocol was enacted, focusing primarily on whether individuals can truly consent to sex work.

On the one hand, the autonomy argument posits that women have the right to make their own choices about their bodies and work, including their right to engage in sex work. Imposing victimhood on women, particularly those from poorer countries, is paternalistic and 'one-dimensional' and further encourages anti-immigration policies.<sup>84</sup> The protectionist argument, on the other hand, maintains that people who 'agree' to be sex workers suffer many human rights abuses and are essentially forced into making the 'choice' that they have made.<sup>85</sup> Trafficking only heightens the exploitative circumstances that women are exposed to during sex work or prostitution and, as such, no one should be considered able to consent to these conditions.<sup>86</sup>

The significance of these debates is that, regardless of how or whether consent (or its irrelevance) is framed in legislation, 'the issue is often an important subtext at every stage in the criminal justice response to trafficking.'<sup>87</sup> The UNODC's issue paper on the role of 'consent' in the Trafficking in Persons Protocol gives the following examples of how the issue of consent becomes relevant in practice:

- Trafficking cases are often heavily reliant on the victim (due to victim testimony), enhancing the focus on consent
- Even if legally irrelevant, courts will often allow discussions around consent, with indications of consent influencing how the victim is perceived and how his or her actions are interpreted
- Apparent consent, particularly when asserted by the victim, can make cases difficult to prosecute
- Consent can be relevant to determining the intention of the accused
- Indicators of consent and how it is secured can affect sentencing<sup>88</sup>

## The concept of 'voluntariness' in the victim-offender spectrum

These gaps and challenges point to the need for a clearer understanding of how women engage in and with human trafficking. This can help shift debates about women's agency and improve legal protections for those affected by trafficking in different ways.

'Voluntariness' provides a useful framework for considering the roles women play in trafficking along a spectrum ranging from 'victim' to 'victim-offender' to 'offender.'

There is scant literature on the extent and nature of 'voluntariness' in trafficking to help shape the nuances of the spectrum or guide how to identify and assign wrongfulness to an offender. The sources that do exist are dated before 2020 and focus primarily on the following:

- Women who are victims of sexual exploitation versus engaging in voluntary sex work
- Voluntary migration versus trafficked labour (including the recognition that voluntary migration can shift into involuntary migration or trafficking)
- Trafficking victim identified as an offender because they engage in other criminal activity (such as drug trafficking) rather than becoming an offender of trafficking<sup>89</sup>
- Factors keeping victims in the trafficking system (socio-economic and safety)<sup>90</sup>
- Being trafficked for labour exploitation but remaining in the system by engaging in voluntary labour,<sup>91</sup> such as helping with the business aspect of the trafficking system

In addition, few sources acknowledge the existence of 'grey spaces' along the spectrum. The blurred distinction between victim and offender is an important feature of the spectrum.

Acknowledging voluntariness in the victim-offender spectrum means recognising that it is a fallacy to assume all women share the same experiences or that women are always victims subject to exploitation in trafficking. It is important to emphasise that this does not dismiss the experiences of women and continues to accept that women are overwhelmingly victims of trafficking and in need of help.

### Chart 1: The victim-offender spectrum and voluntariness



To establish whether and to what extent women act voluntarily or involuntarily on the victim-offender spectrum, an assessment based on the following identified factors needs to be made:

- Trafficking context
- Nature of the relationships within the trafficking system
- Drivers for moving from victim to offender
- Discernible steps taken by the victim indicating whether their actions were voluntary or involuntary
- Time elapsed between being a victim and becoming a discernible offender
- Type of exploitation suffered
- Level of independence when moving from victim to offender
- Extent to which the victim benefits from involvement in trafficking

The concept of voluntariness may apply to the following offender roles:

- Primary offenders, co-offenders (engaging wilfully and directly in crime or harmful acts)
- Subordinate offenders (those compelled to commit crime or harmful acts by another person)
- Derivative offenders (those who either directly, or by extension, enjoy the benefits of the crime or harm; are complicit)
- Passive offenders or actors (bystanders; not reporting as legally required to do in some jurisdictions)

Moving across the spectrum can be seen as climbing the trafficking ladder – assuming an intermediate role by accepting employment in the trafficking system and then becoming a tool in the system, and ultimately an instrument of the system (or full offender).<sup>92</sup> In the trajectory from victim to offender, there is usually an intermediate position such as the 'madam's favourite'.<sup>93</sup> This suggests that the decision to move from victim to offender is often influenced or driven by other offenders in the trafficking network. As a result, it is difficult to know whether a trafficked person acts, or can ever act, as an independent agent, or if they will always

act as a compelled individual. However, some women actively enable, facilitate, procure or organise human trafficking in ways not necessarily viewed as coercive.

What further confuses positioning on the spectrum is the nature of the relationship between the victim and the offender, the role this relationship plays in bringing the victim into the trafficking system and how it can influence the victim to actively participate in the system.<sup>94</sup> These relationships could include friends, relatives and romantic partners. In this respect, it is imperative to understand the context of the spectrum (setting), the motivations of the victim-offender (why) and the story (how) of their evolution from victim to offender.

The purpose of the voluntariness argument is to encourage those developing responses to trafficking to recognise the complexity of women's roles in the trafficking system and that these roles do not follow a false dichotomy separating clear victims from clear offenders. This can help tailor responses to trafficking, including approaches to detection and prosecution and the services provided to individuals who may be victims, offenders or both.<sup>95</sup> When formulating and adopting measures that are context-sensitive and intersectional, states need to appreciate that roles in trafficking do not follow a binary model. 'Victims and perpetrators are not mutually exclusive categories as people shift between them or are both simultaneously.'<sup>96</sup>

## Current defences for victims and offenders in the criminal justice system

The following section outlines some legal strategies currently used to navigate the complexities presented by women on the victim-offender spectrum who have come into contact with the criminal justice system, which usually relies on a clear distinction between victim and offender.<sup>97</sup>

Central to these legal strategies is the concept of coercion. To use coercion as a defence against the offence of trafficking requires an understanding that the victim's free will was impaired by the pressure placed on them, and that they were justified in feeling this way.<sup>98</sup>

Galoob and Sheley point out that, of the forms of abuse employed by traffickers to gain control of their victims, coercive control is often included as a method of psychological abuse.<sup>99</sup> Coercive control is defined by the authors as the 'micro-regulation' of an individual's everyday behaviours.<sup>100</sup> The control can be exercised through violence and threats, as well as through more subtle forms of abuse such as isolation, humiliation and control or seizure of financial or physical resources.<sup>101</sup> It can be both explicit and implicit, placing victims in a position where they are both 'powerless and compliant' and feel that they cannot escape.<sup>102</sup>

Coercive control is defined by the authors as the 'micro-regulation' of an individual's everyday behaviours

There is often a link between domestic violence/intimate partner violence and human trafficking. Trafficking that involves intimate partners or families often includes 'non-physical coercion and manipulation' – this breeds the kind of fear, loyalty and dependence that either prevents the victim from leaving or facilitates their shift along the spectrum towards offending.<sup>103</sup> Exploitation by family members or an intimate partner, including physical, economic, psychological and sexual abuse, isolation, threats and coercion, is not uncommon in trafficking and can have particularly harmful consequences for reporting and access to services for victims.<sup>104</sup>

The UNODC has pointed out that the 'most significant determinant for victims becoming perpetrators' is the relationship between the trafficker and victim.<sup>105</sup> Understanding the dynamic between these two parties is critical, including 'the level of loyalty, obligation or indebtedness' that can influence the actions perpetrated by a victim in furtherance of this relationship.<sup>106</sup>

There are a few different options for women on the victim-offender spectrum to use coercion as a defence against the offence of trafficking.

Some jurisdictions, such as England, Ireland, Scotland and France, have recognised coercive control as a criminal offence.<sup>107</sup> The Serious Crime Act in the United Kingdom criminalises repeated or continuous

controlling or coercive behaviour towards another that has a serious effect on the person, and that the coercer knows or ought to know would have a serious effect.<sup>108</sup> However, this only applies within an intimate or family relationship and, despite the police recording increasing numbers of coercive control offences in England and Wales, the crime 'remains deeply misunderstood and under-prosecuted.'<sup>109</sup>

Another defence based on coercion relies on the 'wrongful pressure approach.'<sup>110</sup> However, there are severe limitations on when this defence can be used or invoked. To use a 'wrongful pressure approach,' a tangible threat must have been issued. However, the very nature of coercive control is such that the threats are usually subtle and take place over such a long period of time that they become internalised by the victim.<sup>111</sup>

The concept of 'duress' is also used within common law. It is defined by Article 31(1)(d) of the Rome Statute as resulting from 'a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.'<sup>112</sup> The limits on the application of this defence are clear: the victim must have been threatened or subjected to imminent serious bodily harm or death. The response by the victim must also have been proportional to the harm threatened.

The 'affirmative defenses' to human trafficking available in the United States have been positioned as an alternative to the defence of duress.<sup>113</sup> These defences tend to relax the conditions required to invoke them – specifically those relating to the imminent threat being made and the action taken being directly linked to or reasonable in relation to the threat.<sup>114</sup> It also expands on the types of crimes that the defence can be used for, although several states place limits on this.<sup>115</sup> Many jurisdictions also require a 'nexus requirement' between the trafficking and the criminal offence committed by the victim.<sup>116</sup> A nexus requirement is a connection or link that establishes a cause-and-effect relationship or a direct relationship between elements of a legal case.

Oklahoma is the only state that does not have a 'nexus requirement' and does not preclude the defence from being raised for any criminal offences committed.<sup>117</sup> The defence is as follows: '[i]t is an affirmative defense to prosecution for a criminal offense that, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking.'<sup>118</sup> This version of the defence therefore provides all trafficking victims with a defence against any criminal charges that may be brought against them for the commission of a criminal offence. It is this requirement, that the raiser of the defence be considered a victim legally, that will implicate many of the debates raised in this paper around women's differing roles in trafficking, voluntariness and consent.

These defences are in line with the principle of non-punishment, advocated for by the Office of the High Commissioner for Human Rights and the Special Rapporteur on trafficking in persons.<sup>119</sup> Both recommend that states ensure their legislation does not allow trafficked persons to be detained, prosecuted or punished for 'activities that they were involved in as a direct consequence of their situation as a trafficked person.' Once again, a clear link between victimhood and perpetration is being advocated for or required by this proposed principle.

## Developing a range of responses: mainstreaming gender in the implementation of UNTOC and the Palermo Protocol

Mainstreaming gender in the implementation of UNTOC and the Palermo Protocol could help address current challenges in dealing with women along the victim-offender trafficking spectrum, by promoting a more holistic and intersectional approach.

The UNODC's issue paper on organised crime and gender defines 'gender mainstreaming' as:

... [the] process of assessing the gendered implications of any planned actions, including policies, programming or legislation, and ensuring that gender concerns and experiences are an integral consideration in the design, formulation, implementation, analysis and monitoring of such action.<sup>120</sup>

As such, it seeks to understand individual experiences, considers the diverse contexts of both victims and offenders of trafficking and explores the (potential) reasoning behind offenders engaging in trafficking, accepting that the experiences of women and men are not homogeneous. Such an approach should result in more nuanced, but generally applicable, measures to combat trafficking in persons.

To this end, it is necessary for legislators and policymakers to move beyond conceptualising men as offenders and women as victims. A first step in the mainstreaming exercise is to recognise that women's and men's roles in trafficking are not binary. The next step is to accept and engage with intersectionality, appreciating that both victims and offenders experience multiple, intersecting forms of discrimination. These affect their decision-making and roles or positions in trafficking, as well as the causes and effects of trafficking and the types of interventions needed to combat it. An intersectional approach can be used to ensure equality before the law and equal access to justice.<sup>121</sup>

A better understanding of the intersectionality of trafficking requires gathering comprehensive data and statistics. The data must speak to factors beyond gender and include age, race, nationality, ethnicity, disability and education, among others. It also requires asking specific qualitative and quantitative questions from each group involved in trafficking, such as victims, offenders, law enforcement officials and judges to gain a more holistic understanding of the organised crime landscape. These questions might include ones around social relationships in communities and families, conditions of vulnerability (both in a physical setting and relating to personal characteristics) and behaviours shown during trafficking.

It is necessary for legislators and policymakers to move beyond conceptualising men as offenders and women as victims

In 2023, the UNODC published the *Toolkit on Mainstreaming Gender and Human Rights in the implementation of the United Nations Convention against Transnational Organised Crime* specifically to support the mainstreaming of intersectional gender and human rights considerations into laws, policies and strategies against organised crime.<sup>122</sup> The toolkit emphasises that states must contextualise trafficking in their national circumstances to develop robust measures that can be effectively implemented. It sets out key stages to guide law and policymakers in mainstreaming gender. These include exploring the issue, asking key questions about causes, consequences and solutions, gathering and analysing data, developing solutions, implementing, monitoring and evaluating responses, accounting for failures and successes and learning from them.<sup>123</sup> It is envisioned that the UNTOC, its related protocols and other applicable international instruments can guide and be incorporated into these contextualised responses.

To move away from a binary approach to developing responses, the Toolkit accepts that women's decisions are shaped by their personal circumstances, which include social, economic, cultural and political elements. In doing so, there is an understanding that women are not only victims in trafficking activities, but can also play the roles of supporter, organiser, leader and recruiter – and that individual experiences of trafficking can lead to a woman's involvement in organised crime.

The steps and measures that can be taken by states to mainstream gender in combating human trafficking, as set out in the Issue Paper and Toolkit, can ensure the provisions of the UNTOC, its related protocols and international legal instruments are included and implemented.

Because there is no international criminal court with the jurisdiction to hear the crimes set out in UNTOC and the Palermo Protocol, implementation depends on the 'indirect model of enforcement.' This means that the success of UNTOC and its Protocols relies both on the way that states implement them internally and how successfully they can co-operate with one another.<sup>124</sup> It is thus critical that states can adequately respond to the practical scenarios of trafficking that play out within their individual territories. In part, as it is more than two decades since they were enacted, this should extend beyond what UNTOC and the Palermo Protocol account for and better reflect debates concerning consent and the role of women in trafficking.

## Recommendations

The application of voluntariness to the victim-offender spectrum can be difficult. While the literature presents and explains the concept, it does not offer practical guidance for its application in real world cases.

An assessment of (in)voluntariness needs to involve a consideration of the following factors at the very least.

1. The trafficking context must be assessed to determine why and how the victim ended up being trafficked, including their personal circumstances and the push and pull factors within and beyond their home country; this is closely linked to factor 3.
2. The nature of the person's relationships within the trafficking system should be considered, including their relationship with the trafficker, other offenders in the network and other victims. These can act as motivations for moving along the victim-offender spectrum.
3. The underlying drivers for transitioning along the victim-offender spectrum must be examined to understand what led the trafficked person to shift from victim to offender.
4. It is important to assess whether the person's actions were voluntary or involuntary by examining any steps taken to escape a coercive situation. This is not to imply that victims must always try to escape trafficking. Rather, it seeks to understand what they were able to do in the circumstances, how much control they had, and how they exercised it. It also considers the behaviours or acts that victims were subjected to that may have influenced their decision to become offenders. For example, whether continuous abuse pushed them to offend as a means of escape or whether positive treatment groomed them into becoming offenders.
5. The period it took to move from victim to offender should be evaluated as it reveals how long it took for the victim to consider, decide and continue to willingly participate in trafficking activities.
6. The type of exploitation suffered must be taken into account to contextualise their experience and its potential impact on their shift to offending.
7. The level of independence when moving from victim to offender must be assessed, as it helps determine whether the person acted or could have acted of their own volition; this factor is closely linked to factor 4.
8. Whether and to what extent the victim benefitted from their involvement in trafficking must be considered, as this can shape how their role is viewed within the broader context of coercion and agency.

This approach aligns with the mainstreaming agenda and, read together with the Toolkit, these factors can be applied to help law and policymakers in drafting measures to combat trafficking. This exercise can help to better describe the different roles in trafficking – such as victims, offenders, facilitators and bystanders. It can guide how individuals are positioned within the trafficking system and the how they should be treated under the law and in society. This would allow laws and policies that address trafficking in persons to include the concept of 'voluntariness' in their definitions.

Responses can then be tailored appropriately and focus on non-punitive protections for those considered closer to victim than offender on the spectrum. Protective measures can extend beyond the criminal justice system and include rehabilitative and reintegration programmes. These programmes can consider the sectors in which the individual, as both trafficking victim and offender, has been involved, and work with the relevant departments to develop measures that incorporate 'voluntariness.' For instance, departments regulating migration could be cognisant of 'voluntariness' in repatriation or reintegration programmes. Additionally, states may emphasise the use of trauma-informed assessments to determine where an individual may sit on the spectrum, using a multi-disciplinary approach in the measures addressing trafficking. This could include psychology, an appreciation of history, language and cultural factors, among others.

These recommendations advocate for a nuanced case-by-case approach to understanding voluntariness, which can be applied regionally, continentally and globally.



## Conclusion

The victim–offender spectrum of human trafficking is characterised by blurred lines and grey areas. There is no silver bullet for clearly defining what the spectrum entails. However, the factors outlined above may assist in determining the degree of voluntariness in individual cases involving women situated along the spectrum.

Accepting the concept of voluntariness would allow legislators and the criminal justice system to better recognise the complicated contexts in which women intersect with trafficking, and acknowledge that the levels of culpability are not always clear-cut. Cases are not and cannot be treated as the same. The criminal justice system must assess whether an accused trafficker moved from victim to offender, whether that movement was voluntary or not and what the appropriate response should be.

Trafficking involves force, coercion, deception, fraud or abuse of power. Given these conditions, it is hard to argue that anyone can freely choose to stay in the system or recruit and manage others in it. This has implications for the development of laws and policies in terms of the non-punishment principle, which could protect individuals on the victim–offender spectrum from punishment for their involvement in trafficking activities.

Ultimately, states have a responsibility to develop legislation, policy and strategies that consider the more nuanced reality of the victim–offender spectrum and lead to interventions that respond more effectively to the needs of those who fall anywhere on this spectrum.

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## About ENACT

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