

Who is Who?

A quick reference guide on
Smuggling of Migrants and
Trafficking in Persons



REGIONAL SUPPORT OFFICE
THE BALI PROCESS

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Smuggling of Migrants and Trafficking in Persons are different crimes that may intersect in complex ways. In brief, what begins as a situation of smuggling may develop into a situation of trafficking. In general terms, smugglers and traffickers obtain financial or other material benefits from criminal conduct. However, their distinctions lie in the primary purpose of criminal activities.

What is Smuggling of Migrants?

Migrant smugglers facilitate other people's illegal entry into a foreign country for financial and other material benefits by various methods, for example, by producing, procuring, providing, or possessing fraudulent travel or identity documents, bribing officials, secretly crossing an international border, etc.ⁱ Those who are smuggled are non-nationals of the country they are being smuggled into and referred to as migrants, though asylum seekers and refugees may also be smuggled.ⁱⁱ

Migrant smugglers who smuggle other people for financial and other material benefits are criminalized to protect national borders.ⁱⁱⁱ However, people who smuggle other people for humanitarian reasons are not considered migrant smugglers in international law unless they seek to profit from doing so.^{iv} Smugglers generally transport migrants to chosen or agreed-on destinations and leave them once they receive payment or other material benefits for such services.

What is Trafficking in Persons?

Human traffickers recruit, transport, transfer, harbor or receive people, internationally or domestically, through improper means, for any exploitative purposes.^v Examples of improper means include making false promises, using threats or force or penalty, retention of travel or identity documents, giving some benefits to family members, using debt traps, abuse of power or a position of vulnerability, using romantic relationships, kidnapping, blackmailing, using verbal abuse, threats of reporting to the authorities, etc.^{vi} Such conduct with exploitative intention are criminalized and people who are subject to such conduct are considered victims.^{vii}

Traffickers^{viii} profit, either directly or indirectly, from different forms of exploitation of victims.^{ix} Exploitation can take many forms. Non exhaustive examples include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, or practices like slavery, servitude or the removal of organs.

Using one or a combination of multiple improper means, traffickers take their victims' freedom away to control or maintain them in an exploitative situation. Therefore, trafficking victims may need protection and assistance to break through the control of their traffickers and to prevent them from falling back into a situation of trafficking.

What are the distinctions between Smuggling of Migrants and Trafficking in Persons?

Based on the explanations above, there are general distinctions between smuggling and trafficking.

Smuggling of Migrants	Trafficking in Persons
<ul style="list-style-type: none"> Smuggling of migrants is a transnational crime and involves the procurement of illegal entry or illegal residence of a person from Country A into Country B.^x 	<ul style="list-style-type: none"> Trafficking in persons does not necessarily involve a person being taken across a border; trafficking may happen within one country.
<ul style="list-style-type: none"> Migrant smugglers <i>always</i> act for the purpose of financial or other material benefit. 	<ul style="list-style-type: none"> The purpose of the traffickers at the outset is the exploitation of the victim.
<ul style="list-style-type: none"> Smuggled migrants are not 'victims' of smuggling but may be victims of other crimes while being smuggled.^{xi} 	<ul style="list-style-type: none"> Not all people who are exploited, are victims of trafficking
<ul style="list-style-type: none"> Smuggling of Migrants is a crime for supporting illegal border crossing or stay of migrants into or in a country for profits. What begins as a situation of smuggling may develop into a situation of trafficking. 	<ul style="list-style-type: none"> Trafficking in Person is always a crime against a person. A person can consent to being exploited, and still be a victim of trafficking where improper means have been used.

What are the commonalities between Smuggling of Migrants and Trafficking in Persons?

Both crimes may seriously endanger the lives, safety, and well-being of the individuals concerned. They may also occur along the same routes, use the same methods of transportation, and may also be carried out by the same criminals. People who are smuggled may also be victims of trafficking or become victims of trafficking during the smuggling journey.

Why is it important to understand distinctions between Smuggling of Migrants and Trafficking in Persons?

Sometimes, the information at hand may make it difficult to distinguish between smuggling and trafficking. Therefore, understanding the general distinctions between the two terms and the responsible use of language are important because:

- Smuggling of Migrants and Trafficking in Persons are two distinct crimes that have different legal consequences and implications for the persons concerned.
- The treatment of and assistance available to smuggled migrants and trafficking victims may be different under domestic laws from a criminal justice perspective.

ENDNOTE

ⁱ UNGA, *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, A/55/383/Add.1, 3 November 2000, Para.88,89,90 and 91

ⁱⁱ "Migrants refer to people who are lack of citizenship attachment to the host country (or) non-nationals," OHCHR, *Differentiation between migrants and refugees*, Retrieved from <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf>

ⁱⁱⁱ A/55/383/Add.1, 3 November 2000, Para.88; OHCHR, *Commentary, Recommended Principles and Guidelines on Human Rights and Human Trafficking*, P.34

^{iv} McAdam, M., *Understanding the Smuggling of Migrants Protocol*, P. 4-5, Retrieved from https://www.baliprocess.net/UserFiles/baliprocess/File/SOM%20Protocol_Mar2021.pdf

^v "Profits from trafficking could include profits from services and exploitation of the victims; costs paid by victims (*passport, visa, transport*) for example where the victim paid for illegally facilitated migration and subsequently became a victim of trafficking; Profits from the sale or resale of a person from one trafficker to another; and the value of unpaid services/salaries that would otherwise have been paid to the persons exploited. In the context of trafficking, it was requested that states to consider "[e]stablishing cooperative mechanisms for the confiscation of the proceeds of trafficking.", OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Principle 16 and Related Guidelines: Asset Confiscation and Disposal, P. 220,221

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- ^{vi} UNODC, *Guidance Note on 'abuse of a position of vulnerability' as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, Para. 2.3, Retrieved from https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf; "The Protocol's definition establishes a clear link between the 'act' element and the means of Trafficking," UNODC, *Issue Paper Abuse of a position of vulnerability and other "means" within the definition of Trafficking in Persons*, P.4. Para.2, P.75, Para 2, Retrieved from https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf ; UNODC, *Model Law against Trafficking in Persons*, (i) "Forced labour or services", P. 15
- ^{vii} "Any conduct that combines any listed action and means and is carried out for any of the listed purposes must be criminalized as trafficking", UNODC, *Legislative Guides: United Nations Convention against Transnational Organized Crime*, 2. Main elements of the articles, P. 268, Para. 33; " (...) the accused engaged in the prohibited conduct with either the intention that the victim be exploited or knowledge that they would be exploited will be sufficient to establish the offence", UNODC, *Legislative Guides: United Nations Convention against Transnational Organized Crime, Definition And Criminalization Of Trafficking In Persons 2020*, Chapter 3, Para 118; "In case of trafficking in children, (...) trafficking will exist where the child was subject to some act, such as recruitment or transport, the purpose of which is the exploitation of that child", OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, P. 35, 265, 266
- ^{viii} "The term "traffickers" (...) is used to refer to: recruiters; transporters; those who exercise control over trafficked persons; those who transfer and/or maintain trafficked persons in exploitative situations; those involved in related crimes; and those who profit either directly or indirectly from trafficking, its component acts and related offences.", OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Footnote 606
- ^{ix} "Profits from trafficking could include profits from services and exploitation of the victims; costs paid by victims (*passport, visa, transport*) for example where the victim paid for illegally facilitated migration and subsequently became a victim of trafficking; profits from the sale or resale of a person from one trafficker to another; and the value of unpaid services/salaries that would otherwise have been paid to the persons exploited.", OHCHR, *Commentary*,

Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principle 16 and Related Guidelines: Asset Confiscation and Disposal, P. 220,221

^x UNODC, Issue Paper, A Short Introduction to Migrant Smuggling, 'Illegal entry' or residence, P.10

^{xi} McAdam, M., Understanding Smuggling of Migrants and Trafficking in Persons