

Thematic Meeting on Trafficking and Smuggling of People, focusing on Unaccompanied Minors

8th – 9th November 2017

Background note

What is Trafficking in Human Beings?¹

Trafficking in women and men is composed of three elements: a certain **act** by a certain **means** for the **purpose** of exploitation.

Act: recruitment/transportation/transfer/harboring/receipt of persons.

Means: threat/use of force or other forms of coercion/abduction/fraud/deception/abuse of power or of a position of vulnerability/giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

Purpose: exploitation (includes, at a minimum: exploitation of the prostitution of others/other forms of sexual exploitation/forced labor or services/slavery/practices similar to slavery/servitude/removal of organs).

Child trafficking is composed of just two elements: an **act** and the **purpose** of exploiting the child.

When it comes to children, the means are considered irrelevant. **A child is every human being below the age of 18 years².**

What is Smuggling of Migrants?³

Migrant smuggling, according to the UN Smuggling of Migrants Protocol, is: "the procurement, **in order to obtain, directly or indirectly, a financial or other material benefit**, of the **illegal entry** of a person into a State Party of which the person is not a national or a permanent resident."

The purpose of the Smuggling of Migrants Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among State Parties to that end, while protecting the rights of smuggled migrants (Article 2 Smuggling of Migrants Protocol). The Protocol requires States not to criminalise migrants for the fact of having been the object of the crime of smuggling (Article 5).

¹ These definitions are set out in the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children", supplementing the 2000 "United Nations Convention against Transnational Organized Crime", which entered into force on 25 December 2003. Available at: <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>

² Definition taken from the "African Charter on the Rights and Welfare of the Child", Article 2, <http://www.achpr.org/instruments/child/#a2> and UN Convention on the Rights of the Child, Art. 1.

³ This definition is set out in the "Protocol against the Smuggling of Migrants by Land, Sea and Air", supplementing the "United Nations Convention against Transnational Organized Crime", <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>

The Protocol against the Smuggling of Migrants refers only to the irregular movement of migrants across **international borders**.

The Protocol also creates an obligation to establish **'aggravating circumstances'** to the crime of smuggling of migrants. These include 'circumstances (a) that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) that entail inhuman or degrading treatment, including for exploitation, of such migrants' (Article 6(3)).

Trafficking in Human Beings vs Smuggling of Migrants

There is frequently confusion and misunderstanding in relation to the difference between Trafficking in Human Beings and Smuggling of Migrants. Although this is clearly set out in the international legal definitions of the two crimes, the general public, the media, politicians and even those working directly with migrants and refugees all too often confuse the two, with serious implications for policy responses and practical solutions. Simply put, when the media or politicians use the term "traffickers", very often what they actually mean is "migrant smugglers".

Human traffickers exploit people for profit, and violate their human rights. Migrant smugglers facilitate people's irregular journey, thereby committing a crime against the State, rather than against a person. While acknowledging that in many cases, migrant smugglers may abuse the situation to gain additional profits for themselves, or even violate the migrants' human rights, the distinction is that in essence they are providing a service that is required by the migrant or refugee, in the absence of options for regular migration.

It is important though to understand that Trafficking in Human Beings and Smuggling of Migrants can occur along the same routes and that smuggling can sometimes lead to trafficking, but these are different crimes that require different responses in law, both with regard to the rights of a person who has been the object/victim of one of these crimes and to the penalties for perpetrators.

From a rights holder's perspective, the **confusion between trafficking and smuggling often leads to States, courts and service providers failing to identify some migrants as victims of trafficking**. States have an obligation to correctly identify victims of trafficking to ensure that their rights are not further violated and that they can access assistance, protection measures and solutions, including physical and mental health support, witness protection and remedies.

Key differences between Trafficking in Human Beings and Smuggling of Migrants

Smuggling of Migrants	Trafficking in Human Beings
Crime against the State (state sovereignty)	Crime against the person (human rights violation)
Once-off, commercial relationship	Longer-term, exploitative relationship
Profit from fee for facilitation of irregular migration	Profit from exploitation
Always involves crossing a border	May be internal or international
Migrant consents	No consent or invalidated consent

Unaccompanied and Separated Children (also referred to as "Unaccompanied Minors")

According to the **UN Committee on the Rights of the Child**, General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6⁴:

"Unaccompanied children" (also called unaccompanied minors) are children [...] who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so".

"Separated children" are children [...] who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members."

⁴ Available at: www.refworld.org/docid/42dd174b4.html

The European Union legal framework and the African Charter on the Rights and Welfare of the Child also mention unaccompanied children:

- The **EU Council Directive 2004/83/EC of 29 April 2004** on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, states that *“Unaccompanied minors” means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the [EU] Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States*⁵.
- The **African Charter on the Rights and Welfare of the Child**, specifically mentions “unaccompanied children” in the context of *Article 23: Refugee Children*⁶, stating that:
 1. *“State Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether **unaccompanied** or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties”.*
 2. *“State Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an **unaccompanied** refugee child in order to obtain information necessary for reunification with the family”.*
 3. *“Where no parents, legal guardians or close relatives can be found, the child shall be **accorded the same protection** as any other child permanently or temporarily deprived of his family environment for any reason.”*

⁵ Chapter 1, Article (2) (i), <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>

⁶ See African Charter on the Rights and Welfare of the Child, Article 23 (1) (2) (3), <http://www.achpr.org/instruments/child/#a2>