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Global Initiative to Fight Human Trafficking



# **Anti-human trafficking manual for criminal justice practitioners**

Module 1



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
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Module 1:

Definitions of trafficking in persons and smuggling of migrants



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# Module 1:

## Definitions of trafficking in persons and smuggling of migrants

### Objectives

On completing this module users will be able to:

- Recall the elements of trafficking in persons and smuggling of migrants as defined by the relevant United Nations protocols;
- Contrast the elements of the definitions of trafficking in persons and the smuggling of migrants;
- Explain the meaning of the elements “act, “means” and purpose” in trafficking in persons cases;
- Understand the issue of consent in a trafficking in persons case and how consent is vitiated;
- List some of the underlying offences to trafficking in persons;
- Recall factors on deciding the jurisdiction for prosecution of trafficking in persons cases.

### Introduction

It is important to distinguish between trafficking in persons and smuggling of migrants for two reasons:

- The constituent elements of the respective offences are different; and
- The response required of your authorities will vary, depending on the offence.

The definitions for trafficking in persons and migrant smuggling are found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (Trafficking Protocol) and the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol) respectively.

#### **Trafficking Protocol, article 3(a)**

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduc-

tion, 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.

### Smuggling Protocol, article 3(a)

“Smuggling of migrants” shall mean 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.

**Table 1. Definitions of trafficking in persons and smuggling of migrants**

|   | <i>Trafficking in persons<br/>(adults)</i>   | <i>Trafficking in persons<br/>(children)</i>  | <i>Migrant smuggling</i>  |
|---|--|---|---|
| <i>Victim's age</i>                                 | Over 18  | Below 18  | Irrelevant  |
| <i>Mental element</i>                               | Intention  | Intention   | Intention   |
| <i>Material element</i>                             | <ul style="list-style-type: none"> <li>• Act</li> <li>• Means</li> <li>• Exploitative purpose</li> </ul> | <ul style="list-style-type: none"> <li>• Act</li> <li>• Exploitative purpose</li> </ul> | <ul style="list-style-type: none"> <li>• Act: Procurement of illegal entry</li> <li>• Purpose: For financial or other material benefit</li> </ul> |
| <i>Consent of the trafficked or smuggled person</i> | Irrelevant once the means are established  | Irrelevant. Means do not need to be established   | The smuggled person consents to the smuggling   |
| <i>Transnationality</i>                             | Not required   | Not required  | Required  |
| <i>Involvement of an organized crime group</i>      | Not required   | Not required  | Not required  |

## Trafficking in persons

Article 3 of the Trafficking Protocol clarifies that trafficking in persons has three constituent elements:

- (1) An act (what is done);
- (2) The means (how it is done); and
- (3) Exploitative purpose (why it is done).

Article 5 further requires countries to ensure that the conduct contained in article 3 is criminalized in their domestic legislation. It is important to remember that the definition contained in the Trafficking Protocol is meant to provide a level of consistency and consensus around the world on the phenomenon of trafficking in persons; domestic legislation, however,

need not follow the precise language of the Trafficking Protocol. Rather, domestic legislation should be adapted in accordance with domestic legal systems and give effect to the meaning and concepts contained in the Trafficking Protocol.

## Examples of criminal legislation

### Criminal Code of Canada

279.01: Every person who recruits, transports, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable:

- (a) to imprisonment for life if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or
- (b) to imprisonment for a term of not more than fourteen years in any other case.

279.04: For the purpose of the trafficking in persons offences, a person exploits another person if they:

Cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service; or

Cause them by means of deception or the use or threat of force or of any other form of coercion to have an organ or tissue removed

### Criminal Code of Italy

600: (Placing or holding persons in conditions of slavery or servitude). – Whoever exerts on any other person powers and rights corresponding to ownership; places or holds any other person in conditions of continuing enslavement, sexually exploiting such person, imposing coerced labour or forcing said person into begging, or exploiting him/her in any other way, shall be punished with imprisonment from eight to twenty years.

Placement or maintenance in a position of slavery occur when use is made of violence, threat, deceit, or abuse of power; or when anyone takes advantage of a situation of physical or mental inferiority and poverty; or when money is promised, payments are made or other kinds of benefits are promised to those who are responsible for the person in question.

The aforesaid penalty becomes harsher, increasing by one third to 50%, if the offences referred to in the first paragraph above are perpetrated against minors under eighteen or for sexual exploitation, prostitution or organ removal purposes”.

601: (*Trafficking in human beings*). – Whoever carries out trafficking in persons who are in the conditions referred to in article 600, that is, with a view to perpetrating the crimes referred to in the first paragraph of said article; or whoever leads any of the aforesaid persons through deceit or obliges such person by making use of violence, threats, or abuse of power; by taking advantage of a situation of physical or mental inferiority, and poverty; or by promising money or making payments or granting other kinds of benefits to those who are responsible for the person in question, to enter the national territory, stay, leave it or migrate to said territory, shall be punished with imprisonment from eight to twenty years.

The aforesaid penalty becomes harsher, increasing by one third to 50 per cent, if the offences referred to in this present article are perpetrated against minors under eighteen or for sexual exploitation, prostitution or organ removal purposes”.

602: (Sale and purchase of slaves). – Whoever, in cases other than the ones referred to in article 601, purchases or sells or transfers any person who is in any of the conditions referred to in article 600, shall be punished with imprisonment from eight to twenty years.

The aforesaid penalty becomes harsher, increasing by one third to 50 per cent, if the offences referred to in this present article are perpetrated against minors under eighteen or for sexual exploitation, prostitution or organ removal purposes”.

## Elements of a case of human trafficking

The Trafficking Protocol requires that the crime of trafficking be defined through a combination of the three constituent elements and not the individual components, though in some cases these individual elements will constitute criminal offences independently. For example, the act of abduction or the non-consensual application of force (assault) will likely constitute separate criminal offences under domestic criminal legislation.

In criminal law terms, these three constituent elements can also be identified as the *actus reus*—the material or physical element(s)—and the *mens rea*—the mental element. No conviction may be rendered in the absence of these two criminal law concepts, fundamental to criminal systems around the world.

### Actus reus requirements

The *actus reus* or material elements of trafficking in persons vary depending on the legislation of your country. In the case of the crime of trafficking as defined in the Trafficking Protocol, the *actus reus* requirement is split into two parts.

#### ***Actus reus requirement (1):***

The offence must include any one of the following:

- Recruiting
- Transporting

- Transferring
- Harboring
- Receiving a person

Some or all of these terms are likely to have a clearly defined meaning in your domestic legal system.

### ***Actus reus requirement (2):***

It must also contain at least one of the following means:

- Use of force
- Threat of force
- Coercion
- Abduction
- Fraud
- Deception
- Abuse of power or of a position of vulnerability
- Giving or receiving of benefits

### **Mens rea requirement**

The mens rea requirement reflects the state of mind of the person charged with an offence. Only those with a sufficient “guilty mind” can be found liable for a criminal offence. In certain jurisdictions and in certain cases, criminal liability may be “strict” (“strict liability” offences).

The requisite mental element required in a trafficking in persons case is that the person committed the material act(s) with the intention that the victim be “exploited” (as defined by a country’s domestic anti-trafficking legislation).<sup>1</sup>

The Trafficking Protocol does not define exploitation but gives a non-exhaustive list of forms 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.”

Again, it is important to remember that the Trafficking Protocol obligation to criminalize trafficking in persons does not require that domestic legislation use the precise language

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<sup>1</sup> The “purpose of exploitation” is a *dolus specialis* mental element: *Dolus specialis* can be defined as the purpose aimed at by the perpetrator when committing the material acts of the offence. It is the purpose that matters, not the practical result attained by the perpetrator. Thus, the fulfilment of the *dolus specialis* element does not require that the aim be actually achieved. In other words, the “acts” and “means” of the perpetrator must *aim* to exploit the victim. It is not therefore necessary that the perpetrator actually exploits the victim.

contained in the definition of trafficking in persons. Rather, domestic legislation should be drafted in a way that is consistent with your domestic legal framework, provided it contains a combination of the constituent elements contained in the definition.

An offence of trafficking in persons should not require that actual exploitation take place. As is clear from the Trafficking Protocol, actual exploitation need not occur provided there is a manifestation of intention to exploit the individual. All that is required is that the accused committed one of the constituent acts, employing one of the listed means for the purpose or, put another way, with the intention that the individual be exploited.

The mental element can be proven in a number of ways. It should be noted that the Trafficking Protocol requires that countries only criminalize trafficking in persons when conducted intentionally as per Article 5(1). This speaks to the mental element. However, countries are not precluded from allowing the mens rea requirement to be established on a lesser standard, i.e. via recklessness, wilful blindness or even criminal negligence, subject to the requirements of the domestic legal system.



### Practical guidance

Many trafficking cases may be obvious. A scenario in which persons are recruited, transported to another country, never allowed to leave a factory, and work around the clock clearly fall within the definition of trafficking in persons and such conduct must be criminalized as such.

Similarly, cases involving women recruited or harboured and forced to provide sexual services unmistakably meet the definition of trafficking in persons. Some cases, however, may be more complicated. When in doubt as to whether a particular circumstance meets the definition of trafficking in persons, attention should be paid to both the definition contained in the Trafficking Protocol and the constituent elements of trafficking in persons as defined in your domestic legislation. Where possible, police officers and other law enforcement authorities may wish to consult with prosecutors to assess whether a particular set of facts meets the definition of trafficking in persons, as reflected in your domestic legislation.

## Other examples of trafficking in persons, as contemplated by the Trafficking Protocol

- Forced marriages may involve an act, means and purpose that fit the definition of trafficking as defined in the Protocol. The act may be transfer or receipt of a person; the means will include force, threats, coercion or abduction; the purpose may be sexual exploitation and/or servitude.
- In some societies where a member of a family commits a crime, a young female from the offenders' family may be sent to live in servitude with a priest or with the victim's family to "repay" the crime. The act may be receipt or harbouring; the means may be coercion, abuse of power or of a position of vulnerability; the purpose may be sexual or labour exploitation, servitude or slavery.

- Diplomatic staff frequently employ servants. In a number of cases around the world some of these servants have been recruited and forced to provide labour within the households.
- Forcible abduction and conscription of children and adults into armed forces during times of conflict can also be prosecuted as a trafficking crime. Children are especially vulnerable to military recruitment due to their emotional and physical immaturity. The act may be recruitment, transporting, or receiving a child or adult, the means (in the case of adults) may be the use or threat of use of force, or the abuse of a position of vulnerability and the purpose may be servitude, forced labour, or sexual exploitation.
- In some countries, particularly those with an already established adoption market, illicit adoption practices are becoming more common and can be prosecuted under the umbrella of trafficking crimes. Children may be forcibly separated from their mothers who were coerced into signing blank documents that were later made into illegal contracts. The act may be transporting or receiving a child and the purpose may be slavery or sexual exploitation. It is unnecessary to establish a means when the trafficking victim is under 18 years of age, however coercion, fraud and deception are commonly used on the mother to provide signatures, blood samples and birth certificates.
- Peacekeeping and post-conflict operations create circumstances in which trafficking in persons, mainly women for sexual exploitation, has flourished in the past. The act may be recruiting, transferring or receiving, the means may be coercion, deception or abuse of power or of a position of vulnerability and the purpose may be sexual exploitation, servitude, or forced labour.

**Table 2. Trafficking in Persons (TIP)—matrix of the elements of the offence**

|                           |   |  |   |   |       |
|---------------------------|---|--|---|---|-------|
| <b>Recruitment</b>        | + | <b>Threat or use of force</b>  | + | <b>Exploitation of the prostitution of others</b> | = TIP |
| <b>Transportation</b>     |   | <b>Other forms of coercion</b>   |   | <b>Sexual exploitation</b>                        |       |
| <b>Transfer</b>           |   | <b>Abduction</b>   |   | <b>Labour exploitation</b>                        |       |
| <b>Harbouring</b>         |   | <b>Fraud</b>   |   | <b>Slavery or other slavery like situations</b>   |       |
| <b>Receipt of persons</b> |   | <b>Deception</b>   |   | <b>Organ removal</b>                              |       |
|                           |   | <b>Abuse of power</b>  |   | <b>Etc.</b>                                       |       |
|                           |   | <b>Abuse of a position of vulnerability</b>  |   |   |       |
|                           |   | <b>Giving or receiving of payments or benefits to achieve the consent of a person having control over another person</b> |   |   |       |



### Self-assessment

What are the constituent elements of trafficking in persons?

List some offences that may be committed along with the trafficking in persons offence in your jurisdiction.

## The issue of consent

Article 3(b) of the Trafficking Protocol states that the consent of a victim of trafficking in persons to the intended exploitation is irrelevant once it is demonstrated that deception, coercion, force or other prohibited means have been used. Consent, therefore, cannot be used as a defence to absolve a person from criminal responsibility.

In trafficking cases involving children, the Trafficking Protocol states that trafficking in persons is made out regardless of the use of prohibited means.

Both of these instances reflect the simple fact that no person can consent to being exploited, because in the case of adults, consent has been negated through the use of improper means and, in the case of children, their vulnerable position makes it impossible for them to provide consent in the first place.

If consent is obtained through any of the prohibited means, that is threats, force, deception, coercion or through abuse of power or of position of vulnerability, the consent is negated.

A child is not capable of consenting to such conduct, regardless of whether it was obtained improperly because the law affords them special status due to their unique position as vulnerable persons.

The issue of consent is complex since consent can take many forms. The following examples illustrate the question of consent.

### Example of negated consent

Twenty-three-year-old Anita lives in Central Asia. She wants to live and work abroad and one day answers a newspaper advertisement for waitressing work abroad that specifically requires the ability to speak her native language. Anna answers the ad and when her plane lands, a man takes her to an apartment where she meets a dozen other women. She asks them if they all work at the restaurant as waitresses. They laugh at her and one says: "Restaurant? You're not going to work at a restaurant! You'll find out tonight where you are working!"

Anna is held for six months and prostituted by her traffickers, who claim to have purchased her for several hundred dollars. They say she owes them money for her plane ticket, accommodation and food. They beat her when she refuses a client.

### Example of deceit regarding the conditions of work

Bela lives in a South American country and works as a prostitute. One day, a regular client who visits her periodically when conducting business in her city, tells her that she could make much more money in the North American city where he lives. This client, called Nick, tells her that the prostitutes in his city go out to the clubs all the time, make a lot of money, and have a lot of fun. Nick tells her he will buy her plane ticket, so Bela agrees and gets a visa to travel to the new city.

Nick meets Bela at the airport and she stays at his house for a few days. One day, a group of men come to the house to take her to her new place of work. The men give Nick \$US 10,000 and take Bela to a town outside the city. There she is put to work in three brothels and has to have sex with up to nine customers a day. If she refuses, her debt is increased. All of the money paid for her services goes either to the brothel owners or to the men who bought her. She is told that she cannot leave before her debt is reimbursed. She sees violence used against some of her friends.



#### Self-assessment

When is consent not relevant in the commission of the offence of trafficking in persons?



#### Discussion

Do you think the following case is one of trafficking in persons? Is there an act, a means and a purpose? Can you identify them?

A runs a factory that weaves silk for dresses. The work is very delicate, the thread is very fine, requiring nimble fingers and good eyes.

Silk weaving is very competitive, with cloth suppliers constantly offering lower and lower prices to the dress manufacturers. A decides to get a labour force that can do the fine work and do it cheaply: he decides to get some children to work in his factory.

A asks around and hears about a middleman, B, who has a good reputation for supplying weavers with young boys who learn quickly and cost little. A approaches B and asks him to find about a dozen boys to work in his factory.

B travels to the country, to a village he knows is very poor and the families are large. Many of the men are working away, often out of the country.

He tells C, the mother of D (a nine-year-old boy), that he has work for D in the town. He will be apprenticed to a weaver and taught all there is to know about the job. D will have a bed, be paid a small wage and will be fed. B pays C about \$US20 for D. B takes D to the town and to A's factory.

D is put to work with two older boys who show him what to do. He is fed on a weak stew most of the time. He sleeps on straw under the machinery. He is paid a coin a week.

## Migrant smuggling

Article 3 of the Smuggling Protocol establishes that migrant smuggling is comprised of the following elements:

- procuring the illegal entry of another person;
- into another state;
- for the purpose of financial or material gain.

Article 3(b) further defines "illegal entry" as the crossing of (international) borders without complying with the necessary requirements for legal entry into the receiving State.

Article 6 of the Smuggling Protocol requires, amongst other things, the criminalization of the offence of migrant smuggling.

## Examples of criminal legislation

### Belgium

Article 77 of the Immigration Law criminalizes smuggling in persons, and article 77bis penalizes involvement in the entry into Belgium of a foreigner if violence, intimidation, coercion or deception were used, or abusing the vulnerability of a foreigner in terms of his or her illegal status, precarious situation, pregnancy, disease or disability. Both laws are used to prosecute smuggling in persons, with the difference that violations of 77bis carry a harsher sentence. Aggravating circumstances include violations conducted on a "regular" basis or carried out by an organized association (consisting of two or more persons) and the penalties increase to 10 to 15 years and a fine.

### Colombia

Colombia's broad trafficking law includes smuggling offences and states that "anyone who promotes, induces, constrains, enables, finances, cooperates or participates in a person's transfer within the national territory or abroad by resorting to any form of violence, ruse or

deception, for exploitation purposes, to lead such person to work in prostitution, pornography, debt bondage, begging, forced labour, servile marriage, slavery for purposes of obtaining financial profit or any other benefit either for himself or for another person, shall incur 10 to 15 years' imprisonment and a fine..." The law criminalizes facilitation of illegal migration for the purpose of profit and has provisions regarding obtaining profit or property from smuggling punishable by six to eight years' imprisonment.

## Elements of a case of migrant smuggling

The actus reus or material elements of migrant smuggling vary depending on the legislation of your country. In the case of the crime of smuggling, as defined in the Smuggling Protocol, the actus reus requirement includes the following:

- Procurement of an illegal entry of another person;
- Entry into another country by the other person, a smuggled migrant who is neither a national nor permanent resident of that country;
- Agreement to receive a financial or other material benefit.

The Smuggling Protocol does not define "procurement". Generally speaking, this refers to the act of bringing about a specific thing; in the case of migrant smuggling, the illegal entry of another person into a country.

The mens rea requirement reflects the state of mind of the person charged with an offence. Only those with a sufficient "guilty mind" can be found liable for a criminal offence. In certain jurisdictions and in certain cases, criminal liability may be imposed in "strict liability" offences even in the absence of mens rea.

The requisite mental element required in a smuggling of migrants case is that the person committed the material act(s) intentionally and in order to obtain a financial or other material benefit, directly or indirectly. Hence, smuggling for non-profit purposes does not fall under the scope of the Smuggling Protocol.

The mental element can be proven in a number of ways. It should be noted that the Smuggling Protocol requires that countries only criminalize smuggling of migrants when conducted intentionally as per article 6(1). This speaks to the mental element. However, countries are not precluded from allowing the mens rea requirement to be established on a lesser standard, i.e. via recklessness, wilful blindness or even criminal negligence, subject to the requirements of the domestic legal system.

Again, it is important to remember that the Smuggling Protocol obligation to criminalize smuggling of migrants does not require that domestic legislation use the precise language contained in the definition of smuggling of migrants. Rather, domestic legislation should be drafted in a way that is consistent with your domestic legal framework, provided it contains a combination of the constituent elements contained in the definition. It is also important to note that migrants are not to be made liable to criminal prosecution under the Smuggling Protocol for the fact of having been the object of smuggling as per article 6 of the Smuggling Protocol.

## Key differences between trafficking in persons and migrant smuggling

In practice, it may be difficult to distinguish between these two crimes in the first instance. In many cases, victims of trafficking may first start out as smuggled migrants. Consequently, in investigating trafficking in persons cases, it may sometimes be necessary to rely on measures against smuggling. It is critical, however, that those investigating smuggling cases be familiar with the crime of trafficking in persons as the consequences of treating a trafficking case as one of migrant smuggling can be severe for the victim.

### Identifying the differences

In some cases it may be difficult to quickly ascertain whether a case is one of human smuggling or trafficking. The distinctions between smuggling and trafficking are often very subtle and there are overlaps. Identifying whether a case is one of trafficking in persons or people smuggling can be very difficult for a number of reasons:

- Some trafficked persons might start their journey by agreeing to be smuggled into a country illegally, but find themselves deceived, coerced or forced into an exploitative situation later in the process (by e.g. being forced to work for extraordinary low wages to pay for the transportation).
- Traffickers may present an opportunity that sounds more like smuggling to potential victims. They could be asked to pay a fee in common with other people who are smuggled. However, the intention of the trafficker from the outset is the exploitation of the victim. The fee was part of the fraud and deception and a way to make a bit more money.
- Smuggling may be the planned intention at the outset but a too-good-to-miss opportunity to traffic people presents itself to the smugglers/traffickers at some point in the process.
- Criminals may both smuggle and traffic people, employing the same routes.
- Conditions for a smuggled person along the journey may be so bad it is difficult to believe a person could have consented to this.

Having said this, there are a number of key differences between migrant smuggling and trafficking in persons:

### Consent

Migrant smuggling generally involves the consent of those being smuggled. Victims of trafficking, on the other hand, have either never consented or, if they initially consented, that consent has been rendered meaningless by the improper means of the traffickers.

### Transnationality

To smuggle a person means to facilitate the person's illegal border crossing and entry into another country. Trafficking in persons, on the other hand, need not involve the crossing of any border. Where it does, the legality or illegality of the border crossing is irrelevant. Thus, while migrant smuggling is always, by definition, transnational, trafficking in persons need not be.

## Exploitation

The relationship between smuggler and smuggled migrant usually ends after the facilitation of the border crossing. Smuggling fees are paid up front or upon arrival. The smuggler has no intention to exploit the smuggled person after arrival. Smuggler and migrant are partners, albeit disparate, in a commercial operation that the migrant enters willingly. Trafficking involves the ongoing exploitation of the victims in some manner to generate illicit profits for the traffickers. It is the intention of the trafficker that the relationship with the exploited victims will be a continuous one and extend beyond the crossing of the border in the final destination. Smuggling can become trafficking, e.g. when the smuggler sells the person and the accumulated debt, or deceives/coerces/forces the person to work off transportation costs under exploitative conditions.

## Source of the profit

One important indicator of whether a case is one of smuggling or of trafficking in persons is how the offenders generate their income. Smugglers generate their income from fees to move people. The trafficker in contrast continues to exert control over the trafficked victim in order to achieve additional profits through the ongoing exploitation of the victim.

## Appropriate charges

As explained above, the offence of trafficking in persons may involve many different acts and many different actors. The offence is committed by acts of 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.

Trafficking cases, by their nature, are very likely to involve other offences. These offences may be an integral part of the trafficking process, and can be used to prove that an element of the trafficking in persons offence has been committed. They can also be charged separately or utilized as alternative charges, depending on the legal system. They can also be called underlying offences to trafficking.

Other offences may be committed against the trafficking victim or others, but would not be an integral part of the trafficking offence. These should be charged separately.



### Self-assessment

What is smuggling of migrants?

What are the basic differences between trafficking in persons and smuggling of migrants?

## Examples

Identifying whether trafficking in persons or smuggling of migrants has taken place can be difficult in practice. Please look at these examples which illustrate the basic differences between the two. Please note that cases have to be seen in the context of domestic law and local circumstances. In this module we examine cases in light of the Trafficking in Persons and Smuggling of Migrants Protocols.

|   | Case example |
|--|--------------|
| <p>An advert is placed by a recruitment agency in a local newspaper in a town. It promises good wages for cleaners and domestic servants in another country. All visa and other migration requirements will be taken care of.</p> <p>A young woman applies. She is worried because she thinks she may have to pay a fee. She is told not to worry because all fees will be taken care of when she arrives at the destination. Reassured, she agrees to be flown to the developed country for the promised work. She is taken to the airport, provided with a passport and given instructions that she will be met at the other end by the agency's staff.</p> <p>When she arrives, she is met by a man and a woman. She is told she must hand over her passport as security. She is driven to a large house where she is told she must work as a servant. Money is exchanged between the "staff" from the "agency" and her new "employer".</p> <p>Before they leave, she asks the "agency staff" about her wages. She is told she will be paid a wage but will have to pay for accommodation and food. She asks about when she will get her passport back. She is told she will get her passport back once she has reimbursed the employer for the costs of recruitment. She is further told it will be possible to save money from her wages to pay back the fee the "employer" has paid and the transport costs. As the weeks go by the amount "owed" increases because she is paid little and the cost of food and accommodation is high. For every small mistake she receives a slap. She has no alternative but to work for 14 hours per day, seven days per week.</p> <p>Is this a case of TIP or smuggling of migrants?</p> |              |

|    | Case example |
|---|--------------|
| <p>An advert is placed in a local paper that says that an agency can arrange travel to another country where there are good opportunities for agricultural labourers, factory workers, waiters and chefs.</p> |              |

A man sees this advert and makes contact. He is told the fee will be \$US 10,000. He will be transported by truck to a neighbouring country from where he will be flown directly to the destination country. All immigration documents will be provided. He takes loans from his family, works hard at three jobs and after 18 months gets the money together. He pays this to the agency and sets off on his journey.

Travelling by truck with ten other people at first, he is surprised to find they go to a sea port and not an airport. He and the rest of the group are told to leave the truck and hide in scrub land at the edge of the port until someone comes for them. Two days later, having lived on scraps of food from trash bins, a man contacts them and they are smuggled aboard a ship.

Over the next 12 months similar methods of transport are used. The group stays together, but one man dies and has to be left at the roadside in country they pass through.

Eventually, the group are in a truck when it stops. The back doors are opened and they see they are in the middle of a city. They are told they have arrived and must get out. The man asks about the passport he was promised. He is told not to make trouble and he now has to find his own way. The truck leaves, and the group disperses quickly into the city.

Three days later, together with two other men from the group, he finds work picking potatoes. He is allowed to live in farm buildings with other workers. He is paid very low wages by the standard of the destination country.

Is this a case of TIP or smuggling of migrants?



### Case studies: Case 1.

Pedro lives in South America. He is 35 years old and does not have a permanent job. He earns some money in seasonal construction work but it is not enough to sustain him, his wife and their two small children. While working on a construction site in his city, he hears about a man who is looking for people interested in selling one of their kidneys for organ transplant purposes. This man organizes trips to another country where the kidney is removed by medical professionals. The recipients pay up to \$US60,000 for a healthy kidney.

Although Pedro is worried about having one kidney, he agrees to have his kidney removed. He is promised \$US30,000 for his kidney, as well as payment of all his travel expenses and accommodation for recovery in a nice, comfortable environment. The organizer assists Pedro in applying for a passport and visa and makes all the travel arrangements for him. Upon arrival at his destination, he is questioned by the immigration officials, but since he can show that he has a return ticket, he is allowed entry. He is met at the airport by a man named Luis and is taken to a small apartment which is far from the luxury accommodation he was promised by the

organizers. After a couple of days' rest, during which he is not allowed to leave the apartment, he is taken to a small dirty room, where the operation takes place. Before the operation, Pedro signs a paper in English but as his English is very limited, he does not quite understand what he signs.

After the operation, Pedro is taken back to the apartment, where he recovers for one week. Luis gives him only \$US500 instead of the \$US30,000 he was promised. Pedro gets angry with Luis and demands the rest of his money. Luis tells him that the trade of organs, tissues and other body parts is strictly prohibited by law and if Pedro wants to approach the police, he will himself end up being arrested and deported, without having received any money. Luis also points out that since Pedro signed a paper stating that the donor and recipient of the organ were relatives and that no money was being exchanged, Pedro cannot prove that he in fact is to be paid anything. Pedro decides that it is after all better to receive \$US500 than nothing, so he agrees and goes home. A week later Pedro falls ill with a serious infection.

### Points for discussion

- Please note that, as will always be the situation in real life cases, cases can only be considered in the light of the information available.
- On the basis of the Trafficking and Smuggling Protocols, can it be stated that this is a case of human trafficking and not people smuggling?
- On the basis of your domestic laws, is this a case of migrant smuggling or trafficking in persons?
- Are the three elements of trafficking present?
- What is the act in the current case? What are the means used to commit the act? What is the goal of the whole process?
- What other crimes exist in your legislation that could be used to prosecute the case (main/alternative charges)? What associated crimes took place?



### Case studies: Case 2.

Krasimir lives in Eastern Europe and is 10 years old. He lives with his parents, two older brothers, one younger sister and his grandparents. His father, Nikolay, is unemployed and an alcoholic. His mother is sick and also unable to work. Krasimir's older brothers are also unemployed. The family has constant struggles with money and Krasimir and his siblings are beaten by their father regularly.

One day, Nikolay's old army friend, Iliya, comes over. He promises Nikolay € 150 a month if he will "rent" Krasimir to him to beg in a Western European capital city. Iliya promises to pay for Krasimir's accommodation and food and promises to take care of him. Nikolay agrees.

One week later, Iliya comes to pick up Krasimir and gives his father EU 100 in cash. There are three other boys in the van with Krasimir. First they stop to get passports from the passport authority. With the passports, they cross the border, but the border guards don't stop Iliya, they just wave him through with a smile.

The next morning, the five of them arrive at their destination. Iliya takes them to an apartment where the three boys share one room and Iliya has another room. Iliya gives the boys each a copy of their passports and holds onto the originals. The next morning they "start work." Each day, they go to a different place to beg, Iliya tells them where and escorts them there. They have to beg from 9am to 6pm every day and then find their ways home. If they earn less than € 40 per day, they get beaten by Iliya. They are given enough food by Iliya and there is no sexual abuse.

Krasimir is not allowed to phone his family and does not know how long he must stay. Iliya tells them if they are picked up by police to say that they are tourists and waiting for their father. Iliya threatens that if they gave any information to the police, he would injure the whole family.

### Points for discussion

- Please note that, as will always be the situation in real life cases, cases can only be considered in the light of the information available.
- On the basis of the Trafficking and Smuggling Protocols, can it be stated that this is a case of human trafficking and not people smuggling?
- On the basis of your domestic laws, is this a case of migrant smuggling or trafficking in persons?
- Are the three elements of trafficking present?
- What is the act in the current case? What are the means used to commit the act? What is the goal of the whole process?
- What if Krasimir was 18 years old?
- What other crimes exist in your legislation that could be used to prosecute the case (main/alternative charges)? What associated crimes took place?



### Case studies: Case 3.

Lisa lives in a small city in Southeast Asia and is 18 years old. Her parents and younger siblings depend on her for support and she struggles to find work that will feed all of them. One day, she hears about an agency in her city that exports labour to factories abroad. At home, the monthly minimum wage is \$US 40, but in these factories, the pay is \$US 2.25 per hour and the company also provides food and housing. Lisa knows that she will have to work illegally but thinks that the money she will be able to send home to her family will be worth it.

She goes to the agency and learns that they charge \$US 2,000 for an employment contract. She does not have the money, but knows that other people are borrowing from money lenders in the area. She also goes to a money lender and uses her family's house as collateral on the loan. Now she has to send monthly payments to the money lender as well as to her family. She is nervous but also believes she is doing the right thing. She signs the employment contract and leaves home.

After working for a month in the factory and not being paid, she and her fellow workers ask for their wages due. They are informed that they will be paid \$US 100 each for the month. Lisa and some other workers protest and are not given any work for the next month. Meanwhile, they are forced to live in a dorm with 36 beds, only four toilets, and often fed inedible or spoiled food. The living quarters are always locked between 9pm and 6am and are infested with cockroaches and rats.

Lisa becomes desperate and decides to go to the manager to apologize and try to get some work. She knows that he withholds work as a punishment to those who complain, even though there is enough to do. Instead of listening to her apology, the manager propositions her for sex and tells her she could have a comfortable desk job if she agrees. Lisa declines. The manager orders her back to work and indicates that he will report her to immigration authorities if she does not comply.

### Points for discussion

- Please note that, as will always be the situation in real life cases, cases can only be considered in the light of the information available.
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- On the basis of your domestic laws, is this a case of migrant smuggling or trafficking in persons?
- Are the three elements of trafficking present?
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- What other crimes exist in your legislation that could be used to prosecute the case (main/alternative charges)? What associated crimes took place?



### Case studies: Case 4.

Anna is from an Eastern European country. She has worked in a factory since leaving school, but recently lost her job. She has two small children to support and has recently divorced her husband. She knows it will be very difficult to find a new job in her country. One day, the brother of a friend tells her that she can make good money in a Western European hotel as a cleaning lady. She agrees and he promises to call his friend and make the arrangements.

A few days later, she leaves her children with her mother, promising to send money home, and drives with her friend's brother over an unmarked border, where she is transferred into a waiting van with six other women and girls and two men. Over a journey of several days, the women and girls switch repeatedly from vans into small boats and back again to move from one country to the next, always avoiding official border crossings. At times, the women and girls are locked in apartments or houses and are constantly guarded. They are disoriented and start to become suspicious and afraid.

Finally, the women and girls reach a house and are ordered to strip naked in front of a group of men. Anna does as she is told and is sold to the owner of a bar. The owner tells her that she is in the country illegally and must now work as a prostitute to pay off her travel and transportation debt. He tells her that she will be arrested if she leaves the premises of the bar and if she does not do what she is told, she will be beaten or sold to other "more dangerous" people who will treat her worse.

She is forced to work every day, from 6pm to 6am, and is only given food once a day. She is fined for any infraction and forced to buy lingerie and the food she eats, which are added to her debt.

### **Points for discussion**

- Please note that, as will always be the situation in real life cases, cases can only be considered in the light of the information available.
- On the basis of the Trafficking and Smuggling Protocols, can it be stated that this is a case of human trafficking and not people smuggling?
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## **Appropriate charges**

As explained above, the offence of trafficking in persons may involve many different acts and many different actors. The offence is committed by acts of 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.

Trafficking cases, by their nature, are very likely to involve other offences. These offences may be an integral part of the trafficking process, and can be used to prove that an element of the trafficking in persons offence has been committed. They can also be charged separately or utilized as alternative charges, depending on the legal system. They can also be called underlying offences to trafficking.

Other offences may be committed against the trafficking victim or others, but would not be an integral part of the trafficking offence. These should be charged separately.

Underlying offences to trafficking may include but are not limited to:

- Slavery
- Slavery-like practices
- Servitude
- Forced or compulsory labour
- Debt bondage
- Forced marriage
- Forced abortion
- Extortion
- Torture
- Cruel, inhumane or degrading treatment
- Rape
- Sexual assault
- Assault
- Bodily injury
- Murder
- Kidnapping
- Abduction
- Unlawful confinement
- Labour exploitation
- Withholding identity papers
- Violations of immigration law
- Money-laundering
- Corruption
- Abuse of office
- Smuggling of migrants

Investigation and prosecution of the individual acts mentioned above can be particularly useful in situations and in countries where:

- A distinct criminal offence of trafficking does not yet exist;
- The penalties for trafficking do not sufficiently reflect the nature of the crime and do not have any deterrent effects; or

- In cases where the existing evidence is not sufficient in order to prosecute for trafficking but may be sufficient to prosecute for such underlying offences. In systems that allow plea bargains, in general it would be recommended to charge for all possible offences, so that in the case of a plea bargain, some charges may be crossed out.

Where the evidence is there, for a number of reasons, you should aim at prosecuting perpetrators under the offence of trafficking in persons. If possible in your legal system, utilize underlying offences as alternative charges to increase chances for a conviction.

If the criminal offence of trafficking exists in your jurisdiction, the underlying offences are particularly useful in situations where you do not find sufficient evidence for the prosecution of trafficking. The evidence may still be sufficient for prosecution of the individual criminal acts, the underlying offences to trafficking such as unlawful confinement, sexual assault, bodily injury, withholding of identity documents, etc. In these situations your only option may be to prosecute for the individual criminal acts.

Even if you initially choose to prosecute traffickers under the offence of trafficking in persons but the evidence does not support your case beyond reasonable doubt, the evidence may suffice for conviction for the underlying offences. Hence, the underlying offences can also be invoked in addition to prosecuting under the offence of trafficking in persons. The provisions can also be invoked as additional or overlapping offences to demonstrate the seriousness of a particular trafficking operation.

As a practitioner you know that investigating suspects and prosecuting defendants with trafficking offences can be very complex, time consuming and costly. It is therefore not surprising that there are a number of examples of cases where trafficking in persons is present, indeed is the driving force—may be the *raison d'être* of a case—but the only charges laid are for the underlying offences such as unlawful confinement, sexual assault, bodily injury, withholding of identity documents, etc.

Failing to prosecute for trafficking offences may be appealing in the short term, but has a number of potentially significant long term consequences. In many occasions a trafficking charge may give a victim access to victim support services, protection, and assistance that would not otherwise be available. These victim support services can include the possibility of a reflection period, temporary or even permanent residence status in the destination country, and support services at various levels, including accommodation, health care, legal and psychological counselling and access to resettlement packages. This is of importance to you for a number of reasons.

Trauma can affect the quality of the testimony of trafficking victims. Providing support, protection and assistance to victims of trafficking helps the victim overcome the most severe consequences of trauma and helps you to build the trust of a trafficking victim. You are not likely to get that trust if you cannot provide proper support for victims. Without trust you are unlikely to get the quality of testimony you require.

In many jurisdictions the laying of a charge for trafficking in persons will trigger various protection and assistance measures for victims. It may also mean that the victim is not prosecuted for offences he or she may have committed in the process of trafficking. Prosecuting

the victim for offences he or she may have committed as a direct consequence of being trafficked may destroy the relationship that you have to build in order to gain the best possible witness testimony for your case. It may directly significantly weaken the witness testimony and contribute to the victim's decision not to cooperate with the criminal justice system.

Failing to prosecute for trafficking in persons offences may also mean that the wider trafficking networks are left to operate without any disruptions.



### Self-assessment

What are some of the underlying offences to trafficking in persons?

When is it useful to investigate and prosecute a trafficker for those underlying offences?

## Jurisdiction

The Convention against Transnational Crime (TOC Convention) requires States Parties to establish jurisdiction to investigate, prosecute and punish all offences established by the Convention and any Protocols to which the country in question is a State Party.

Jurisdiction must be established over all offences committed within the territorial jurisdiction of the country, including its marine vessels and aircraft. This is called the principle of territorial jurisdiction.

If the national legislation prohibits the extradition of its own nationals, jurisdiction must also be established over offences committed by such nationals anywhere in the world. This allows the country to meet its Convention obligation to prosecute offenders who cannot be extradited on request because of their nationality. Jurisdiction established over offences committed by nationals of the State are called the active personality jurisdiction.

The Convention also encourages, but does not require, the establishment of jurisdiction in other circumstances, such as all cases where the nationals of a State are either victims or offenders.<sup>a</sup> Jurisdiction established over offences committed against nationals of the State is called the passive personality jurisdiction.

<sup>a</sup> 33Convention Art.15, para.(1) (mandatory jurisdiction); Art.15, para.(2) (optional jurisdiction); and Art.16,para.(10) (obligation to prosecute where no extradition due to nationality of offender). See also the discussion of jurisdictional issues in chapter 9 of the Legislative Guide to the Convention.

Trafficking in persons cases may involve a number of jurisdictions. Where this is the case a decision has to be taken about which jurisdiction the prosecution should take place in. There are a number of principles that should guide this decision.

It is very important to identify as soon as you can that it is possible a case can be prosecuted in more than one jurisdiction.

Once this possibility is identified the next consideration is where it is most feasible to prosecute. Any decision made on which jurisdiction is best placed to prosecute should be made on a case-by-case basis taking into account all the relevant factors.

The basic principle underlying any decision is that a person should not be prosecuted more than once for the same criminal conduct. This applies even where a person has been acquitted of a charge relating to that conduct in another jurisdiction. This is known as the principle of *ne bis in idem* or double jeopardy.

Prosecutions should take place in the jurisdiction where the majority of criminality took place or where the majority of the loss took place. In trafficking cases, this is often, but not automatically, the destination location where exploitation took place. The following factors should be considered:

## **Existence of legislation**

Does the legislation of the jurisdiction include the offence of trafficking in persons?

Is the legislation comprehensive and include all forms of exploitation?

## **Sentencing powers**

Although not the primary consideration, sentencing should reflect the gravity of the offence.

## **Location of the accused**

Is it possible to prosecute in that jurisdiction?

Are transfer or extradition proceedings possible? A general principle *aut dedere aut judicare* (extradite or prosecute) applies here.

## **Division of prosecution**

Cases may be complex and cross borders. Prosecution in more than one jurisdiction is not desirable.

What measures (realistically and practically) can be taken to allow a prosecution to take place in one jurisdiction?

## Witness attendance

The attendance of victims as witnesses is often unavoidable in trafficking cases.

Ensure measures are being taken to give the best possible support to those witnesses.

In transnational trafficking cases witnesses may be required from other jurisdictions. Consider which parts of evidence may be received in other forms such as in writing or via a video link.

There have been some very simple lessons here such as giving a witness a mobile phone and paying for some credit on it. Checking if a person is e-mail “savvy” might mean you can set up an account you can maintain contact on.

## Witness assistance/protection

What assistance can a witness be given in a particular jurisdiction?

Do they have a legal framework that allows witness protection or assistance?

Even if there is no official legal framework is there a “de-facto” witness assistance programme, or is there the possibility of such assistance or protection on a case by case basis?

What evidence is there that a stated witness assistance programme is actually effective in practice? Are there any indicators that show it is not?

Is there a capability of the trafficking offenders to strike the witnesses within a particular jurisdiction?

Are there any general issues, for example existing or emerging conflicts that may affect the ability to protect witnesses?

## Delay

Although time should not be a leading factor it should be considered. Are there backlogs which would delay the case? Delays should be minimized.

What is the potential time scale for a case to come to trial in a particular jurisdiction?

## Interests of the victim

Would the interests of the victim be prejudiced by changing jurisdiction?

Is compensation for victims possible within a jurisdiction?

What levels of compensation may be expected in different jurisdictions?

## Evidential issues

Cases should proceed on the best possible evidence. Admissibility of evidence varies from jurisdiction to jurisdiction.

Given the evidence available and the rules of admissibility which jurisdiction would offer the best chance of successful prosecution?

## Legal requirements

Decisions on where to hear cases cannot be taken to avoid complying with legal requirements in one or another jurisdiction.

## Proceeds of crime

Again, not a primary consideration but factors for consideration include:

- Where assets are held;
- Where there is the best chance of securing asset seizure;
- Will jurisdictions share recovered assets with law enforcement/prosecutors/victims in other jurisdictions?
- Do victims have access to any recovered assets as compensation?

## Resources and costs of prosecuting

This should only be a consideration when all other factors are equally balanced.



### Self-assessment

What are the factors determining the preferred jurisdiction in a particular case?

## Summary

Trafficking in persons, as defined by the Trafficking in Persons Protocol requires an act, means and a purpose.

- Consent is vitiated if obtained through the use of improper means.
- Trafficking in persons can take place within and outside the borders of a country.
- Smuggling of migrants must take place across international borders.

When a decision has to be taken about which jurisdiction the prosecution should take place in, the following factors should guide this decision:

- Existence of legislation
- Sentencing powers
- Location of the accused
- Division of prosecution
- Witness attendance
- Witness assistance/protection
- Delay
- Interests of the victim
- Evidential issues
- Legal requirements
- Proceeds of crime
- Resources and costs of prosecuting





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