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Issue paper

The International Legal Definition of Trafficking in Persons:

Consolidation of research findings
and reflection on issues raised

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

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1. Introduction

1.1. Background and context

Until December 2000, the term “trafficking in persons” was not defined in international law, despite its incorporation in several international legal instruments. The long-standing failure to develop an agreed-upon definition of trafficking in persons reflected major differences of opinion concerning the ultimate end result of trafficking, its constitutive acts and their relative significance, as well as similarities and differences between trafficking and related issues such as irregular migration and the facilitated cross-border movement of individuals into prostitution or irregular employment.

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime¹ (Trafficking in Persons Protocol) is considered to be “the principal, legally binding global instrument to combat trafficking in persons,”² not least because it sets out the very first international legal definition of “trafficking in persons”.³ Under article 3 of that instrument, trafficking in persons comprises three elements: (i) an “action”, being recruitment, transportation, transfer, harbouring or receipt of persons; (ii) a “means” by which that action is achieved (threats or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person); and (iii) a “purpose” (of the action/means): namely, exploitation, which includes, 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”.⁴ All three elements must be present to constitute “trafficking in persons” except in relation to trafficking of children for

¹Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, United Nations *Treaty Series*, vol. 2237, p. 319, done 15 November 2000, entered into force 5 December 2003 (Trafficking in Persons Protocol).

²Report of the Conference of Parties to the United Nations Convention on Transnational Organized Crime on its fourth session, held in Vienna from 8 to 17 October 2008 (CTOC/COP/2008/19), decision 4/4.

³The “international legal definition of trafficking in persons” refers in this paper to the definition of trafficking in persons in the United Nations Trafficking in Persons Protocol.

⁴Trafficking in Persons Protocol, art. 3.

which the “means” element is not required.⁵ The consent of a victim in trafficking is specified as irrelevant when any of the stipulated “means” are used.⁶

Achieving international agreement on the definition of trafficking in persons was widely considered to be a major step forward in articulating a common understanding of the nature of the problem and establishing the foundation upon which the necessary cooperation between States could be developed. From a legal perspective, a definition of trafficking was rightly seen as the necessary foundation upon which a legal framework of obligations and responsibilities could be built. In many senses these hopes have been realized.

While there has been widespread acceptance of the Protocol’s definition at the international, regional and national levels, its implementation in practice has been complicated. As States seek to grapple with practical, day-to-day challenges such as identification of victims and prosecution of traffickers, questions have arisen about certain aspects of the definition—most particularly, but not exclusively, those aspects that are not elsewhere defined in international law and/or not well established in national law and practice. The existence of such questions means that, despite the best efforts of the drafters and subsequent harmonization of national laws with the international definition, the parameters around what constitutes “trafficking” are not yet firmly established. Under what circumstances, if any, will the exploitation of a child for profit not be trafficking? What role does consent play (or not play) in relation to trafficking for purposes of removal of organs? When does prostitution involving a measure of financial or other exploitation morph into trafficking? That States with very similar laws and very similar legal definitions of trafficking are answering such questions in very different ways confirms the fluidity of those parameters.

The stakes for definitional clarity (and indeed definitional ambiguity) are high because to characterize certain conduct as “trafficking” has substantial and wide-ranging consequences for States, for the perpetrators of that conduct and for the victims. Persons who are victims of that conduct become “victims of trafficking”, and thereby entitled to special measures of assistance and protection that may not be available to those who are not identified as having been trafficked. Criminals involved in a practice that is identified as “trafficking” are likely to be subject to a different and typically harsher legal regime than would be applicable if they had been charged with another crime. For the State, characterization of certain conduct as “trafficking” will trigger a range of criminalization and cooperation obligations as well as protection measures.⁷ It will also impact on national understanding of the nature and extent of the “trafficking problem”, and affect a State’s interaction with external compliance institutions and mechanisms.

The potential breadth and narrowness of the definition has raised several issues that States have taken quite different positions on. There is a tension between those who support a conservative or even restrictive interpretation of the concept of trafficking, and those who advocate for its expansion: between understandable efforts to expand the concept of trafficking to encompass most, if not all forms of severe exploitation; and the practical challenge of setting priorities and establishing clear boundaries, particularly for criminal justice agencies involved in the investigation and prosecution of trafficking-related crimes. The complex and fluid definition contained in the Trafficking in Persons Protocol has contributed to ensuring that such tensions remain

⁵ Ibid, art. 3 (c).

⁶ Ibid, art. 3 (b). In the case of a child victim, there is no stipulation to establish the means of the trafficking and hence the consent of the child victim is always irrelevant.

⁷ The protection measures for victims of trafficking in persons are specified in article 6, not all of which are mandatory for States Parties.

unresolved. These tensions sit within a broader political and advocacy framework that is impatient with complexity and the need for legal nuance. Certainly, there have been strong and consistent efforts to simplify the definition and forms of trafficking in ways that will advance advocacy (and sometimes public communication) efforts. The increasingly common merging of “trafficking” with “modern slavery”, a term that is not defined—or indeed recognized—in international law is one manifestation of this trend, as are claims that “all trafficking is slavery” and “all forced labour is trafficking”.

1.2. The work of UNODC on the definition of trafficking in persons

In January 2010, the Working Group of States Parties to the Trafficking in Persons Protocol⁸ identified a lack of conceptual clarity with respect to the definition of trafficking as an obstacle to the effective implementation of the international legal framework around trafficking in persons, and its national equivalents. Specifically, it was noted that some critical concepts within the definition were not clearly understood and were being inconsistently implemented and applied. The Working Group recommended that:

[t]he Secretariat should prepare, in consultation with States parties, issue papers to assist criminal justice officers in penal proceedings, on subjects such as consent; harbouring, receipt and transport; abuse of a position of vulnerability; exploitation; and transnationality.⁹

In response to this request, the Secretariat (United Nations Office on Drugs and Crime, UNODC) initiated a multi-year research project. The first phase of the study, completed in 2012, considered “abuse of a position of vulnerability and other ‘means’ within the definition of trafficking in persons”. Its outputs included a detailed “issue paper”, as well as a guidance note for practitioners. In the second phase of the study, the role of “consent” in the Trafficking in Persons Protocol’s definition was considered and an issue paper on the subject published in 2014. The third issue paper, released in 2015, examined the concept of “exploitation” within the Trafficking in Persons Protocol’s definition of trafficking in persons.

⁸Article 32 of the United Nations Convention against Transnational Organized Crime (Organized Crime Convention) establishes a Conference of the Parties (COP) “to improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of this Convention.” In 2008, the COP established an Open-ended Interim Working Group on Trafficking in Persons (Working Group) to advise and assist the COP in the implementation of its mandate with regard to the Trafficking in Persons Protocol. The Working Group is mandated to (i) facilitate implementation of the Trafficking in Persons Protocol through the exchange of experience and practices between experts and practitioners in this area; (ii) make recommendations to the COP on how States Parties can better implement the provisions of the Protocol; (iii) assist the COP in providing guidance to UNODC on its implementation-related activities; and (iv) make recommendations to the COP on how it can better coordinate with the various international bodies combating trafficking in persons with respect to implementing, supporting and promoting the Protocol. (Conference of the Parties to the United Nations Convention against Transnational Organized Crime 2008).

⁹“Report of the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010”, CTOC/COP/WG.4/2010/6, 17 February 2010, para 31(b). Note that the mandate specifically directed the research towards “assist[ing] criminal justice officers in penal proceedings”.

Table 1. Overview of outputs and countries surveyed in selected issue papers to date

	Output	Countries surveyed
1	<p>Issue paper: <i>Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons.</i> Vienna: United Nations Office on Drugs and Crime (2012).</p> <p>Guidance note: <i>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</i></p>	<p>Initial surveys: Belgium, Brazil, Canada, Egypt, India, Mexico, the Republic of Moldova, Netherlands, Nigeria, Switzerland, the United Kingdom of Great Britain and Northern Ireland, United States of America</p> <p>Follow-up electronic surveys (2016): Armenia, China, Djibouti, France, Mali, Niger, Russian Federation, Romania, Senegal, Singapore, Tunisia</p>
2	<p>Issue paper: <i>The Role of Consent in the Trafficking in Persons Protocol.</i> Vienna: United Nations Office on Drugs and Crime (2014).</p>	<p>Initial surveys: Argentina, Australia, Belarus, Indonesia, Israel, the Philippines, Norway, Serbia, Spain, Thailand, the United Kingdom and the United States</p> <p>Inputs from additional countries: China, Finland, Kenya and Tonga</p> <p>Follow-up electronic surveys (2016): Armenia, China, Djibouti, France, Mali, Niger, Romania, Russian Federation, Senegal, Singapore, Tunisia</p>
3	<p>Issue paper: <i>The Concept of Exploitation in the Trafficking in Persons Protocol.</i> Vienna: United Nations Office on Drugs and Crime (2015).</p>	<p>Initial surveys: Australia, Brazil, Bulgaria, Canada, Colombia, Egypt, Malaysia, Qatar, Sweden, Thailand, Uganda, United Arab Emirates</p> <p>Inputs from additional countries: Israel, Switzerland, United States</p> <p>Follow-up electronic surveys (2016): Armenia, China, Republic of Djibouti, France, Mali, Niger, Romania, Russian Federation, Senegal, Singapore, Tunisia</p>

The national surveys were unique in their rigour and depth, examining not just national definitions of trafficking but also delving into how criminal justice agencies are interpreting and applying those definitions. This was made possible through detailed in-country surveys that included analysis of the legal framework and associated practice, as well as interviews with practitioners—mainly prosecutors but extending, in some countries, to investigators, defence lawyers and judges. Initial findings and conclusions were scrutinized by a group of expert practitioners drawn principally, but not exclusively, from the surveyed States. While the focus of the studies was very much on the domestic application of the selected concepts, they also sought

to ascertain how, from the point of view of international law, and with reference to the drafting history of the Convention, the relevant provisions and their concomitant obligations should be understood by States Parties.

1.3. Scope, purpose and structure of this Consolidation and Reflection Paper

The analysis by UNODC of the three definitional concepts (abuse of a position of vulnerability; the principle of the irrelevance of consent; the element of exploitation) provides a useful lens through which to approach broader questions that have emerged around the definition over the past several years. These questions relate, most particularly, to the scope of the definition and the possibility and desirability respectively of establishing common definitional parameters at the international level to support consistency in State practice and advancement of the Protocol's purposes.

The purpose of this Consolidation and Reflection Paper is to guide consideration and development of some practical guiding principles for criminal justice practitioners that emerge from the three definitional concept papers, and determine potential next steps for research and analysis. A further objective of this work is to identify how a particular interpretation of one of the terms may impact the interpretation and application of another concept in the same case.

In preparation for this consolidation and reflection paper, supplementary country research was conducted during the period August-October 2016 through the dissemination of surveys to selected countries (with responses received from Armenia, China, Djibouti, France, Mali, Niger, Kazakhstan, Romania, Russian Federation, Senegal, Singapore, South Africa and Tunisia). Those surveys were designed with a view to verifying, consolidating and extending initial findings, and inviting a broader range of perspectives by expanding the range of countries studied. A subsequent Expert Group Meeting held in Vienna, in November 2016 brought together national and independent experts to review the draft findings.

The Consolidation and Reflection Paper is divided into four parts, of which this contextual introduction forms the first. Part 2 provides a summary and synthesis of key findings of the three studies and seeks, in its final section, to ascertain trends in how "trafficking" is being understood and defined at the national level. In part 3, challenges facing practitioners who are charged with identifying, investigating, prosecuting and adjudicating trafficking in persons cases are identified and discussed. In part 4, this analysis is used as the basis for a set of guiding principles for policymakers and criminal justice practitioners to support their understanding and application of the definition of trafficking in persons.

2. CONSOLIDATION: CORE CONCEPTS IN THE DEFINITION OF TRAFFICKING IN PERSONS

This part provides an analytical summary of each of the three studies, with the concluding section identifying broader trends and findings.

2.1. Abuse of a position of vulnerability as a “means”

The international legal definition of trafficking in persons contained in the United Nations Trafficking in Persons Protocol—and the definition adopted by many States—identifies abuse of a position of vulnerability as a “means” by which the “act” of trafficking (recruitment, harbouring, etc.) is secured. This particular “means” stands apart from others such as “force” or “fraud” in its essentially open-ended quality. The rules of treaty interpretation place great weight on the intention of the drafters and the UNODC study examined this aspect in some detail. Collective recollections on the point of abuse of a position of vulnerability from those who participated in the drafting of the Trafficking in Persons Protocol are inconclusive beyond confirming that the concept, which was introduced at the eleventh hour, reflected a general desire to ensure that the definition was capable of encompassing the myriad, subtle means by which people are exploited. Critically, introduction of this particular “means” was also seen as a circuit-breaker in the heated debate around trafficking and prostitution: abuse of a position of vulnerability could potentially accommodate an expansion of the concept of trafficking, while being sufficiently vague to avoid locking States into a fixed position on the perennially contentious issue of their domestic response to prostitution.

But drafters were not prepared to be too explicit. Their instruction, issued through an interpretative note, that abuse of a position of vulnerability “is understood as referring to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”¹⁰ is subjective and circular in referring to but not explaining abuse, raising significant questions. For example, what does a real alternative mean? Must the alternative be specific, available and known and, if so, to the victim, the perpetrator, or both? Is it necessary to objectively establish the existence of a particular alternative? And what makes an alternative acceptable? To whom must an alternative be acceptable? Must it be acceptable from an objective point of view or is the acceptability of an available (and “real”) alternative to be measured from the point of view of the alleged victim? More critically, the substance of the instruction focuses only on the existence of vulnerability, thereby potentially leaving room for an assertion that any

¹⁰ *Travaux Préparatoires*, p. 347.

subsequent inquiry into whether the alleged perpetrator actually abused or intended to abuse the vulnerability of the alleged victim is secondary. This is potentially at odds, or at least establishes a tension, with the text of the provision. It also risks reducing the threshold of culpability by contradicting the principle that the *actus reus* of a crime be established on the basis of the perpetrator's acts or omissions; not on the basis of the victim's situation and perception of it.

The difficulties associated with the interpretative note are reflected in national law and practice. The UNODC study examined law and practice around "abuse of a position of vulnerability" in 12 States Parties, reflecting a diversity of legal traditions as well as substantial differences with regard to how the definition of trafficking had been transposed into national law. The results provided ample confirmation that irrespective of how it is (or is not) captured in national law, States are interpreting and applying the concept of abuse of a position of vulnerability in very different, and sometimes problematic, ways.

In several States,¹¹ application of this "means", especially as the sole "means" appears to have contributed to lowering the threshold for "exploitation." Put simply, exploitative conduct that may not otherwise be associated with trafficking—perhaps because it appears to lack a clear coercive or deceptive element (such as pimping or labour rights abuses)—is being prosecuted as such in several States through invocation of abuse of a position of vulnerability. Several stark illustrations of this trend emerged during the study, including a case in the Netherlands in which a group of Chinese irregular migrants approached a Chinese restaurant manager and, in some instances, "begged" him to give them work. The manager accommodated the migrants in shared bedrooms and paid them less than the minimum wage, and was subsequently prosecuted for human trafficking. It did not matter that he took no initiative and did not intentionally abuse their vulnerability (as noted in the court's decision); the requisite legal standard under Dutch law of "conditional intent" was satisfied by his awareness of the vulnerable situation of the migrants (UNODC issue paper 2013: 34-35). Abuse of a position of authority is considered the easier means to prove in the Dutch context and has lowered the threshold to such an extent that there is some unease among practitioners as to whether trafficking has become conflated with irregular employment of irregular migrants. (UNODC issue paper: 36-37).

In Switzerland, even though the no means element is included in Swiss law, abuse of a position of vulnerability can render a victim's consent given to prostitution irrelevant, serving to make what would otherwise be voluntary prostitution (albeit exploitative), a situation of trafficking-related exploitation¹² (UNODC issue paper: 61-65). In Moldovan courts, invoking "abuse of a position of vulnerability" as a means can transform a case from being one of pimping to one of trafficking, resulting in higher penalties for the perpetrator and more protections for the victim of the crime (UNODC issue paper: 29-34).

Among those countries that have explicitly included abuse of a position of vulnerability within their definition of trafficking, the focus of inquiry is generally on establishing the fact of vulnerability, rather than proving its abuse. In effect, this means that the mere existence of vulnerability (e.g. poverty, irregular migration status, disability, etc.), may be sufficient to satisfy the means element and thereby help support a conviction. Some countries have established that abuse of, or intention to abuse vulnerability, may be inferred from a defendant's knowledge of the (proven) vulnerability (UNODC issue paper: 86).

¹¹Based on the initial countries surveyed as part of the research described on page 8.

¹²Please note that, for the purposes of this discussion, the term "trafficking-related exploitation" refers to forms of exploitation that may be considered trafficking if the other elements are established—as discussed in the UNODC issue papers on Consent, Abuse of a Position of Vulnerability and Exploitation.

Where abuse of a position of vulnerability is omitted from domestic definitions, situations that would otherwise fall within that definition may be excluded from it. For instance, in Nigeria in the absence of abuse of a position of vulnerability, cases in which a person seemingly knew that he or she would be working in prostitution would not necessarily be viewed as a situation of trafficking for the purpose of exploitation of prostitution, and means of control such as use of “juju” oaths may not be captured by the other means available.

Table 2. Abuse of a position of vulnerability (APOV): key findings

Intention of the drafters	<ul style="list-style-type: none"> • The intention of drafters is unclear beyond seeking to ensure definition encompassed subtle means of coercion/manipulation. • Abuse of a position of vulnerability (APOV) is central to how trafficking in persons is understood.
National insights	<ul style="list-style-type: none"> • There is a lack of clarity and consistency in the understanding and application of APOV; confusion between vulnerability as susceptibility to trafficking and abuse of vulnerability as a “means” of securing control over victims. • APOV is rarely the sole “means” relied upon to ascertain exploitative intent. • APOV is increasingly used by traffickers as modus operandi to move away from more overt means to more subtle ones.
Overarching themes and findings	<ul style="list-style-type: none"> • APOV is an essential safeguard: enabling definition to accommodate new and different methods used by exploiters to subjugate victims. • APOV is relevant to the identification of potential trafficking, irrespective of whether it is included in legislation or not, as traffickers use more subtle means to traffic victims. • Lack of a clear definition of APOV creates ambiguities and thereby risks of misapplication impacting negatively on the rights of victims and those of the accused. • APOV can lead to a potential expansion of the concept of “trafficking”, especially when (a) the mere existence of vulnerability is sufficient to establish means (no need to prove abuse); and (b) where APOV is relied on in conjunction with the principle of the irrelevance of consent. • Similarly, APOV can also result in a narrower application of trafficking, wherein cases of trafficking are not investigated and prosecuted as such for lack of “hard” means or reliance on other subtle means. • Training and safeguards should aim to ensure the integrity of the entire process: potential victims are appropriately identified, alleged perpetrators are effectively investigated, suspects are fairly prosecuted, and convicted traffickers are subject to sanctions that are proportionate to the gravity of their offence.

Expert practitioners involved in reviewing and finalizing the UNODC study sought to address the various challenges outlined above by offering a guidance note, directed to criminal justice authorities, setting out an appropriate understanding of abuse of a position of vulnerability, which, in their view, could avoid many of the risks and pitfalls that an examination of national law and practice had revealed. The note offers the following interpretation:

Abuse of a position of vulnerability occurs when an individual's personal, situational or circumstantial vulnerability is intentionally used or otherwise taken advantage of, to recruit, transport, transfer, harbour or receive that person for the purpose of exploiting him or her, such that the person believes that submitting to the will of the abuser is the only real or acceptable option available to him or her, and that belief is reasonable in light of the victim's situation. In determining whether the victim's belief that he or she has no real or acceptable option is reasonable, the personal characteristics and circumstances of the victim should be taken into account (UNODC Guidance Note, 2012).

The guidance note makes several important points in relation to establishing abuse of a position of vulnerability in the context of a criminal prosecution. For example, it affirms that both the existence of vulnerability and the abuse of that vulnerability must be established by credible evidence. It further notes that the existence of vulnerability (including a determination as to whether the victim's belief that he or she has no real or acceptable option is reasonable) is best assessed on a case-by-case basis, taking into consideration the personal or circumstantial situation of the alleged victim provided that it is reasonable. Moreover, abuse of a position of vulnerability should not be more or less easily found in relation to certain exploitative purposes (e.g. sexual exploitation) than in relation to others.

2.2. Principle of the irrelevance of consent

Article 3(b) of the Trafficking in Persons Protocol states that the consent of the victim to the intended exploitation is irrelevant when any of the stipulated means (threats or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, giving or receiving payments etc.) have been used.

The legal invalidity of consent obtained through coercion and fraud appears to have been consistently recognized and upheld in all major legal systems. However, questions have arisen with respect to “softer” forms of duress or coercion, often framed in terms of vulnerability. Specifically: can consent be vitiated—or its quality damaged—by actions that play on the vulnerability of the individual providing consent to a situation that appears to harm him or her? In practice, the central issue is usually one of degree: the greater the vulnerability of the person providing consent and the more harmful the situation he or she consents to, the more likely that consent will be disregarded as a valid defence to criminal liability.¹³

Valid consent does not however always act as a defence to criminal liability. Major legal systems have also recognized that, in the criminal law context, valid consent (i.e. that which is informed and freely given) can be overridden on the basis of public interest, for example an interest in preventing actions that are widely considered to be unacceptable and/or harmful. Despite careful legal rationalizations for particular policy positions on consent, it is evident that values have played a key role in how those positions are shaped and defended. For example, many countries have asserted a legitimate State interest in rejecting consent as a defence to prostitution-related charges on the grounds of having to preserve order and morality. Similarly, considerations of “human dignity” have been used to strengthen the position that one cannot consent to prostitution or serious bodily harm or indeed to one's own exploitation. A competing, or at least

¹³While the previous section focuses on legal arguments concerning abuse of a position of vulnerability, this section is directed at consent. This paper subsequently suggests, in parts 3 and 4, guidance for holistically responding to core underlying issues in any potential trafficking situation, such as the vulnerability of a person.

balancing, liberal value in criminal law and policy around consent has been “personal autonomy” and the related value of respect for voluntary undertakings. Thus, people can and do take decisions that others would not take; decisions that are high risk; that entail hardship and even some measure of harm; or that end badly. Such a view accepts the individual’s right to make his or her own decisions and rejects attempts to invalidate such choices when these are rational and voluntary, even if they are patently unwise or likely to result in harm to the individual.

Consent has been central to the narrative around trafficking since at least the first decades of the twentieth century when trafficking was associated with the cross-border movement of women and girls into sexual exploitation and subject to international regulation.¹⁴ The relationship between trafficking and consent, most particularly with respect to prostitution has continued to be a central theme of much scholarship and advocacy. It is therefore somewhat surprising that, aside from deliberation of one or two aspects highlighted further below, consent was not the subject of substantive discussion or debate during the drafting of the Trafficking in Persons Protocol. States rather appeared to consider the matter to be self-evident: where means are present, a person should simply not be able to consent to their own exploitation. Or rather, the fact that a person consents to his or her exploitation, should not absolve the person who profits from it. A review of the *travaux préparatoires* and discussions with officials who were present during the negotiations affirm that drafters were preoccupied with the danger that consent would become the first line of defence for those accused of trafficking offences, particularly in cases where victims may have consented at some point (e.g. to migrate for work and/or to work in the sex industry). This danger was considered particularly acute because the Trafficking in Persons Protocol sought to capture the more subtle means of control that could be masked by apparent consent. While drafters understood that lack of consent was implicit in the means element itself, it was agreed that an explicit affirmation of this point was an important additional safeguard. There was no consideration of “borderline” cases where consent could even be envisaged as possible or of the ramifications of expanding the concept of trafficking through a combined application of the principle of the irrelevance of consent and a “soft” means such as abuse of a position of vulnerability (for example, the consent of a person to engage in prostitution being disregarded on the basis that her vulnerability as an irregular migrant was abused). Furthermore, there was almost no discussion of consent in relation to “exploitation of prostitution”—one of the forms of exploitation stipulated in the definition—beyond the recognition that the initial agreement to enter the sex industry should not be relevant to the question of whether trafficking had occurred.

The UNODC study, which surveyed law and practice around the principle of the irrelevance of consent in 12 countries, revealed that the issue is much more complex and troublesome than drafters anticipated. These difficulties do not appear to relate to substantive differences in the criminal law or even differences of opinion around the importance of the principle of the irrelevance of consent. Indeed, with regard to children, all the States surveyed either explicitly or implicitly accepted that consent of a child to any part of the trafficking process or outcome will always be irrelevant and that, in relation to adults, the presence of “means” should be sufficient to invalidate any consent that may have been asserted (by the perpetrator or the victim). Further, irrespective of how their national laws reflected the principle—including whether or not the

¹⁴Initial international agreements focused on force and deception, implying that consent needed to be vitiated in some way by the actions of the exploiter (League of Nations 1904; League of Nations 1910; League of Nations 1921). However the means element was subsequently eliminated, thereby rendering consent wholly irrelevant once the act (procuring, enticing, or leading away any woman, of any age, across an international border) and purpose (“immoral purposes”) were both established (League of Nations 1933). The 1949 Trafficking Convention continued this approach, requiring States to punish: “Any person who, to gratify the passions of another: (1) procures or entices or leads away, for the purposes of prostitution, another person, even with the consent of that person; (2) exploits the prostitution of another person, even with the consent of the person.”

national legal definition incorporated the means element—all the practitioners interviewed for the study expressed broad support for the idea that perpetrators of trafficking-related exploitation should not be allowed to escape justice by pointing to the apparent consent on the part of victims.

In practice however, even where the law was clear on its irrelevance, criminal justice practitioners experienced considerable difficulty understanding and applying a rule that in some senses seemed counterintuitive. This difficulty stems from that fact that in other contexts (e.g. theft, sexual offences, forced marriage) consent may operate to make permissible what would otherwise be a crime—the lack of consent being an essential element of the offence. In the context of trafficking then, how can a victim’s consent not be important in determining whether a crime has in fact occurred? The issue does not generally arise in “hard” and “straightforward” trafficking cases, usually because the circumstances and severity of those cases make it perfectly obvious that consent was never present in the first place. For example, questions of consent (to the initial acts, to the exploitation itself) will rarely be asked of victims who were abducted, or are found trapped in a factory or brothel, or on a fishing boat under terrible conditions. In less straightforward cases, consent becomes one way of working out whether trafficking has occurred or whether another offence—or no offence at all—has been committed. Indeed, consent appears to be an important subtext at every stage in the criminal justice response to trafficking. For example:

- Victim identification (where victims are not identified as such on the basis that they appear to have consented to their situation)
- Decisions about which cases to investigate (where apparent consent is a factor in deciding not to investigate or to deprioritize a particular investigation relative to one in which alleged victims clearly have not consented)
- Decisions about which charges to lay (where apparent consent alters a charge from trafficking to a lesser offence such as pimping)
- Decisions about which cases to refer for prosecution (where apparent consent is a factor in deciding not to refer cases)
- Decisions about which cases should be prosecuted (where apparent consent is a factor in deciding not to take a case forward on the basis of an assessment of the likelihood of successful prosecution)
- Prosecution and adjudication of trafficking cases (where apparent consent presents an obstacle to successful conviction because of reliance on the testimony of a victim who insists upon the validity of his or her consent)
- Sentencing of offenders (where indications of apparent consent result in lesser penalties)

The survey confirmed that decisions as to consent became particularly significant when abuse of a position of vulnerability was being alleged as the “means” by which the exploitation was made possible. This is not unexpected given that other means such as threats or the use of force, abduction and deception will often clearly show that no consent was given or that any consent given was readily nullified, rendering inquiry as to whether the victim consented to his or her exploitation pointless. The means of abuse of a position of vulnerability contains no such clear indication that consent was nullified and, when this is the only means relied upon, will often be complicated by assertions of “victim” consent.

In national practice it is apparent that consent can operate as a double-edged sword. Overstretched criminal justice systems can be overly willing to accept assertions of consent (including victim’s prior knowledge of exploitative conditions and/or willingness to remain in an exploitative situation) as an indicator that exploitation either did not take place or was not espe-

cially serious. Taking assertions of consent (whether made by suspected victims or by perpetrators) at face value can mean that victims of trafficking are not accurately identified, protected and supported, and that cases deserving investigation and prosecution are ignored.

Conversely, an overly rigid attachment to the principle of the irrelevance of consent can result in cases that are not trafficking being treated as such, leading to grave injustices against alleged perpetrators and their “victims”; sweeping away complex questions about autonomy, agency and freedom; and diluting the legal and moral force of the framework that has been developed to deal with the serious crime of trafficking.

Table 3. The principle of the irrelevance of consent: key findings

Intention of the drafters	<ul style="list-style-type: none"> • Victims often give their consent to some aspect of the trafficking process; perpetrators should not be able to use this to avoid prosecution. • Irrelevance of consent is integral to the Protocol’s definition and understanding of trafficking in persons.
National insights	<ul style="list-style-type: none"> • The principle of the irrelevance of consent is widely accepted. • Irrespective of the legal approach taken, consent is often highly relevant in practice—in all steps of the process from identification through to prosecution and especially in cases where the alleged means do not clearly vitiate consent. • The relevance of consent can depend on the form and severity of exploitation.
Overarching themes and findings	<ul style="list-style-type: none"> • Consent can be a vehicle for both expanding and contracting what is considered to be “trafficking”. • There is a need for greater clarity around consent that strikes a balance between clarity and flexibility.

Experts involved in the survey process readily acknowledged a key finding of the country surveys: national practitioners are uncomfortable with the lack of certainty and predictability around the issue of consent and would welcome direction on effective application of the principle. The study concluded with a “list of key considerations for criminal justice practitioners” that seeks to operationalize its main findings. For example, in addressing the dual risks posed by consent, the recommendations suggest first, that law enforcement officials not be dissuaded from referring a case for further investigation including gathering evidence of the actions and intentions of the alleged trafficker, on the sole basis of a victim’s assertions of consent. Second, the recommendations suggest that the absence of apparent or asserted consent should not be a determining factor in deciding whether to prosecute a given case as one of trafficking. Rather, the prosecutor should take into consideration all the evidence in the case to determine whether it is sufficient to prove each and every element of the trafficking crime. Critically, the recommendations remind practitioners that prosecutions should focus firmly on the actions and intentions of perpetrators. The actions and state of mind of the alleged victim may indeed be relevant for shedding light on the actions or intentions of the alleged perpetrator, but should not have a direct impact on decisions about culpability.

2.3. Exploitation: the purpose of trafficking

Article 3(b) of the Trafficking in Persons Protocol requires that the implicated individual or entity intended that the action, which, in the case of adults must be procured through use of a prohibited means, would lead to “exploitation”. Exploitation, as the “purpose” of human trafficking, is widely considered to be the key element of the offence. Yet the Trafficking in Persons Protocol does not define ‘exploitation’, instead providing an open-ended list that includes, 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”.

The common dictionary definitions of exploitation indicate two alternate meanings—one technical, the other normative. In the first sense exploitation can refer, (neutrally), to making use of or deriving benefit from a thing or situation, for example a resource. In the second sense it focuses on relationships between people: referring, in a potentially pejorative way, to taking advantage of a person (or the characteristics or their situation) for one’s own ends.¹⁵ In international law, use of the term exploitation mirrors this duality. In reference to a “thing”, such as an economic resource, exploitation has a neutral, potentially even a positive connotation.¹⁶ With reference to a person, exploitation has an inevitably negative connotation. For example, international human rights law prohibits the “exploitation of prostitution”,¹⁷ as well as all forms of exploitation that are prejudicial to children.¹⁸ Exploitation has also been used as an umbrella term to unify a stipulated group of harmful practices.¹⁹ Despite accommodating such references, international law itself does not contain a general definition of exploitation. As discussed further below, while certain practices commonly identified as “exploitative” are indeed defined, others are not.

Within the context of trafficking there is general support for understanding exploitation—in the sense of taking unfair advantage—as a continuum, albeit one that is poorly defined and highly contested. At one extreme lie the situations in which it is both legally and socially acceptable for one person to derive an unequal, possibly even unfair advantage from another. The inequalities of power that enable this unfair advantage are themselves considered to be acceptable within that time and place, as is the disproportionate benefit accrued through the taking of unequal/unfair advantage. At the other extreme are situations where the unfair advantage is acute and the resulting harm very severe. Practices commonly associated with this latter end of the continuum, such as slavery and servitude, are now universally condemned, at least at the level of law and policy. Forced labour is similarly accepted to lie somewhere near slavery on the continuum. All forms and manifestations of exploitation that do not belong at either end lie somewhere along this continuum. For example, somewhere not too far from the starting point will be exploitative conduct of a lesser kind that nevertheless reaches a point of unfairness or injustice to warrant it being subject to legal sanction. Failure to pay a mandated minimum wage may be one such example. From a legal perspective, the idea of a continuum is particularly useful because points on that continuum can be set with reference to the legal regime they fall within (and vice-versa).

¹⁵Judy Pearsall and Bill Trumble, eds., *Oxford English Reference Dictionary* (Oxford University Press, 2nd ed. 1996).

¹⁶For example, the United Nations Convention on the Law of the Sea, which establishes a regulatory regime for the economic exploitation of maritime natural resources. Jean Allain, “Introduction”, in *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2012), p. 2.

¹⁷Convention on the Elimination of All Forms of Discrimination against Women, United Nations *Treaty Series* vol. 1249, p. 13, done 13 December 1979, entered into force 3 September 1981 (CEDAW), art. 6.

¹⁸Convention on the Rights of the Child, United Nations *Treaty Series* vol. 1577, p. 3, done 20 November 1989, entered into force 2 September 1990 (CRC), arts. 34-36.

¹⁹For example, in article 5 of the African Charter on Human and Peoples’ Rights, United Nations *Treaty Series* vol. 1520, p. 217, done 27 June 1981, entered into force 21 October 1986 (... All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.)

The list of exploitative purposes set out in the Trafficking in Persons Protocol includes concepts that have been defined in international law but also some that have not. For example, while the term “exploitation of the prostitution of others” is found in international human rights law, there is no internationally recognized definition of that concept, or indeed of the (presumably) broader term “sexual exploitation”. “Organ removal”, a late and somewhat discordant addition to the stipulated list of end purposes of trafficking, is similarly without precedent in international law. Even when considering forms of exploitation that do benefit from international legal definitions, much uncertainty remains. Well-established concepts such as “slavery”, “practices similar to slavery”, “servitude” and “forced labour” appear to be staggering under the weight of the expectations generated by their inclusion in the modern legal framework around trafficking. For example, while debt bondage (a “practice similar to slavery”) is defined in international law,²⁰ the extent to which it embraces common situations of debt-financed migration and labour contracting is very unclear. The international legal definition of “forced labour” may be almost a century old,²¹ but its precise scope is still subject to ongoing discussion and debate with very little prospect of immediate resolution.

An examination of the drafting history of the Trafficking in Persons Protocol is critical to understanding both the intention of the drafters and the assumptions on which their discussions and eventual decisions were based. A review of the *travaux préparatoires* confirms that considerations of exploitation were a central part of the negotiations, not just in terms of the definition but also more broadly in establishing the Trafficking in Persons Protocol’s scope of application. The final text—comprising an undefined umbrella concept and an open-ended list of examples, only some of which are subject to international legal definition in other international treaties—appears to chart a middle course between two positions: ensuring maximum breadth of coverage while also providing sufficiently clear indication of the nature of exploitation being addressed. There was considerable debate around the forms of exploitation to be expressly included within the definition. Some proposals, such as domestic work, sex tourism and forced motherhood did not gain significant traction. Others, such as serfdom, the making or distribution of child pornography, purchase and sale of children, forced marriage, adoption and debt bondage were discussed more extensively but eventually dropped, generally with the implication that the proposed practice could be potentially subsumed under one or more of the stipulated forms and by the fact that the forms listed were “at a minimum”. The term “trafficking in persons for the purpose of labour exploitation, in particular forced labour or serfdom” was proposed by the ILO for article 1, in place of “trafficking for forced labour, but this was not accepted (Travaux: 354). A profit element to “exploitation” was also proposed but not accepted (Travaux: 340).

The survey of national law and practice found that exploitation is widely considered to be critical to the concept of trafficking. However, States have taken the opportunity presented by the Trafficking in Persons Protocol’s flexible approach to exploitation, to tailor their understanding of the crime of trafficking in persons to national contexts and priorities. For example, the stipulated forms of exploitation vary from country to country. Some have followed the list set out in the Trafficking in Persons Protocol. Others have added one or more other forms of exploitation to that list. A few have contracted the list to one or two of the stipulated forms. Some States

²⁰ Defined in the Supplementary Slavery Convention (Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, United Nations *Treaty Series* vol. 226, p. 3, done 1 April 1957, entered into force 30 April 1957) as “the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined”.

²¹ ILO Forced Labour Convention 1930 (No. 29), art. 2 defines “forced or compulsory labour” as “all work or service which is exacted from any person under the menace of any penalty, and for which the said person has not offered himself voluntarily”.

have included definitions of the stipulated forms of exploitation in their legislation, while others have not. The list of exploitative purposes is exhaustive in some States, and open-ended, or unclear on this point, in others. Most of the surveyed States have gone beyond the list of forms of exploitation set out in the Trafficking in Persons Protocol, either explicitly by adding additional forms in legislation, or implicitly, by interpreting certain stipulated forms as extending to other practices. Forced begging, illegal adoption, commercial surrogacy and exploitation in criminal activities are among the most common additional forms of exploitation that have been included in national laws.

All States surveyed have included sexual exploitation (either explicitly or effectively) within their understanding of exploitative purposes in relation to trafficking in persons. In the majority of States surveyed, sexual exploitation is considered to be the most prevalent form of trafficking-related exploitation, or at least the most commonly investigated and prosecuted form.²² In some States the concept of sexual exploitation has been interpreted to include practices such as commercial surrogacy and forced or servile marriage. With the exception of one State, practitioners generally agreed that trafficking for purposes of sexual exploitation is well understood and, relative to other forms of exploitation, is easier to investigate and successfully prosecute though the reasons for this are varied. Unsurprisingly, the national approach to prostitution is relevant to how the exploitation of prostitution and sexual exploitation are understood in the context of trafficking.

Despite the existence of an international legal definition, the parameters of the international legal prohibition on forced labour are not firmly established in the context of trafficking at the national level. All States surveyed have included forced labour (either explicitly or effectively) within their understanding of exploitative purpose in relation to trafficking in persons. Some have left the term undefined; others have incorporated the international legal definition of forced labour into national legislation. Several surveyed States have crafted their own detailed (and potentially more expansive) definition (UNODC issue paper 2015: 96). The survey revealed particular sensitivities in some States around the issue of forced labour, including a reluctance to admit the existence of a problem. In most States, practitioners noted considerable difficulties in identifying and prosecuting forced labour, as well as in walking the line that divides bad work from trafficking for forced labour (see further, part 3.2 below)

A similarly complex and unsettled picture emerged around other forms of exploitation. For example, while slavery and practices similar to slavery have been included as forms of exploitation within the national trafficking law, most States have not defined them. These purposes of trafficking appear to be of limited practical importance, are inadequately understood, and are rarely prosecuted. Practitioners were generally unclear on the distinction between slavery, practices similar to slavery and other stipulated forms of exploitation, most particularly forced labour. Similarly, international confusion and uncertainty around the removal of organs as a form of trafficking-related exploitation is reflected at the national level. Most of the surveyed States have included this form of exploitation within their definitions of trafficking but such cases are rare, albeit increasing. Moreover, where illicit organ removal (or removal of other body parts) does occur, it is generally addressed under the legislative regime governing organ removal, or as a distinct criminal offence under the penal code or other legislation.

²²This however is understood to represent an underrepresentation of trafficking for the purpose of forced labour/labour exploitation. *The Global Report on Trafficking in Persons 2014* as well as the forthcoming 2016 version both confirm the continued rise of trafficking in persons for other forms of exploitation than sexual exploitation (see <https://www.unodc.org/unodc/data-and-analysis/glotip.html>).

Overall, the country survey confirmed that exploitation is not well understood; nor is its understanding uniform. The absence of clear definitions in the law both of exploitation itself and of stipulated forms of exploitation is seen as part of the problem, providing officials with a measure of interpretative discretion that can lead to inconsistency. Detailed and operationally focused definitions appear to reduce, but not eliminate, confusion. Many practitioners noted that even with the help of clear legal definitions, it is often difficult to distinguish trafficking from other crimes. While not directly relevant for the law, it appears that severity (in relation to exploitation and means used) as well as degree of harm suffered are all important considerations in determinations of whether trafficking is investigated and prosecuted.

Importantly, cultural and other context-specific factors appear to play a significant role in shaping perceptions of what constitutes exploitative conduct for the purposes of establishing trafficking. Such considerations appear to be especially relevant in relation to forms of exploitation that particularly affect women and girls such as sexual exploitation and forced or servile marriage. For example, in certain countries surveyed, the concept of forced marriage was said to be anomalous and not in keeping with the national understanding of the nature of marriage. In yet other countries, some considered that the exploitation of migrant workers to have been normalized in the national culture to the point that it would not be obviously considered to be trafficking. Issues around religion and ethnicity can also play a role in determining whether a particular practice meets the threshold of exploitation required for trafficking. For example, practitioners in one state noted that practices such as child marriage and child begging might be viewed differently depending on the ethnic background of those involved.

Another problematic concept in understanding the role of exploitation, relates to it being the “purpose” for which trafficking is perpetrated. Trafficking is a crime of *dolus specialis*, or special intent. This means that the trafficking crime can be fulfilled without exploitation having taken place, where it can be shown that the alleged trafficker has used acts and means (in the case of adults, or only acts, in case of child victims) knowing or intending that exploitation result. However, practitioners who participated in the survey process confirmed that actual exploitation is the most compelling evidence of the intent to exploit. Questions such as whether the purpose element could be established without knowing the type or severity of exploitation intended, were considered largely hypothetical in light of the factual reality that the exploitative situation is often the starting point for investigations and constitutes the core proof that a situation is indeed one of trafficking in persons.

Table 4. The “exploitation” element of the definition: key findings

Intention of the drafters	<ul style="list-style-type: none"> • Drafters sought breadth while ensuring clarity and flexibility to accommodate future/unforeseen forms of exploitation. • Agreement on stipulated forms of exploitation; express exclusion of “labour exploitation” as an exploitative purpose.
National insights	<ul style="list-style-type: none"> • Most States have refrained from defining “exploitation” instead adopting the approach of listing forms of exploitation. • Many States have included additional forms of exploitation. • Practitioners experience some difficulty in establishing parameters around certain forms of exploitation including forced labour. • Severity of exploitation and means/degree of harm are relevant in distinguishing trafficking from other, lesser offences, but the threshold of seriousness is difficult to establish. • Cultural/national perspectives play a role in shaping perceptions around what is considered exploitative in relation to trafficking. • The “purpose of exploitation” element is generally established by establishing the fact of exploitation.
Overarching themes and findings	<ul style="list-style-type: none"> • Not all exploitation occurs in the context of trafficking; there is a need to uphold the purpose and spirit of the Protocol in understanding stipulated forms of exploitation and adding additional ones. • Flexibility through an open-ended list of purposes is important. • The absence of definitions in national law is problematic. • Existing international definitions (e.g. of slavery, servitude, forced labour), are/should be applicable.

With only a few exceptions, practitioners affirmed the need to retain a degree of flexibility in defining and understanding exploitation in the context of trafficking. This was necessary in their view due to the emergence of new or hidden forms of exploitation; changes in how victims are being trafficked; and an improved understanding of how exploitation occurs. However, noticeably fewer practitioners noted that a vague law was not a good law and that basic principles of legality and justice require crimes to be delineated with certainty.

The UNODC study on exploitation resulted in the formulation of a “Guidance on policy and practice for further consideration” aimed at practitioners involved in the investigation, prosecution and adjudication of trafficking cases. The Guidance emphasized that not all exploitation of persons occurs in the context of trafficking. While States Parties may go beyond the minimum standard set in the Trafficking in Persons Protocol, it was essential to respect its purpose and spirit (addressing serious forms of criminal conduct and not encompassing less serious forms of conduct or mere technical violations of the law). The Guidance highlighted the need for practitioners to be aware of the risk of making assumptions or judgments about exploitation based on victim stereotypes or cultural expectations. For example, the fact that a victim’s economic situation may have improved should not be relevant in determining whether the purpose element of trafficking had been established. While potentially useful in establishing means, the victim’s subjective belief regarding his or her situation should also not interfere with the application of

an objective standard to determine whether the purpose element of the trafficking definition had been established. While cultural factors such as religious beliefs and the ethnicity of the victim may impact on how different forms of exploitation are understood and applied (and thereby the purpose element of the definition), there is a risk (borne out in the country survey) that such approaches result in varied applications of criminal justice standards. Therefore, when considering cultural and national perspectives, States Parties and their practitioners should be guided by the overall purposes of the Trafficking in Persons Protocol²³ and by relevant international human rights standards including those protecting human dignity and freedom.

²³Article 2 of the Protocol states that its purposes are: (a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives.

3. REFLECTION ON ISSUES RAISED

It is important to emphasize that the three studies and the resulting issue papers do not purport to represent a comprehensive examination and evaluation of the international legal definition of trafficking in persons. A number of concepts within the definition which would merit analysis, have not yet been subject to study. Examples include the “act” of harbouring (is inclusion of this act sufficient to enable situations involving no physical movement such as inherited bondage to be characterized as trafficking?); and the means of “deception” (what level of deception is required to establish this as a means of trafficking? Would—or should—a relatively minor deception about pay or conditions of work be sufficient?).

Nevertheless, the work done thus far has enabled the formulation of certain conclusions and has exposed several common issues and themes that help shape responses to broader questions that have emerged around the definition over the past several years. For example: to what extent has the international legal definition been accepted and incorporated into national understandings of trafficking in persons? Which are the least understood elements of the trafficking in persons definition and how are they managed in the practice of States? Are some of the different approaches to the definition of trafficking departing from the spirit of the Protocol? What are the risks of narrowly interpreting trafficking in persons to only manifestly extreme or severe cases? To what extent is it possible, or indeed desirable, to establish common definitional parameters at the international level? Perhaps most critically, what does the concept of “trafficking” offer to those who are being exploited and what definition or interpretation offers the most realistic opportunity to use the international legal framework in the service of their interests?

While a comprehensive response to these questions is outside the scope of the paper, this part seeks to offer some insight that might be useful in determining next steps. The first section identifies a number of overarching findings that emerged from the definition study across its three phases. The second section identifies the common threads within conclusions and recommendations offered by practitioners.

3.1. Overarching findings

While each study was tightly focused on one specific aspect of the definition, the process as a whole enabled the emergence of certain commonalities about how the definition of trafficking in persons, in its entirety, is being understood, interpreted and applied.

The Protocol's definition of trafficking embodies compromise as well as a desire for both clarity and flexibility

The UNODC studies' consideration of the broader context within which the Trafficking in Persons Protocol was developed supports the view that definitional fluidity and ambiguity was no accident. The struggle for an international legal definition of trafficking pre-dates the Trafficking in Persons Protocol by many decades. The key disagreements between States that prevented the emergence of a consensus were not resolved at the time that this instrument was negotiated. The definition of trafficking agreed in 2000 reflects the many compromises that ultimately permitted its formulation and adoption. The introduction of concepts examined above such as the irrelevance of consent and abuse of a position of vulnerability are a direct result of negotiated compromises, some of which were inherited from earlier instruments. The decision of the Member States not to define exploitation or attach definitions to stipulated exploitative purposes was not accidental, either, but rather, part of a broader effort to create a definition of trafficking that all States could agree to. These considerations all weigh against a narrow or inflexible interpretation of the definition.

The Protocol put forward a meticulously crafted three-pronged definition and criminalization provisions that introduce a series of conditions (means-act-purpose of exploitation-lack of consent) that need to be fulfilled for the commission of the crime. However, despite the fact that some of these elements appear in an innovative way for the first time in international law, the Protocol leaves room for interpretation by States Parties.

The international legal definition of trafficking as set out in the Protocol is widely accepted by States and criminal justice practitioners

The Trafficking in Persons Protocol of 2000 has been widely embraced by States and the international community, with all major international legal and policy instruments on trafficking concluded in the past decade and a half adopting the Protocol's definition.²⁴ At the national level, the UNODC studies confirmed that there exists a remarkable level of uniformity between States with respect to definitions and understandings, particularly when measured against the situation that existed prior to the adoption of the Trafficking in Persons Protocol. For example, the anti-trafficking laws of most States affirm that trafficking can be used against women, men and children; that the purpose of trafficking extends to forced labour as well as sexual exploitation; and that perpetrators include those who organize and facilitate the crime, as well as those responsible for the exploitation. In formulating their definition of trafficking, most States have reproduced or otherwise recognized the three elements of the international legal definition: requiring that a stipulated "act" be committed through application of specific "means" for a number of stipulated exploitative "purposes". Almost all States have affirmed the international legal definition of trafficking in children by establishing the elements of the offence as a stipulated "act" committed for a stipulated exploitative "purpose". Even in cases where States have omitted the "means" element of the Protocol's definition, the essence of that element is invariably preserved in application.

²⁴ See for example: Council of Europe Convention on Action against Trafficking in Human Beings 2005; Directive 2011/36/EU of the European Parliament and of the Council of Europe (2011); Association of Southeast Asian Nations, *ASEAN Convention against Trafficking in Persons, Especially Women and Children* 2015.

Ambiguities in the definition are complicating the efforts of States to prosecute human trafficking crimes

The UNODC studies emerged out of States' disquiet around the application of the international legal definition of trafficking at the national level. States are uneasy about the shortcomings of the definition to underpin a universal and consistent understanding of the practices that fall within the parameters of "trafficking". There are also very real concerns that while the scope of conduct falling within its parameters appears to be ever widening, the crime of trafficking has proved to be extremely difficult to investigate, prosecute and adjudicate.

An expansion of the concept of trafficking has brought some real benefits in terms of bringing previously underserved exploitative practices to the attention of States and their criminal justice authorities. Many national and independent experts reported that national authorities continue to interpret the definition of trafficking in persons in the narrowest terms, focusing only on cases with extreme or "hard" means. Certainly, with regard to the criminal justice response, ambiguities, vagueness and imprecision create evidentiary challenges. That aspect is examined in more detail at 3.2, below. Nevertheless, it is important to remember that ambiguities are not uncommon in international law, and debatable issues in other established crimes such as forced labour and slavery pose similar legal and policy questions.

Gatekeeper concepts including abuse of vulnerability and consent are being utilized by States to expand the parameters of what constitutes trafficking

As noted above, the Protocol allows a measure of flexibility to accommodate new or unforeseen means and forms of exploitation. UNODC studies established that in some instances and in some countries, the concept has significantly expanded. Examples include conduct that may, in other jurisdictions, be prosecuted as pimping, or labour exploitation that would not appear to meet or even come near the threshold of "forced labour". In many of the cases examined in the studies, this expansion was facilitated by a wide interpretation of the concept of "abuse of a position of vulnerability" and the strict application of the principle of the irrelevance of consent with a number of States Parties taking the opportunity presented by the Protocol's flexible approach to exploitation to tailor understanding of the crime of trafficking in persons to national contexts and priorities.

These same gatekeeper concepts are also being utilized by States to contract the parameters of what constitutes trafficking

Paradoxically, the lack of clarity around these same key aspects of the definition has simultaneously contributed to a narrowing of the concept of trafficking in other States. UNODC studies found that a tendency to pursue to prosecution only trafficking cases presenting evidence of overt force or extreme exploitation maybe more widespread that initially perceived. A disregard for the principle of the irrelevance of consent plays out in a similar way, serving to close the door to investigations or prosecutions in cases where there is some indication that the alleged victim consented to some aspect of her or his exploitation or her or his getting in this situation.

Cultural, economic and contextual factors play a role in determining, at the national level, what is and is not trafficking

A subsequent review of all country studies confirms that this aspect is indeed significant and sometimes even determinative. What is considered exploitative labour rising to the level of trafficking will be different in a less developed country—where exploitative labour is normalized—than in a more developed one. In some countries, trafficking for forced or servile marriage is not possible because of a culture that does not recognize certain conduct as a crime. National attitudes towards prostitution and the legal response to prostitution as well as the perceptions of people who are engaged in it may shape the attachment of criminal justice practitioners to the principle of the irrelevance of consent and their interpretation of abuse of vulnerability. And issues around religion and ethnicity can also play a role in determining whether a particular practice meets the threshold of exploitation required for trafficking. For example, practitioners in one State noted that practices such as child marriage and child begging might be viewed differently depending on the ethnic background of those involved.

“Means” are an essential aspect of the definition of trafficking in adults—exploitative conditions alone are not sufficient to establish trafficking

The requirement to show “means” affirms that, at least within the Protocol, exploitative conditions alone are insufficient to establish trafficking of adults. Agreement to work in a situation that may be considered exploitative will not constitute trafficking if that agreement was secured and continues to operate without threats or the use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. While exploitation alone may involve criminal offences and human rights violations, “means” must be used to constitute trafficking of adults within the confines of the Trafficking in Persons Protocol. UNODC studies also confirmed that even in jurisdictions that do not have a means requirement in their definition, the issue of consent arises for consideration at trial.

3.2. Practitioner insights

For each of the three studies, involved practitioners were invited to formulate general conclusions and recommendations that could be used to help States in understanding and applying the definition of trafficking in persons. While each study resulted in a separate set of conclusions, it is possible to identify a number of common threads that can be useful in the development of overarching guidance. The process of analysis and consolidation of findings of all three studies also allows for better recognition of the interlinkages between the three concepts.

In understanding and applying the definition of trafficking, the need for breadth and flexibility must be balanced by clear parameters that preserve the spirit of the Protocol: With only a few exceptions, practitioners across all three studies affirmed the need to retain a degree of flexibility in defining and understanding trafficking. Many pointed to the emergence of new or hidden forms of exploitation; changes in criminal methodology (e.g. including a shift away from more overt or violent forms towards more subtle means such as abuse of vulnerability); and improvement in the understanding of how exploitation happens as factors underlining the importance of such an approach.

However, it was also noted that a vague law is not a good law: that basic principles of legality and justice require crimes to be delineated with certainty. In this regard, the absence of clear definitions in the law (e.g. of abuse of vulnerability, exploitation, stipulated forms of exploitation) is seen as part of the problem, providing criminal justice practitioners with a measure of interpretative discretion that can lead to or even foster inconsistency. Detailed and operationally focused definitions appear to reduce, but not eliminate, confusion. They may also operate to reduce the flexibility that is required for an effective criminal justice response. Ultimately though, ambiguities around the definition cannot, and indeed should not, be definitively resolved. The risks attached to this situation (including risks to the rights of potential victims and accused) should be identified and appropriately managed.

Irrespective of differences in national definitions, not all exploitation is human trafficking—a threshold of severity is often relevant, as are other factors, to determining whether a situation is one of “trafficking”: UNODC research confirmed that while this is not an explicit consideration in the definition set out in the Trafficking in Persons Protocol, the seriousness of the conduct involved, the severity of the means used and the degree of harm caused or intended can be important practical considerations at both the investigative and prosecutorial stages. While more severe cases are more likely to be identified and prosecuted, it follows that borderline and less apparent cases involving more subtle *modi operandi* by traffickers, may not be considered “trafficking”. In other words, where the exploitation and/or means used are not considered particularly severe, or where the exploitation does not appear to have caused substantial harm to the victim, then a case may not be pursued as trafficking, or even be identified as such in the first place. Here, context plays a role in determining severity, with sexual situations more likely to be considered exploitative than non-sexual situations. Similarly, where victims appear to have given their consent to less severe exploitation, that consent is more likely to be taken into account in deciding whether a situation of trafficking exists. Practitioners generally supported this approach as a common sense way of prioritizing resources while also preserving the perception of “trafficking” as being a particularly serious crime carrying severe penalties. However, among practitioners, there was a general sense that attempts to precisely delineate a “threshold of seriousness” when seeking to establish what amounts to trafficking would be risky and possibly counterproductive.

The victim’s state of mind may be relevant but should not be the primary focus in establishing whether a situation of trafficking exists: Practitioners observed that the victim’s state of mind was often a major consideration throughout the criminal justice process. In some respects, this is inevitable. For example, without inquiring into the victim’s state of mind it may be difficult to ascertain whether certain “means”, such as abuse of vulnerability, were used. And even where the irrelevance of consent is enshrined in law, the victim’s perception of whether his or her situation was exploitative is almost inevitably part of the prosecution case and can also influence decisions about whether a case will be referred for prosecution at all. However, assessing the state of mind of a person who may be the victim of serious exploitation is a fraught task. Even more importantly, an emphasis on the victim and his or her state of mind can operate to detract from the rightful focus, which should be on the criminal intent and criminal activity of the accused person. While noting the importance of preserving individual agency, practitioners emphasized the value of a robust (but flexible) prosecution policy, and criminal offence provisions that embody an objective test applied to the specific circumstances of the case and that promote a move away from consideration of the victim’s subjective frame of mind.

Practical and evidentiary challenges, which exist in all trafficking cases, are particularly acute in relation to trafficking for forced/exploitative labour: Participating practitioners were almost unanimous in their view that trafficking cases, irrespective of the form of exploitation involved, are

invariably challenging to investigate and prosecute. Convictions are considered very difficult to achieve without the active involvement of victims whose safe and effective cooperation is often very difficult to secure. In most States there is a disproportionate focus on trafficking for sexual exploitation, even when it is clear that other forms of exploitation are also prevalent. While many factors may help explain this situation, participating practitioners pointed to the relatively greater difficulties involved in investigating and prosecuting non-sexual forms of exploitation as the principal reason for any discrepancy. The example of forced labour was frequently cited in this context; this form of exploitation is often well hidden within an otherwise legitimate industry making it difficult to identify in the first place. There are also indications that political and social acceptance of exploitative working conditions, particularly among migrants, contributes to the lower profile of such conduct. Practitioners experience great difficulty in separating bad working conditions from situations that could or should be pursued as a trafficking offence. All practitioners recognized the idea of a continuum of exploitation and were readily able to identify practices that might lie at either end. However, there was much less certainty and consistency in relation to conduct falling between these two extremes. The lack of definitive guidance in this regard was frequently referred to, as was the absence of alternative criminal offences that are available to address borderline cases, meaning that failure to establish trafficking for forced labour can result in highly exploitative conduct being addressed as an administrative offence or even going unpunished. Certainly, the persistently low levels of prosecution/conviction for this form of trafficking appear to uphold the substance of these concerns.²⁵

²⁵For example, the 2016 United States Department of State Trafficking in Persons records 857 prosecutions worldwide for “labour trafficking” in 2015 (less than five per cent of the total number of prosecutions recorded) and 456 convictions (less than seven per cent of the total number of convictions recorded). United States, Department of State, *Trafficking in Persons Report* (2016).

4. GUIDING PRINCIPLES FOR PRACTITIONERS ON CONCEPTS WITHIN THE INTERNATIONAL LEGAL DEFINITION OF TRAFFICKING IN PERSONS

The Guiding Principles set out in this part relate to the definition of trafficking in persons as set out in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime with a particular focus on the means of “abuse of a position of vulnerability”; the principle of the irrelevance of consent, and the purpose element “exploitation”.²⁶ These principles are informed by the experiences of practitioners from a large number and wide range of States. The Guiding Principles are intended to offer interpretative and practical support to criminal justice practitioners who are engaged in the investigation, prosecution and adjudication of trafficking in persons crimes. The principles may also be useful to States, lawmakers, civil society organizations and others involved in preventing and responding to the crime of trafficking in persons.

4.1. General principles

1. The definition of trafficking in persons as set out in the Protocol against Trafficking in Persons, especially Women and Children (for sake of consistency we may want to refer to the Trafficking in Persons Protocol) should be interpreted and applied in full accordance with international law, including international human rights law and international humanitarian law. Of particular importance in this regard is the international legal obligation on all States to ensure that their actions respect the rights and dignity of all persons, without discrimination.
2. The trafficking in persons offence as defined by the Trafficking in Persons Protocol (established under international law) comprises three elements of act, means and purpose. Where the three elements of act, means and purpose are present in the case of adults, or the two elements of act and purpose are present in the case of children, prosecutions for trafficking in persons should be rigorously pursued.

²⁶The full definition set out in article 3(a) of the Trafficking in Persons Protocol reads as follows: “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 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. The use of the second element of “means” (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) is not part of the international legal definition of trafficking in persons when the person involved is under the age of eighteen years”.

3. Trafficking in persons is a serious crime that carries severe penalties. Where the elements of human trafficking are present, prosecutions for human trafficking offences should be pursued. The international legal definition of trafficking in persons does not impart any hierarchy of acts, means or exploitative purpose that is any more or less compelling in establishing that trafficking in persons has occurred.
4. In establishing the offence of human trafficking for the purpose of prosecution, the standard of proof should be the same as for establishing the elements of any crime under national law, with compelling evidence being required to establish each element of the offence.
5. In identifying a situation of human trafficking for the purpose of providing protection and assistance to a possible victim, practitioners should interpret the offence broadly in order to ensure the widest possible scope of protection for persons who may be victims of trafficking, irrespective of whether the criminal elements have been established for the purpose of prosecuting alleged offenders.
6. Victims of trafficking may not identify themselves as such, and may be unwilling to cooperate with authorities on this or other bases. Some victims of trafficking may even, apparently willingly, return to situations of exploitation. In pursuing trafficking in persons offences criminal justice practitioners must focus on gathering compelling evidence of the acts committed, the means used and the exploitative purpose of traffickers without being distracted or persuaded by victims' perceptions of their situation beyond the extent to which those perceptions shed light on the actions and intentions of the alleged perpetrator.
7. The establishment of a relationship of trust between criminal justice practitioners and victims of trafficking in persons is essential to effective criminal justice responses. Practitioners should accordingly be supported to enable the significant investment in time and commitment that is necessary to establish and maintain such relationships. Specific measures requiring support include the development of effective partnerships between investigators, prosecutors, victim support agencies and others who have a role to play in process of building victim trust and gathering evidence of the elements of the crime.
8. Training and guidance on the definition of trafficking in persons including concepts within that definition should be provided to criminal justice practitioners to ensure that potential victims are appropriately identified, alleged perpetrators are effectively investigated, suspects are fairly prosecuted, and convicted offenders are subject to sanctions that are proportionate to the gravity of their offence.

4.2. The means "abuse of a position of vulnerability"²⁷

1. As the crime of trafficking in children is constituted by the "act" of recruitment, harbouring, etc. for an exploitative "purpose", abuse of a position of vulnerability or any other means is not required to be shown in relation to any prosecution for child trafficking.

²⁷This section of the Principles draws on the UNODC issue paper on the same subject and summarizes a more comprehensive "Guidance Note for Practitioners" prepared by a group of expert practitioners convened to finalize a draft of the issue paper. Practitioners are encouraged to consult that document for further information, including insight into national law and practice. United Nations Office on Drugs and Crime, issue paper on Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons, October 2012, available at: https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf; 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, (UNODC, 2012), available at: https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf

2. Establishing the existence of victim vulnerability may be important for many aspects of a trafficking case. For example, vulnerability can be a critical indicator when identifying victims; and accurate assessment of vulnerability can help to ensure that victim witnesses are appropriately supported and protected. However, more is required in criminal prosecutions. The mere existence of proven vulnerability is not sufficient to support a prosecution that alleges abuse of a position of vulnerability as the means by which a specific “act” was undertaken. In such cases both the existence of vulnerability and the abuse of that vulnerability must be established by credible evidence. In short, a victim’s vulnerability may be an indicator of abuse of a position of vulnerability, but it may not constitute a means of trafficking in persons unless that situation of vulnerability has also been abused.
3. The existence of vulnerability is best assessed on a case-by-case basis, taking into consideration the personal, situational or circumstantial situation of the alleged victim. Personal vulnerability for instance, may relate to a person’s physical or mental disability. Situational vulnerability may relate to a person being irregularly in a foreign country in which he or she is socially or linguistically isolated. Circumstantial vulnerability may relate to a person’s unemployment or economic destitution. Such vulnerabilities can be pre-existing and can also be created and even fostered by the trafficker. Pre-existing vulnerability may relate (but not be limited) to poverty; mental or physical disability; youth or old age; gender; pregnancy; culture; language; belief; family situation or irregular status; and cultural or other bonds with trafficker. Created vulnerability may relate (but not be limited) to social, cultural or linguistic isolation; irregular status; or dependency cultivated through drug addiction or a romantic or emotional attachment or through the use of cultural or religious rituals or practices.
4. Abuse of a position of vulnerability occurs when an individual’s personal, situational or circumstantial vulnerability is intentionally used or otherwise taken advantage of, to recruit, transport, transfer, harbour or receive that person for the purpose of exploiting him or her, such that the person believes that submitting to the will of the abuser is the only real or acceptable option available to him or her, and that belief is reasonable in light of the victim’s situation. In determining whether the victim’s belief that he or she has no real or acceptable option is reasonable, the personal characteristics and circumstances of the victim should be taken into account.
5. Abuse of a position of vulnerability should not be more or less easily found in relation to certain exploitative purposes than in relation to others. A finding of abuse of a position of vulnerability depends only on credible evidence that establishes the existence of a position of vulnerability on the part of the victim, and an abuse of that position of vulnerability by the trafficker for the purpose of exploiting the victim. The particular form of the exploitative purpose in a specific case is not relevant to that analysis.
6. The standard of proof to establish abuse of a position of vulnerability should be the same as for establishing the elements of any crime under national law, including the other elements of the crime of trafficking in persons. Specifically, credible evidence must prove that the perpetrator intended to use the abuse of a position of vulnerability to commit an act (recruiting, transporting, transferring, harboring, or receiving) for the purpose of exploitation.
7. Evidence of abuse of a position of vulnerability may be less tangible than for other means of trafficking (such as use of force). Furthermore, victims may not identify themselves as victims, particularly where they continue to remain dependent on or otherwise attached to those who have abused their vulnerability. Practitioners should access the cooperation of specialists (e.g. psychologists, social workers, anthropologists and cultural advisers) at the investigative phase to ensure that evidence is effectively and appropriately collected, and brought to trial at the

prosecutorial phase for instance, through or supported by expert witness testimony. Such cooperation may also be essential to gain the trust of victims and empower them to testify at trial.

8. Practitioners should be aware of risks associated with uncertainties around the concept of abuse of a position of vulnerability and these risks should be identified and managed. Misapplication of the concept could potentially compromise the rights of victims to be recognized as such, as well as the rights of accused persons to a fair trial.

9. Where the concept of abuse of a position of vulnerability is explicitly included in the definition of trafficking in domestic legislation, it should be carefully defined to provide clarity and guidance to practitioners and to protect against the risks outlined above. The definition should confirm the necessity of establishing both the existence of a position of vulnerability and the offender's abuse of that position of vulnerability.

10. Trafficking in persons is a serious crime that carries severe penalties. Safeguards should be put in place to ensure that a common sense (not to confuse with a stereotyping) approach can be taken to understanding and applying abuse of a position of vulnerability to promote an effective criminal justice response to trafficking and protect against the risks outlined above.

4.3. The principle of the irrelevance of consent²⁸

1. Under the international definition of trafficking in persons, consent of an individual to the intended exploitation is irrelevant where any of the “means” stipulated in that definition have been used. As the crime of trafficking of a child does not require the establishment of means, the consent of a child to the intended exploitation is always irrelevant to establishing the offence.

2. Victims of trafficking may not identify themselves as such and some victims of trafficking may even willingly return to situations of exploitation. In pursuing trafficking in persons offences, criminal justice practitioners must focus on gathering compelling evidence of the acts committed, the means used and the exploitative purpose of traffickers without being distracted or persuaded by victims' perceptions of their situation beyond the extent to which those perceptions shed light on the actions and intentions of the alleged perpetrator. In particular, criminal justice officials should not be dissuaded from further investigating a situation that may be trafficking on the basis of assertions that the individual involved has consented to the situation.

3. Consent is irrelevant where there is credible evidence that establishes the use of means by the perpetrator for purposes of exploiting the victim. The type of “means” used is not relevant to establishing the offence. In practice, irrelevance of consent may be more readily apparent in relation to certain means (such as threats or use of force) than in relation to others (such as abuse of power or a position of vulnerability). However, practitioners are obliged to disregard assertions of consent in all cases where means have been used and where those means have operated to vitiate the consent of the victim. The severity of harm resulting from the use of particular “means” may be relevant to sentencing and its potential aggravation, but is not relevant in establishing the offence of trafficking in persons.

²⁸These principles draw on the UNODC issue paper on the same subject and practitioners are encouraged to consult that document for further information, including insight into national law and practice. United Nations Office on Drugs and Crime, issue paper on *The Role of “Consent” in the Trafficking in Persons Protocol*. Vienna: United Nations Office on Drugs and Crime (2014). Available at: https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf

4. Consent is irrelevant where means are used, regardless of the type of exploitation intended.
5. In cases where consent is asserted by the presumed victim or alleged perpetrator, failure to understand and treat such consent as irrelevant can lead to cases of trafficking in persons not being accurately identified and effectively prosecuted. Practitioners should cooperate with specialists (including psychologists and social workers) at the investigative phase to ensure that evidence of the means used by traffickers is effectively and sensitively gathered, and brought to trial; for instance, through or supported by expert witness testimony to explain the specific circumstances of the victim's consent and its irrelevance on account of any means used. The consent issue paper provides the advice: "In the face of these challenges, practitioners share the view that trials should ideally focus on the perpetrator's conduct, rather than on the victim's state of mind".²⁹

4.4. Exploitation as the "purpose" element of trafficking in persons³⁰

1. It is not necessary to prove exploitation to establish the "purpose" element of the trafficking offence. Rather, it need only be established that the perpetrator intended that the action (recruitment, transportation, etc.), procured through "means" (threats or use of force, other forms of coercion, etc.), in the case of adults, would lead to exploitation.
2. The Trafficking in Persons Protocol does not define "exploitation" but provides a non-exhaustive list of forms of exploitation: 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. States may thus include additional forms of exploitation that have not been explicitly listed in the Trafficking in Persons Protocol in line with the purpose and scope of the Protocol.

²⁹ United Nations Office on Drugs and Crime, issue paper on *The Role of "Consent" in the Trafficking in Persons Protocol*. Vienna: United Nations Office on Drugs and Crime (2014), page 78. Available at: https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf

³⁰ These guidelines draw on the UNODC issue paper on the same subject and practitioners are encouraged to consult that document for further information, including insight into national law and practice. United Nations Office on Drugs and Crime, issue paper on *The Concept of "Exploitation" in the Trafficking in Persons Protocol*. Vienna: United Nations Office on Drugs and Crime (2015). Available at: https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf

3. Certain forms of exploitation stipulated in the international legal definition of trafficking in persons (forced labour or services;³¹ slavery;³² and practices similar to slavery³³) have been defined elsewhere in international law. These definitions offer important interpretative guidance to States. For those forms of exploitation that are listed in article 3(a) of the Trafficking in Persons Protocol but are not defined in international law, States should offer clarification and guidance on their meaning for the benefit of criminal justice practitioners charged with identifying and investigating trafficking in persons offences. The forms of exploitation that are set out in the Trafficking in Persons Protocol do not impart nor imply a hierarchy of severity; severity of exploitation and resulting harm is to be determined by an assessment of the factual circumstances of the specific case, not the type of exploitation.

4. While exploitation is the essence of the crime, exploitation alone does not amount to trafficking in persons and not all exploitation occurs in the context of trafficking in persons. “Acts” and “means” are essential additional elements of the crime against adults, and “acts” are essential additional elements of the offence in relation to children. Where acts and means are absent in relation to adults, or acts are absent in relation to children, the exploitation that has occurred will not constitute trafficking in persons under international law and should be addressed by alternative legislative provisions or approaches.

5. Cultural and other context-specific factors may shape perceptions of what constitutes exploitation for the purpose of establishing the purpose element of the trafficking offence. Criminal justice practitioners should understand that what constitutes exploitation is to be measured objectively against the standards in the country in which the exploitation takes place within the framework of international human rights law and standards protecting human dignity and freedom, and not on the basis of the victim’s prior situation, his or her views about the exploitative situation, or his or her cultural, national or social background.

6. Trafficking in persons is a complex crime, with criminals involved, including organized crime groups pursuing profit through new and evolving forms of exploitation. Accordingly, States should ensure that their legislative definition of trafficking in persons is fit for purpose and can capture all forms of exploitation that trafficking in persons may be perpetrated for, whether by stipulating additional forms of exploitation; by flexibly interpreting listed forms to capture those encountered in practice; or by ensuring that stipulated forms are non-exhaustive and offered at a minimum.

³¹ILO Forced Labour Convention 1930 (No. 29), art. 2 defines “forced or compulsory labour” as “all work or service which is exacted from any person under the menace of any penalty, and for which the said person has not offered himself voluntarily”.

³²The Supplementary Slavery Convention (Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, United Nations *Treaty Series* vol. 226, p. 3, done 1 April 1957, entered into force 30 April 1957) defines “slavery” as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.

³³The Supplementary Slavery Convention (Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, United Nations *Treaty Series* vol. 226, p. 3, done 1 April 1957, entered into force 30 April 1957) identifies four practices as being “similar to slavery”. These are: debt bondage (“the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as a security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined”); serfdom (“the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status”); servile forms of marriage (“any institution or practice whereby (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death or her husband is liable to be inherited by another person”); and sale of children for exploitation (“any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour”).

7. In addition to its complexity, trafficking in persons is a serious crime that carries severe penalties. Safeguards should be put in place to ensure that situations where the “exploitation” is frivolous or trivial in relation to the scope and purpose of the Trafficking in Persons Protocol and/or the national legal framework around trafficking are not captured as such.



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