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Issue Paper

Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons

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Issue Paper

Abuse of a position of vulnerability
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of trafficking in persons



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Abbreviations and Acronyms

APOV	Abuse of a position of vulnerability
COP	Conference of the Parties to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto
Working Group on Trafficking in Persons	Open-ended Interim Working Group on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
EU	European Union
European Trafficking Convention	Council of Europe Convention on Action against Trafficking in Human Beings
EU Trafficking Directive 2011/36/EU	Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims
ILO	International Labour Organization
Trafficking	Trafficking in Persons
Trafficking in Persons Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
Organized Crime Convention	United Nations Convention against Transnational Organized Crime

Executive Summary

Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol) defines trafficking in persons as constituting three elements: (i) an “action”, being recruitment, transportation, transfer, harbouring or receipt of persons; (ii) a “means” by which that action is achieved (threat 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 intended action/means): namely, exploitation.¹ All three elements must be present to constitute “trafficking in persons” in international law. The only exception is when the victim is a child; in such cases it is not necessary to prove that one of the acts was accomplished through the use of any of the listed “means”.

The Protocol, and its definition of trafficking in persons, has been widely embraced by States and the international community. However, over the past decade it has become evident that questions remain about certain aspects of the definition, as well as its application in domestic criminal law. In particular, questions have emerged regarding those aspects of the definition that are not elsewhere defined in international law or commonly known to the major legal systems of the world. The existence of such questions means that the parameters around what constitutes “trafficking” are not yet firmly established. This is relevant because of the global political pressure that is being brought to bear on States to prosecute traffickers. It is also important because to characterize certain conduct as “trafficking” has significant and wide-ranging consequences for States, for the perpetrators of that conduct, and for the victims. There is currently a tension between those who support a conservative or even restrictive interpretation of the concept of trafficking, and those who advocate for its expansion. The complex and fluid definition in the Protocol provides justification for both perspectives, and has contributed to ensuring that such tensions remain unresolved.

In January 2010, the Open-ended Interim Working Group on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Working Group on Trafficking in Persons) considered the

¹ The 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”.

proposition that important concepts contained in the Protocol are not clearly understood and, therefore, are not being consistently implemented and applied. The Working Group on Trafficking in Persons recommended the Secretariat to prepare a series of Issue Papers “to assist criminal justice officers in penal proceedings” on several concepts including consent, harbouring, exploitation and, the subject of the present study: abuse of a position of vulnerability (APOV).

The methodology of the Study comprised two main steps: (i) a desk review of relevant literature including legislation and case law; and (ii) a survey of twelve countries representing different regions and legal traditions. The survey included analysis of the legal framework and associated practice, as well as detailed interviews with practitioners. On the basis of this information and further research, a draft Issue Paper was prepared and discussed with a group of expert practitioners. The draft was subsequently revised to reflect the results of that consultation as well as feedback from other reviewers.

The Issue Paper is divided into four parts. Part 1 provides introductory and background material. Part 2 provides an overview and analysis of the international legal and policy framework around abuse of a position of vulnerability and related concepts explored in the Paper. Part 3 summarizes and analyzes the results of the survey of national law and practice as it relates to the “means” element of trafficking: most particularly abuse of a position of vulnerability. Part 4 seeks to draw together the findings from legislation, case law and the views of practitioners around a series of key issues and questions, including: the place of abuse of vulnerability in the crime of trafficking; the relationship of abuse of vulnerability with other “means” and the trafficking “acts”, as well as definitional concepts such as consent and exploitation; evidentiary issues; practitioner perceptions of the value of the concept and views on the accuracy and utility of the Interpretative Note attached to Article 3 of the Protocol, that seeks to explain “abuse of a position of vulnerability”.

The review of relevant international and regional legal and policy instruments, as well as a range of interpretative and supporting texts, undertaken in Part 2, supports the following preliminary conclusions:

APOV is accepted as an integral part of the definition of trafficking: The concept of abuse of a position of vulnerability, together with the other means listed in the Protocol has been accepted as a distinct and important part of the international legal definition of trafficking. It has survived intact in all major treaties adopted after the Protocol that incorporate a definition of trafficking in persons, as well as in policy documents and interpretative texts.

The intentions of the drafters of the Protocol with respect to APOV are unclear: official legislative history does not shed light on how or why the concept was included, at the last minute, within the means element of the definition of trafficking. Informal information indicates that the inclusion of a wide range of overlapping means in the definition was motivated by an intention to ensure that all the different and subtle ways by which an individual can be moved, placed or maintained in a situation of exploitation were captured. There is also some

indication that, in respect of APOV, its inclusion enabled consensus on whether, and how, the issue of prostitution should be dealt with under the Protocol.

International law does not define APOV; official guidance on how the concept is to be understood is ambiguous: none of the means cited in the Protocol definition are themselves defined. The drafting history of the Protocol confirms that “abuse of a position of vulnerability” is to be understood as referring to “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”: a circular definition that has not helped to clarify confusion among practitioners. No further guidance is provided and it is unclear what “real and acceptable alternative” actually means or how it is to be applied in practice.

Unofficial guidance around APOV is of limited usefulness: A number of different tools and documents, including several produced by UNODC and ILO, provide guidance on the concept of APOV. However, much of this unofficial guidance is concerned with identifying those factors that make persons vulnerable to trafficking, and thereby on identifying victims of trafficking. They are not concerned with the more complex and fraught question of whether, from the point of view of criminal law, a particular characteristic of the victim or his / her situation was abused as a means of trafficking him or her. They provide little or no guidance on how the proposed indicators could or should be applied in the context of a criminal investigation or prosecution.

The review of national law and practice set out in Parts 3 and 4 found widespread lack of clarity and consistency around the definition of trafficking generally, and aspects of the means element including abuse of a position of vulnerability in particular. While practitioners were generally supportive of the particular legislative approach taken by their country, it was widely acknowledged that the concept of APOV is not one that is easily adapted into relevant legal frameworks. Indeed, the diversity of approaches taken to interpreting and applying the concept, and of opinions on its value, is evidence of its complexity. The following summarizes the major findings of the review. Note that in Part 4, detailed “Suggestions for consideration and discussion” are provided in respect of each of the identified issues.

The place of abuse of a position of vulnerability in the crime of trafficking: All those surveyed agreed that vulnerability is central to any understanding of trafficking: that APOV is an inherent feature of most, if not all, trafficking cases. Responses to questions about specific vulnerability factors were remarkably similar across very different countries of origin, transit and destination. Some of these vulnerability factors, such as age, illness, gender and poverty, are pre-existing or intrinsic to the victim. Others, such as isolation, dependency and, sometimes, irregular legal status, are vulnerabilities that could be created by the exploiter in order to maximize control over the victim. Both types of vulnerability are viewed as capable of being subject to abuse. However, in identifying vulnerability factors, few practitioners appeared to make a distinction between these two types, or between

vulnerability as susceptibility to trafficking, and abuse of a position of vulnerability as a means by which trafficking occurs or is made possible.

Relationship of abuse of a position of vulnerability with other means: The country survey sought to ascertain whether APOV could ever stand alone as the sole means by which an individual is moved into or maintained in a situation of exploitation. There appear to have been very few cases prosecuted on the basis of APOV being the sole means of trafficking. Those examples that are available fail to demonstrate that the success of the prosecution depended on the availability of that means. The survey noted a high level of fluidity between the various “means” stipulated in national laws, due, at least in part, to the absence of definitions. The precise relationship between APOV and other means appears to depend on how the concept is reflected (or not) in the legal framework. In some cases, vulnerability and / or its abuse is used as a subsidiary means in that its function appears to be to bolster or substantiate other means. For instance, it may be established that a person has been deceived through the abuse of their position of vulnerability, where a less vulnerable person would not have been deceived. In other cases, establishing APOV is an important means by which an explicit element of the offence can be established.

Relationship of abuse of a position of vulnerability with the ‘act’ element: While the relationship between APOV and the ‘acts’ of trafficking was not directly considered during the country surveys, it emerged as an important issue at the Expert Group Meeting. The Protocol’s definition establishes a clear link between the ‘act’ element and the means of trafficking. In the present context, the result is that it is necessary to establish that an offender abused the victim’s position of vulnerability in order to recruit, transfer, harbour, or receive that person. In practice, and in much the same way that specific ‘means’ are often not identified, the particular ‘act’ on which a prosecution is relying, is rarely made clear. However, country surveys confirmed that ‘recruitment’ is the act most frequently cited in connection with APOV: reinforcing the tendency to focus on vulnerability as susceptibility to trafficking rather than as a true ‘means’. There is very little information available on APOV being linked to other specified acts such as harbouring or receiving. It is not clear whether this is because APOV is more relevant for some trafficking ‘acts’ than others, or indeed, whether the evidentiary burden differs according to the ‘act’ with which the allegation of APOV is or should be linked.

Relationship of abuse of a position of vulnerability with exploitation: The relationship between the “means” of trafficking and the exploitative purpose is a complex and contested one. The study confined its analysis to insights that arose in the context of the country survey. One important finding was that a number of countries have integrated abuse of vulnerability into their understanding of exploitation. In such situations, the victim’s vulnerability and its abuse may be explored alongside other means, such as deceit, to ascertain the trafficker’s exploitative intent. Where trafficking in persons is addressed across a spectrum of legislation, considerations of “abuse of a position of vulnerability” indirectly arise as part of the narrative of the victim’s story. Some risks were identified in countries

that appear to have established a low threshold for determining abuse of vulnerability and / or exploitation. These risks principally relate to cases being too readily identified as trafficking, and consequently, being incorrectly or too easily prosecuted as trafficking cases.

Relationship with consent: The Trafficking in Persons Protocol is unambiguous on the point that consent is irrelevant in relation to trafficking in children, or where any of the specified means have been used, where the victim is over the age of 18 years. In practice however, the issue of consent has indeed arisen in the context of abuse of vulnerability. In one country, for example, APOV is only considered relevant as a potential “means” where the victim had given his or her consent to the situation: it is the victim’s vulnerability that is used to explain away and nullify the apparent consent. Alternatively, the presence of meaningful consent can change the nature of the crime at issue, from one of trafficking in persons to other crimes. In other countries, the relationship between APOV and consent will sometimes be an issue in situations where the victim does not explicitly identify as a victim. Practitioners generally agree that the use of “means” including APOV must be of a sufficiently specific and serious nature as to vitiate the consent of the victim.

Evidentiary issues: APOV, as it is set out in the Trafficking in Persons Protocol, appears to comprise two separate evidentiary requirements: (i) proof of the existence of a position of vulnerability on the part of the victim; and (ii) proof of abuse of (or intention to abuse) that vulnerability as the means by which a particular act (recruitment, harbouring, etc.) was undertaken. Even among those countries that have included APOV within their definition of trafficking, the country surveys revealed that the focus of inquiry is generally on establishing the fact of vulnerability, rather than on proving its abuse. In effect, this means that the mere existence of vulnerability 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. Both approaches raise concerns, particularly in light of the more general risk identified throughout the study that APOV may open the door to incorrect prosecution. In countries where the concept of APOV does not exist in law, practitioners noted the likelihood of substantial evidentiary challenges to establishing APOV in a prosecution. Some were firmly of the opinion that the concept is too vague to be effectively justiciable. A number of practitioners pointed out that while all trafficking prosecutions rely heavily on victim cooperation, such cooperation would be particularly important, (and perhaps even more difficult to secure), in cases alleging abuse of vulnerability.

Practitioner perceptions of the value of the concept and risks associated with its application: The spectrum of views about the legislative value of the concept of abuse of a position of vulnerability ranged from “vital” and “essential” (given the convictions that would not be achieved otherwise), to “neutral” (no impact one way or another); to “harmful” (given the incorrect convictions that could result from its misapplication). Some experts from countries that have included the concept in their national law expressed the view that omission of this means from the definition of trafficking would result in fewer convictions: particularly in cases of

exploitation where the victim did not identify as such, or where direct means were not present or could not be proved. However, practitioners from States that have included only the more direct means noted that the essence of abuse of vulnerability, including its modern and changing manifestations, can indeed be captured through an appropriate interpretation of these means. Other practitioners agreed that inclusion of APOV as a “means” would likely support more convictions for trafficking, but noted that this may not necessarily be a desirable outcome. Trafficking is an extremely serious crime carrying severe penalties: it is appropriate that proving a charge of trafficking is not made easy. In addition, trafficking convictions should be strictly for trafficking crimes: the definition should not lend support to prosecutions for conduct that falls short of what is generally agreed to constitute “trafficking”. To do so runs the risk of denaturing and reducing the seriousness of this offence. A number of these concerns appeared to be borne out by the Survey Report.

Practitioner perceptions of the value of the Interpretative Note: The *travaux préparatoires* to the Protocol include an Interpretative Note to the effect that APOV “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.” While some practitioners were satisfied with the Note, many others expressed concern about the vague and subjective formulation – as well as its essentially circular nature - that prevented it from providing useful legal guidance. The Note was widely considered to raise many more questions than it answered. For example: (i) what does a real alternative mean? Must the alternative be specific, available and known and, if so, to the victim, the perpetrator or both? (ii) is it necessary to objectively establish the existence of a particular alternative? (iii) what does an acceptable alternative mean? Must it be acceptable from an objective point of view or is the acceptability of an available (“real”) alternative to be measured from the point of view of the alleged victim? More critically, the Note appears to reject as unnecessary any subsequent inquiry into whether the alleged perpetrator actually abused or intended to abuse the vulnerability of the alleged victim. Opinions varied on the best way of addressing these shortcomings. Some practitioners suggested refining the guidance to focus on the belief of the victim. Others suggested that the correct approach would be to focus on the offender and his or her intention to take advantage of the situation of the victim. Notwithstanding the concerns expressed about the limitations of the Interpretative Note, there was general support for the guidance it provided and particular approval of its recognition of the link between APOV and consent.

1 Background

1.1 Context of this study

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol), is considered to be “the principal, legally binding global instrument to combat trafficking in persons.”² It defines trafficking in persons as constituting three elements: (i) an “action”, being recruitment, transportation, transfer, harbouring or receipt of persons; (ii) a “means” by which that action is achieved (threat or use of force or other forms of coercion, abduction, fraud, deception, *abuse of power or of a position of vulnerability*, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person) (emphasis added); and (iii) a “purpose” (of the intended action/means): namely, exploitation.³ All three elements must be present to constitute “trafficking in persons” in international law. The only exception is when a child is the victim; in such cases, it is not necessary to show that any of the actions were done through any of the listed “means”.⁴

This definition clarifies a number of issues that were previously unsettled or disputed: For example, it confirms that:

- The concept of trafficking does not just refer to the *process* by which an individual is moved into a situation of exploitation. It extends to include the *maintenance* of that person in a situation of exploitation;
- Trafficking can take place within as well as between countries, and for a range of exploitative purposes including, but not limited to sexual exploitation and exploitative labour;
- Women, men and children can be victims of trafficking.

Achieving international agreement on the definition on 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. Over the past decade there has been considerable advancement towards these goals, facilitated

² Conference of Parties to the United Nations Convention on Transnational Organized Crime, Decision 4/4, “Trafficking in Human Beings,” reproduced in Conference of Parties to the United Nations Convention on Transnational Organized Crime, “Report 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,” UN Doc. CTOC/COP/2008/19, Dec. 1, 2008.

³ Trafficking in Persons Protocol, Article 3 (emphasis added).

⁴ Trafficking in Persons Protocol, Article 3(c).

by the incorporation of the core aspects of the Protocol's understanding of trafficking into laws and policies at the national, regional and international levels.

However, it has become evident that questions remain about certain aspects of the definition – most particularly those aspects that are not elsewhere defined in international law or commonly known to the world's major legal systems. Efforts to elucidate the scope and substantive content of these aspects of the definition will not only further strengthen the international legal framework around this issue. Such efforts will also directly support national efforts to respond to trafficking. In this regard it is relevant to note that over the past decade, most States have revised or enacted legislation to respond to trafficking in persons. Many of these laws incorporate the Protocol definition set out above. Some States have shaped the definition to better suit their understanding of the problem and / or existing legal and policy frameworks. Generally, however, the correlation between international and domestic law on the issue of trafficking is very high, underscoring the value of guidance on those issues or aspects that remain unclear.

It is important to acknowledge at the outset that questions around the definition of trafficking have a political as well as a legal dimension. Put simply, the very existence of such questions means that the parameters around what constitutes "trafficking" are not yet firmly established. This is relevant because of the global political pressure that is being brought to bear on States to prosecute traffickers. It also matters because to characterizing certain conduct as "trafficking" has significant and wide-ranging consequences for States, for the perpetrators of that conduct, and for the victims. Of relevance to States, for example, is the fact that, the identification of a particular practice as "trafficking" brings that practice within the various monitoring and compliance mechanisms that have evolved at the international, regional and national levels. Such identification will also trigger a range of criminalization and cooperation obligations on the part of the State - imposed through both national and international law. 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 that identification had not been made. Persons who are determined to be "victims of trafficking", are entitled to special measures of assistance, support and protection that could be withheld from other groups such as irregular or smuggled migrants.

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 include most, if not all forms of severe exploitation; and the practical challenge of setting priorities and establishing clear legal boundaries, particularly for criminal justice agencies involved in investigation and prosecution of trafficking-related crimes. The Protocol's complex and fluid definition provides ammunition for both sides, and has contributed to ensuring that such tensions remain unresolved. The subject of the present study, *abuse of a position of vulnerability*, provides a case in point. As with all elements of the definition of trafficking in persons, the way in which this particular means is interpreted will inevitably operate to either expand or

contract the practices identified as trafficking and, thereby, the categories of person identified as having been trafficked.

1.2 Mandate and Terms of Reference

Article 32(1) 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 to combat transnational organized crime and to promote and review the implementation of [the] Convention.”⁵ The mandate of the COP originally applied only to the Organized Crime Convention. However, at its inaugural session in July 2004, the COP decided to extend its monitoring, information exchange, cooperation and other functions to the three Protocols attached to the Organized Crime Convention, including the Trafficking in Persons Protocol.⁶ The United Nations Office on Drugs and Crime (UNODC) acts as Secretariat to the COP. UNODC is guardian of the Organized Crime Convention and its supplementary Protocols and is mandated to support Member States in the implementation of these instruments.

In 2008, the COP established an Open-ended Interim Working Group on Trafficking in Persons with the purpose of advising and assisting that body in the implementation of its responsibilities with regard to the Trafficking in Persons Protocol. It is mandated to: (i) facilitate implementation through the exchange of experience and practices between experts and practitioners; (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) advise the COP on implementation-related coordination with other bodies.⁷

In January 2010, at the second session of the Working Group on Trafficking in Persons, it was discussed that the one obstacle to the effective implementation of the international legal framework around trafficking persons, and its national equivalents, is that some of the most important concepts are not clearly

⁵ United Nations Convention Against Transnational Organized Crime, 2225 UNTS 209, done Nov. 15, 2000, entered into force Sept. 29, 2003 (Organized Crime Convention), at Art. 32(1).

⁶ Conference of Parties to the United Nations Convention on Transnational Organized Crime, Decision 1/5, “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,” reproduced in Conference of Parties to the United Nations Convention on Transnational Organized Crime, “Report of the Conference of Parties to the United Nations Convention on Transnational Organized Crime on its first session, held in Vienna from 28 June to 8 July 2004,” UN Doc. CTOC/COP/2004/6, Sept. 23, 2004, at 5.

⁷ Conference of Parties to the United Nations Convention on Transnational Organized Crime, Decision 4/4, “Trafficking in Human Beings,” reproduced in Conference of Parties to the United Nations Convention on Transnational Organized Crime, “Report 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,” UN Doc. CTOC/COP/2008/19, Dec. 1, 2008, at 11.

understood and, therefore, are not being consistently implemented and applied. The Working Group adopted the recommendation 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.⁸

In October 2010, at its fifth session, the Conference of the Parties welcomed the recommendations of the Working Group on Trafficking in Persons⁹ and requested the Secretariat to continue its work on the analysis of key concepts of the Trafficking in Persons Protocol.¹⁰ The present Issue Paper is the first of what is expected to be a series addressing each of the key concepts flagged by the Working Group. The paper is concerned specifically with the concept of “abuse of a position of vulnerability”. However, proximate definitional concepts including *abuse of authority* and *the giving or receiving of payment or benefit to achieve consent of a person having control over another person* are also touched on to the extent that these concepts are related.

1.3 Methodology

The methodology for preparation of this Issue Paper was as follows:

Background Paper: involving desk review of international and regional treaty law including historic material, national legislation and national case law from available databases, as well as relevant material produced by international organizations and academics

Survey Report: involving preparation of a survey instrument aimed at capturing additional and in-depth information and views on laws, cases and practices related to the subject of the study as well as practitioner views on the issues raised. The survey instrument (which is attached as Annex 1 to the present report) was then used to guide in-depth interviews with practitioners and experts from twelve countries representing different regions and legal traditions (Belgium, Brazil, Canada, Egypt, India, Mexico, the Republic of Moldova, Netherlands, Nigeria, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America). 40 practitioners were surveyed during the survey process.¹¹ The results of the country surveys, together with a detailed analysis of those results were compiled into a detailed Survey Report.

⁸ Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010, UN Doc. CTOC/COP/WG.4/2010/6 (17 February 2010), para. 31(b).

⁹ Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc. CTOC/COP/2010/L.5/Rev.1 (22 October 2010), para. 5.

¹⁰ Ibid., para. 10.

¹¹ Of 40 practitioners interviewed, 24 were interviewed in person, 4 provided written responses to

Issue Paper: The Survey Report formed the major input into the drafting of Sections 3 and 4 of the Issue Paper. Materials collected during the desk survey and insights from additional interviews with international practitioners were also utilized in the drafting process.

Expert Group Meeting: The draft Issue Paper was presented to and discussed at an Expert Group Meeting, convened by UNODC in Vienna on 28-29 June 2012. The meeting was attended by 20 expert practitioners, ten of whom had been involved in the survey process. The purpose of that meeting was twofold: (i) to undertake a technical review of the draft in order to ensure that it fully reflects current knowledge and the insights of experienced practitioners; and (ii) to receive participant input into the development of a Guidance Note for Practitioners on the concept of abuse of a position of vulnerability

The Issue Paper and Guidance Note are planned to be launched at a side event during the sixth session of the Conference of the Parties, to be held 15-19 October 2012 in Vienna.

1.4 Structure of this paper

The Paper is divided into four parts with the present, initial Part setting out necessary background information including the broader political context, mandate and terms of reference.

Part 2 provides an overview and analysis of the international legal and policy framework around abuse of a position of vulnerability and related concepts explored in this Paper. It commences with a brief overview of the concept of vulnerability. The relevant aspects of the Trafficking in Persons Protocol are then examined, along with a consideration of the intention of States when drafting the relevant provisions. Other major regional instruments are then explored, most particularly the Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention) and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (EU Trafficking Directive 2011/36/EU). A brief survey of other sources of insight and authority is then made before the chapter draws some initial conclusions on the applicable international legal and policy framework

Part 3 summarizes and analyzes the results of the survey of national law and practice as it relates to the “means” element of trafficking: most particularly abuse of a position of vulnerability. The twelve surveyed countries are divided into four groups: (i) those that have reproduced the Protocol’s definition in their national law, including the concept of abuse of a position of vulnerability; (ii) those that have reproduced the three elements of the definition but omitted one or more means including abuse of a position of vulnerability; (iii) those that that have omitted the

surveys and the remainder were interviewed via telephone or Skype. Some interviews were conducted using professional or non-professional interpretation.

means element altogether: retaining only the “action” and “purpose” elements; and (iv) States where the legislative situation is unclear: for example, means may be required under one instrument but not another – or the means element may be omitted but apparently taken into account in judicial decisions. The examination of state-specific law, practice and understanding in Part 3 is intended to establish the foundation for a broader consideration of issues and trends in the following Part 4.

Part 4 seeks to draw together the findings from legislation, case law and the views of practitioners around a series of key issues and questions including: the role of abuse of vulnerability in the crime of trafficking; the relationship of abuse of vulnerability with other definitional concepts including coercion, abuse of power, exploitation and consent; evidentiary issues; practitioner understanding of the concept; practitioner perceptions of its value; and views on the accuracy and utility of the Interpretative Note attached to Article 3 of the Protocol. A list of issues and questions for further discussion is attached to each of the major headings of this Part.

2 The concept in international law and policy

In the 2000 Trafficking in Persons Protocol, *abuse of a position of vulnerability* was cited in a list of means through which persons can be subject to a range of particular actions such as recruitment, transportation and harbouring, for purposes of exploitation. The concept has since been included in a number of other instruments and has been analysed in various interpretative texts and guides. The present chapter summarizes these developments within the context of broader discussion of “means”, and draws some preliminary conclusions.

2.1 Introduction: trafficking and the concept of vulnerability

Vulnerability is central to how trafficking is understood, and to the discourse that has developed around this phenomenon. A brief initial discussion on vulnerability in its broader sense is important for establishing the more restricted boundaries of the present paper.

2.1.1 *Vulnerability as susceptibility to trafficking*

Despite the lack of an agreed definition, the term “vulnerability” is commonly employed across a range of disciplines including criminal justice, human security, environmental science and health. In the context of trafficking, “vulnerability” is typically used to refer to those inherent, environmental or contextual factors that increase the susceptibility of an individual or group to being trafficked. These factors are generally agreed to include human rights violations such as poverty, inequality, discrimination and gender-based violence¹² – all of which contribute to creating economic deprivation and social conditions that limit individual choice and make it easier for traffickers and exploiters to operate. More specific factors that are commonly cited as relevant to individual vulnerability to trafficking (and occasionally extrapolated *as* potential indicators of trafficking),¹³ include gender, membership of a minority group, and lack of legal status. Children have been identified as inherently vulnerable to trafficking,¹⁴ with factors such as being

12 See, for example, United Nations Global Plan of Action to Combat Trafficking in Persons. UN Doc. A/RES/64/293 (12 August 2010), preambular paragraph 3.

13 International Labour Office and the European Commission, Operational Indicators of Trafficking in Human Beings (2009).

14 See, for example, EU Trafficking Directive, preambular paragraph 12.

unaccompanied when travelling or lacking birth registration being seen as additional factors of vulnerability.¹⁵

It is further agreed that factors shaping vulnerability to trafficking tend to impact differently and disproportionately on groups that already lack power and status in society, including women, children, migrants, refugees and the internally displaced. Such conclusions have been generally borne out in studies of trafficking patterns and victim profiles. However, vulnerability to trafficking is certainly not fixed, predetermined or even fully “known”. A multitude of factors operate to shape the context within which trafficking takes place and the capacity of the individual to respond. A genuine understanding of vulnerability will thereby almost always require situation-specific analysis.

A definition of vulnerability that captures many of these points was provided in the outcome document of a judicial summit dealing with access to justice that was held in Brazil in 2008:

Vulnerable people are defined as those who, due to reasons of age, gender, physical or mental state, or due to social, economic, ethnic and/or cultural circumstances, find it especially difficult to fully exercise their rights before the justice system as recognised to them by law. The following may constitute causes of vulnerability: age, disability, belonging to indigenous communities or minorities, victimisation, migration and internal displacement, poverty, gender and deprivation of liberty. The specific definition of vulnerable people in each country will depend on their specific characteristics, and even on their level of social or economic development.¹⁶

These findings were borne out in discussions with practitioners and experts conducted in the context of this study.

Relevant treaty law confirms the existence of certain obligations with respect to *preventing trafficking through addressing vulnerability*. The Trafficking in Persons Protocol, for example, requires States Parties to take positive steps to address the underlying causes of trafficking: specifically, to “take or strengthen measures ... to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”.¹⁷ These obligations are linked to and reinforced by the prevention obligations of the Organized Crime Convention. States Parties to that instrument are required to address the adverse social and economic conditions believed to contribute to the desire to migrate, sometimes by irregular methods, and hence, to the vulnerability

15 For further discussion of the particular vulnerabilities of children in this context, see ILO: General Survey on the fundamental Conventions concerning rights at work, Giving Globalization a Human Face, International Labour Conference, 101st Session, June 2012, especially at paras. 590, 594, 605.

16 100 Brasilia Regulations Regarding Access to Justice for Vulnerable People, available from: <http://justicia.programaeurososial.eu/datos/documentos/noticias/1217852883.pdf>.

17 Trafficking in Persons Protocol, at Art. 9(4).

of victims of cross-border trafficking.¹⁸ Both treaties highlight the need for education and awareness-raising aimed at improving understanding of trafficking, mobilizing community support for action against trafficking, and providing advice and warning to specific groups and individuals that may be at high risk of victimization.¹⁹ Other legal instruments including the European Trafficking Convention and EU Trafficking Directive 2011/36/EU affirm an obligation to prevent trafficking through addressing the factors that create or increase vulnerability.²⁰ An obligation on States to address trafficking-related vulnerabilities finds strong support from a range of regional and international policy instruments.²¹

2.1.2 A distinct but related concept: abuse of vulnerability as a means of trafficking

The subject of the present study is not vulnerability as a form of susceptibility to trafficking, but rather the *abuse* of vulnerability as a *means by which trafficking is perpetrated*. This distinction is important to flag at the outset because the findings set out below confirm the existence of considerable confusion between the two concepts. For example, the mere fact of a person's vulnerability to trafficking (because of poverty, gender, etc.) is sometimes taken as evidence or even proof that the requisite means element of the trafficking definition has been established. Conversely, the apparent absence of initial vulnerability may lead to the conclusion that a person has not, in fact, been trafficked.

The following analysis will consider the reasons why it is important to maintain the distinction between these two concepts. However, the potential overlap between them must also be considered. Our understanding of those factors that increase susceptibility to trafficking is relevant to the extent that it provides some insight into the kinds of vulnerability that can be abused in order to make trafficking happen.²² For example, the irregularity of an individual's legal status *vis-à-vis* the country of destination is widely acknowledged to be an important factor in enhancing their vulnerability to being trafficked. Irregular status also appears to be a form of vulnerability that is particularly amenable to becoming a means by which an individual is placed or maintained in a situation of exploitation. The question of whether less tangible factors commonly identified as increasing vulnerability to trafficking, (such as poverty and inequality), can be similarly transposed is more complicated.

18 United Nations Convention Against Transnational Organized Crime, Art. 31(7).

19 Trafficking in Persons Protocol, Art. 9(2), Organized Crime Convention, at Art. 31(5).

20 European Trafficking Convention, Art. 5; EU Trafficking Directive, Recital paras 12,22,23.

21 For example, the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking 2002.

22 Further on vulnerabilities to trafficking see the discussion in OHCHR Recommended Principles and Guidelines on Human Trafficking: Commentary (2010) at pp. 105-116.

The overlap identified above appears to have been confirmed through the country surveys conducted for the present study. Vulnerabilities commonly cited by practitioners interviewed for the survey included: age (youth and, to a lesser extent, old age); irregular legal / migration status (including threats to disclose information about irregular / legal migration status to authorities); poverty; precarious social status; pregnancy; illness and disability (mental and physical); gender (typically being female, but also transgender); sexuality, religious and cultural beliefs (notably practices commonly referred to as juju and voodoo); linguistic isolation; lack of social networks; dependency (on employer, family member, etc); threats to disclose information about the victim to his or her family or others; and abuse of emotional / romantic relationship. In identifying such factors, few practitioners appeared to make a distinction between vulnerability as a form of susceptibility to trafficking, and abuse of vulnerability as a means by which trafficking occurs or is made possible.

2.2 The Trafficking in Persons Protocol and the “means” element of the definition

As noted previously, Article 3 of the Trafficking in Persons Protocol sets out a definition of trafficking that comprises three separate elements: an *action*; a *means* by which that action occurs or is made possible; and a *purpose* to the action, which is specified as exploitation. States parties must then use this definition to criminalize trafficking in persons in their domestic law. The first component of the definition, the “action” element, is one part (and in the case of trafficking in children, the only part) of the definition that will constitute the *actus reus* of trafficking. This element can be fulfilled by a variety of activities including but not limited to the undefined practices of recruitment, transportation, transfer, harbouring or receipt of persons. The final element of the definition, “for the purpose of exploitation” introduces a *mens rea* requirement into the definition. Trafficking will occur if the implicated individual or entity *intended* that the action (which in the case of trafficking in adults must have occurred or been made possible through one of the stipulated means) would lead to exploitation.²³ Trafficking is thereby a crime of specific or special intent (*dolus specialis*).²⁴

The second part of the *actus reus* of trafficking, the means element (threat or use of force or other forms of coercion, abduction, fraud, deception, *abuse of power* or of

23 The Trafficking in Persons Protocol does not define “exploitation,” rather providing a non-exhaustive 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”. Trafficking in Persons Protocol, at Art 3(a). The travaux préparatoires indicate that the words “at a minimum” were included to ensure that unnamed or new forms of exploitation would not be excluded by implication: Travaux Préparatoires for the Organized Crime Convention and Protocols, at 343, note 22 and at 344, note 30.

24 UNODC Anti-Trafficking Practitioners’ Manual (2009), Module 1, at 4. UNODC further notes that domestic law could enable mens rea to be established on a lesser standard than direct “intent” (such as recklessness, wilful blindness or criminal negligence): *ibid*.

a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person) is relevant only to trafficking in adults. This aspect of the definition confirms the position already reflected in earlier treaties on the subject that individuals can end up in a situation of exploitation through indirect methods such as deception and fraud as well as by physical force. Beyond a clarification of *abuse of a position of vulnerability*, discussed below, none of the stipulated “means” is defined and there appears to be significant overlap between some of them.

Coercion is an umbrella term, used previously in the trafficking context to refer to a range of behaviours including violence, threats and deceit, as well as *abuse of a position of vulnerability*.²⁵ In the Trafficking in Persons Protocol, the definition refers to “threats and use of force and other forms of coercion” clearly linking coercion with the threat and use of force, and potentially, signifying a separation between what are often seen to be the direct and less direct “means” by which individuals are moved into or maintained in situations of exploitation. Deception and fraud are examples of less direct means and will generally relate to the nature of the promised work or service, and/or the conditions under which an individual is to undertake that work or perform that service. There has been little discussion to date about the requisite seriousness or extent of the coercion, deception or fraud that could constitute a “means” for the purposes of the definition of trafficking.

“Abuse of power or of a position of vulnerability” is identified as an additional means through which individuals can be recruited, transported, received, etc. into situations of exploitation. “Abuse of power” has appeared previously in international conventions.²⁶ No precise definition is provided in the Trafficking in Persons Protocol itself and the *travaux préparatoires* confirms that its exact meaning was disputed during the drafting of this instrument.²⁷ During discussions on “abuse of authority” (an earlier, alternative formulation), drafters noted that the term “should be understood to include the power that male family members might have over female family members in some legal systems and the power that parents might have over their children.”²⁸

The concept of abuse of a position of vulnerability was, at the time of its adoption, unique to the Trafficking in Persons Protocol. The *travaux préparatoires* to the Protocol include an interpretative note to the effect that reference to the 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

25 See, for example, European Parliament Resolution on trafficking in human beings, Resolution A4-0326/95 of 18 January 1996, OJ C 032, Feb. 5, 1996 (“deceit or any other form of coercion”); Council of Europe 1997 Joint Action on Trafficking (“coercion, in particular violence or threats, or deceit”); 2000 Committee of Ministers Recommendation (“coercion, in particular violence or threats, deceit, abuse of authority or a position of vulnerability”).

26 See, for example, the 1910 White Slavery Convention.

27 *Travaux Préparatoires for the Organized Crime Convention and Protocols*, at 343, note 20.

28 *Ibid.*

involved.” The Interpretative Note does not explain what is meant by “real and acceptable alternative”.

Apart from an almost identical reference in a 1997 EU Ministerial Declaration,²⁹ the term, and the wording of the Interpretative Note, had previously not appeared elsewhere. Additional information on the origin of the concept was sought from government officials and others who were involved in the drafting process.³⁰ Those discussions were generally inconclusive, beyond appearing to confirm that:

- The concept was introduced very late in the negotiations (Article 3 was the penultimate article to be finalized), and at a very late stage in the finalization of Article 3;
- It reflected a general desire on the part of the Drafting Group to ensure inclusion of, in the words of one participating official interviewed for the Survey: “the myriad, more subtle means of coercion by which people are exploited.”
- It also reflected a compromise in respect of the debate on whether “non-coerced” adult migrant prostitution should be covered by the definition: abuse of a position of vulnerability was seen as an avenue through which the range of exploitative practices identified as trafficking could potentially be expanded – while being sufficiently vague to not lock States into any fixed position on the contentious issue of prostitution.

The *travaux préparatoires* provide no insight in relation to the final point. They do however confirm that abuse of a position of vulnerability did not appear in any of the draft definitions until the very last moment, in October 2000, at the session in which Article 2 was finalized.³¹

The precise meaning of the term “the giving or receiving of payments or benefits to achieve the consent of a person having control of another person” is similarly unclear. For example, is this aspect of the “means” element limited to situations in which legal control is exercised by one individual over another (e.g., a parent over a child) or can it be extended to include *de facto* control (such as that which may be exercised by an employer over an employee)? How does this means differ from abuse of power or abuse of a position of vulnerability? The *travaux préparatoires* provide no guidance and available interpretative documents are equally silent.

29 Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation,” Apr. 26, 1997.

30 Confidential interviews, April 2012.

31 Travaux Préparatoires for the Organized Crime Convention and Protocols, at 345-346. The Travaux Préparatoires do however confirm that the concept was in fact raised much earlier, at the fourth session of the Ad-Hoc Committee, by Belgium, which proposed the inclusion of an additional ‘means’, after reference to coercion, of: “through abuse of the particular vulnerability of an alien due to that person’s illegal or precarious administrative status, or through the exercise of other forms of pressure or abuse of authority such that the person has no real or acceptable choice but to submit to such pressures or abuse of authority”. Ibid, pp 354-355, referring to UN Doc. A/AC.254/L.57.

Discussion with government officials who were present at the drafting process appear to confirm that inclusion of this element was intended to directly address the buying and selling of persons, adults as well as children.³² It was pointed out that in relation to trafficking in children, it is not necessary to establish “means” and that such acts were anyway included in the “action” element. Different officials provided a similar explanation: the purpose was to ensure that no form or means of trafficking would be excluded, even if this resulted in overlap and unnecessary inclusions.

2.3 Regional Instruments

The Council of Europe Convention against Trafficking in Human Beings 2005 (the European Trafficking Convention) and the EU Trafficking Directive 2011/36/EU provide some guidance on the concept of abuse of a position of vulnerability.

The European Trafficking Convention reproduces the definition of trafficking set out in the Trafficking in Persons Protocol including the element of “means”. However, beyond a brief note on a common *modus operandi* of traffickers,³³ and a confirmation that a wide range of means must be considered,³⁴ the Explanatory Report that accompanies the Convention does not shed significant light on what is to be understood by the terms force, coercion, abduction, fraud, deception, abuse of power and the giving or receiving of payment or benefit to achieve consent of a person having control over another person:

The Commentary does provide additional explanation of the term: *abuse of a position of vulnerability*, stating that:

the vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim’s immigration status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights

32 Confidential interviews, April 2012.

33 “Fraud and deception are frequently used by traffickers, as when victims are led to believe that an attractive job awaits them rather than the intended exploitation.” European Trafficking Convention Explanatory Report, at para 82.

34 “A wide range of means therefore has to be contemplated: abduction of women for sexual exploitation, enticement of children for use in paedophile or prostitution rings, violence by pimps to keep prostitutes under their thumb, taking advantage of an adolescent’s or adult’s vulnerability, or abusing the economic insecurity or poverty of an adult hoping to better their own and their family’s lot. However, these various cases reflect differences of degree rather than any difference in the nature of the phenomenon, which in each case can be classified as trafficking and is based on use of such methods.” European Trafficking Convention, Explanatory Report”, at para 84.

and violate human dignity and integrity, which no one can validly renounce.³⁵

The implementation mechanisms established under the Convention have now been operating for several years. Thus far however, they have not expanded on this comment or provided any additional insight into the means element of the definition.

EU Trafficking Directive 2011/36/EU also generally reproduces the definition of trafficking set out in the Protocol.³⁶ It explicitly adopts the language of the Trafficking in Persons Protocol's Interpretative Note in defining "position of vulnerability" as "a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved."³⁷ However it is important to note a significant difference. The Interpretative Note refers to "real and acceptable alternative" appearing to require that both elements be satisfied. The language of the Directive requires only that the alternative be "real" or "acceptable". As with the Interpretative Note, the terms "real alternative" or "acceptable alternative" are not further elaborated or defined.

The notion of vulnerability – although not explicitly abuse of vulnerability, is also raised in the recital to EU Trafficking Directive 2011/36/EU in the context of penalties:

When the offence is committed in certain circumstances, for example against a particularly vulnerable victim, the penalty should be more severe. In the context of this Directive, particularly vulnerable persons should include at least all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability.³⁸

2.4 Supplementary sources of insight

In its capacity as guardian of the Organized Crime Convention and its supplementing Protocols, UNODC has produced a number of resources and guides that consider, or at least touch on, the concept of abuse of a position of vulnerability.

The Legislative Guide to the Convention and Protocols, released in 2004, makes only passing reference to the "means" element of the trafficking definition, briefly referring to the Interpretative Note on abuse of vulnerability and to some limited examples of state practice.³⁹ However the 2009 UNODC Model Law on Trafficking in

35 European Trafficking Convention, Explanatory Report, at para. 83.

36 European Union Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Article 2(1).

37 Ibid, Article 2 (2).

38 Ibid, Recital paragraph 12.

39 Legislative Guide, pp 268-269.

Persons is more expansive: offering two “definitions” of abuse of vulnerability for States Parties to consider in developing their own legislative responses.⁴⁰ The first definition reproduces the substance of the Interpretative Note: “Abuse of a position of vulnerability” shall refer to any situation in which the person involved believes he or she has no real and acceptable alternative but to submit.⁴¹ The second definition refers to: “taking advantage of the vulnerable position a person is placed in as a result of:

- Having entered the country illegally or without proper documentation;
- Pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance;
- Reduced capacity to form judgments by virtue of being a child, illness, infirmity or a physical or mental disability;
- Promises or giving sums of money or other advantages to those having authority over a person;
- Being in a precarious situation from the standpoint of social survival; or
- Other relevant factors.”⁴²

The commentary attached to this provision confirms the open-ended nature of the list of vulnerability factors, noting that other elements, such as abuse of the economic situation of the victim could also be included.⁴³ A comparison between the listed vulnerability factors and the proposed definition of coercion in the Model Law reveals some overlap. For example, it is suggested that “abuse or any threat linked to the legal status of a person” and “psychological pressure” are both forms of coercion that would satisfy that aspect of the means element.⁴⁴

The commentary to the Model Law also touches on the different perspectives on which a definition of abuse of vulnerability can focus: “on the objective situation or on the situation as perceived by the victim”. This latter approach is favoured by one

40 UNODC, Model Law against Trafficking in Persons (United Nations publication, Sales No. E.09.V.11), pp. 10-11. Available from www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf.

41 UNODC, Model Law against Trafficking in Persons (United Nations publication, Sales No. E.09.V.11), pp. 10-11. Available from www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf.

42 UNODC, Model Law against Trafficking in Persons (United Nations publication, Sales No. E.09.V.11), pp. 10-11. Available from www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf.

43 UNODC, Model Law against Trafficking in Persons, p. 9.

44 UNODC, Model Law against Trafficking in Persons, p. 11.

of the cited examples, a model anti-trafficking statute, produced by the US State Department in 2003.⁴⁵ Ultimately however, the Model Law recommends that:

In order to better protect the victims, Governments may consider adopting a definition focusing on the offender and his intention to take advantage of the situation of the victim. These may also be easier to prove, as it will not require an inquiry into the state of mind of the victim but only that the offender was aware of the vulnerability of the victim and had the intention to take advantage of it.⁴⁶

This position appears to be reflected, at least in part, in the following definition of abuse of a position of vulnerability, contained in the Arab Model Law on Combating Trafficking in Persons:

Exploitation of physical, mental, or psychological disability or a given legal status, or any particular situation that may affect the will or behaviour of the person where she/he has no real and acceptable alternative but to submit to the abuse involved.⁴⁷

Although the ILO's two instruments on forced labour, the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), do not refer to the notion of "abuse of vulnerability", the ILO supervisory bodies have considered the notion in examining national legislation and practices aimed at combatting forced labour, as well as the practices that constitute forced labour.⁴⁸ In 2009 the ILO and the European Commission jointly developed a list of operational indicators of human trafficking, which sought to reflect "a consensus among European experts on what indicators should be used to characterize the various elements of the definition of trafficking for data collection purposes".⁴⁹ The production of these indicators was justified as necessary: "because key terms used

⁴⁵ "Abuse of a position of vulnerability means such abuse that the person believes he or she has no reasonable alternative but to submit to the labour or services demanded of the person, and includes but is not limited to taking advantage of the vulnerabilities resulting from the person having entered the country illegally or without proper documentation, pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance, or reduced capacity to form judgments by virtue of being a child." US Department of Justice, Model State Anti-Trafficking Criminal Statute (2003), cited in UNODC, Model Law against Trafficking in Persons, p. 10.

⁴⁶ UNODC, Model Law against Trafficking in Persons, pp 9-10.

⁴⁷ At the time of writing, it was reported that the final text of an Arab Model Law on Combating Trafficking in Persons had been submitted the Arab Council of Ministers of Justice for its endorsement. The cited definition is set out in Article 1(8) of that draft.

⁴⁸ In particular, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has noted the adoption of legislation referring to the abuse of the situation of vulnerability of a person for the purpose of labour or sexual exploitation, and that the presence of this element can be considered an indicator of a situation where the consent of the worker has been vitiated. See, for example, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC, 10st Session, ILO 2012, Part II: Observations Concerning Particular Countries, p. 245 (Argentina).

⁴⁹ International Labour Office and the European Commission, Operational Indicators of Trafficking in Human Beings (2009), p. 2.

in the Palermo Protocol require further elaboration.” The document noted, in particular, questions around the means element of trafficking, including the concepts of coercion, deception, fraud, abuse of power or of a position of vulnerability, and control over another person.⁵⁰ The list includes sixteen indicators for *recruitment by abuse of vulnerability*, each graded as a medium or weak indicator (none are identified as “strong”). Seven similarly graded indicators of *abuse of vulnerability at destination* are also provided.⁵¹ However, because they were primarily developed for research and data collection purposes, the ILO-EC indicators do not provide additional guidance on the key questions that are being examined by this study.⁵²

More recently, the ILO has produced a tool intended to help States measure the problem of forced labour (Survey Guidelines).⁵³ While the ILO Survey Guidelines, like the ILO-EC indicators, were not designed to provide legal guidance on the concept of APOV, this instrument is of particular interest because it directly addresses the abuse of a position of vulnerability in the context of forced labour: a phenomenon that overlaps with, or at least is closely linked to trafficking.⁵⁴ The Survey Guidelines identify abuse of vulnerability as a means of introducing an individual into, or maintaining him or her in a situation of forced labour. The following definition is provided:

Abuse of vulnerability, including threats of denunciation to the authorities, is a means of coercion where an employer deliberately and knowingly exploits the vulnerability of a worker to force him or her to work. The threat of denunciation is used especially in the case of irregular migrant workers. Other instances of abuse of vulnerability include taking advantage of the

50 Ibid, p. 1.

51 Each of the indicators is separately defined. See Explanations for indicators of trafficking for sexual exploitation (ILO, 2009) and Explanations for indicators of labour exploitation (ILO, 2009).

52 Indeed, it is important to note that ILO-EC indicators were developed as a practical assessment tool for researchers designing surveys on trafficking and practitioners (such as labour inspectors) seeking to identify victims of trafficking, “whether or not the case has been prosecuted as such”. Operational Indicators of Trafficking in Human Beings, p.2. As such, while noting the trafficking definition in the Trafficking in Persons Protocol, and organizing the indicators around its key elements, the list of indicators does not constitute interpretive guidance regarding the Protocol and its provisions, and its application in the context of statistical surveys could produce a finding at variance with the Protocol’s trafficking definition.

53 ILO, *Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children*, International Labour Office, 2012.

54 Concerning the relationship between forced labour and trafficking, the survey instrument notes that “forced labour is closely linked to human trafficking”, citing the CEACR’s explanation that “trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour provided under Article 2, paragraph 1 of the [forced labour] Convention.” Ibid. pp. 12, 19. While acknowledging that the Protocol’s definition does not require either movement or the involvement of a third party, the survey instrument considers whether these factors should be included in an “operational definition of trafficking for forced labour, for the purpose of data collection.” Ibid, pp. 19 (emphasis in original). This discussion forms part of a broader debate about the scope of the trafficking definition referred to at 2.2 above. See further A. Gallagher, *The International Law of Human Trafficking* (2010) at pp. 35-36, 47-53.

limited understanding of a worker with an intellectual disability and threatening women workers with dismissal or with being forced into prostitution if they refuse to comply with the employer's demands.⁵⁵

The Survey Guidelines helpfully note certain limits to the concept of abuse of vulnerability:

...the obligation to stay in a job because of the absence of alternative employment opportunities, taken alone, does not equate to a forced labour situation; however, if it can be proved that the employer is deliberately exploiting this fact (and the extreme vulnerability which arises from it) to impose more extreme working conditions than would otherwise be possible, then this would amount to forced labour".⁵⁶

The definition of forced recruitment in the Survey Guidelines also implies limitations:

when, during the recruitment process, constraints are applied to force workers to work for a particular employer against their will – *it being understood that poverty and a family's need for income are not recognized as indicative of such coercion: the coercion or constraints must be applied by a third party*".⁵⁷

While the ILO Survey Guidelines are an important addition to current discussions about abuse of vulnerability, and may indeed be helpful in understanding how to define relevant crimes, several of the caveats noted above with respect to the ILO-EC Indicators are also applicable here. Most significantly, the purpose of the instrument is not to explore and explain concepts that can be used to define the crime of forced labour – but rather, to help facilitate the collection of national statistics on forced labour.

2.5 Conclusions on the concept in international law and policy

A careful review of relevant international and regional legal and policy instruments, as well as a range of interpretative and supporting texts, supports the following preliminary conclusions:

APOV is accepted as an integral part of the definition of trafficking: The concept of abuse of a position of vulnerability, together with the other means listed in the Trafficking in Persons Protocol has been accepted as a distinct and important part of the international legal definition of trafficking. It has survived intact, in all major treaties adopted after the Protocol that incorporate a definition of trafficking, as well as in policy documents and interpretative texts.

55 Ibid, p. 16.

56 Id.

57 Ibid, p. 11.

The intentions of the drafters of the Protocol with respect to APOV are unclear: official legislative history does not shed light on how or why the concept was included, at the last minute, within the means element of the definition of trafficking. Informal information indicates that inclusion of APOV, (along with “abuse of power” and “the giving and receiving of payments to secure the consent of a persons having control over another person”), was intended to ensure that all the different and subtle means by which an individual can be moved, placed or maintained in a situation of exploitation were captured. There is also some indication that the very ambiguity of the term was deliberate: enabling consensus to be reached between States with very different views on whether, and how, the issue of prostitution should be dealt with under the Protocol.

International law does not define APOV; official guidance on how the concept is to be understood is ambiguous: none of the means cited in the Protocol definition are themselves defined. The drafting history of the Protocol confirms that “abuse of a position of vulnerability” is to be understood as referring to “any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved”. No further guidance is provided. It is unclear what “real and acceptable alternative” actually means. It is also unclear whether it is the state of mind of the victim or of the alleged perpetrator that is relevant to a determination of whether vulnerability has been abused.

Unofficial guidance around APOV is of limited usefulness: A number of different tools and documents, including several produced by UNODC and the ILO, provide guidance on the concept of APOV. Much of this unofficial guidance is concerned with identifying those factors that make persons vulnerable to trafficking – and thereby is focused on identifying victims of trafficking. It is not concerned with the more complex and fraught question of considering whether, from a criminal law perspective, a particular characteristic of the victim or his / her situation was abused, and therefore constitutes a means by which a person was subject to trafficking. In addition, suggested indicators of vulnerability are typically vague and open-ended. Little or no guidance is provided on how the proposed indicators could be applied in the context of a criminal investigation or prosecution – or of any attendant risks attached to such application.

3 National Law and Practice: Overview

This Part is intended to provide an overview of national law and policy in the twelve countries surveyed as it relates to the “means” element of trafficking: most particularly abuse of a position of vulnerability. For analytical purposes it has proven useful to divide surveyed States countries into four groups: (i) those that have reproduced the Protocol’s definition in their national law – including the concept of abuse of a position of vulnerability;⁵⁸ (ii) those that have reproduced the three elements of the definition but omitted one or more means including abuse of a position of vulnerability;⁵⁹ (iii) States that that have omitted the means element altogether: defining trafficking as an act done for the purpose of exploitation;⁶⁰ and (iv) States where the legislative situation is unclear or where the legal framework does not fit neatly into one of the above groupings (for example, means may be required under one instrument but not another – or the means element may be omitted but apparently taken into account in judicial decisions).⁶¹

The present chapter considers the way in which countries within these four groups have (or have not) dealt with the concept of abuse of vulnerability in both law and practice, with a view to laying the groundwork for a more detailed analysis of issues and trends in the following chapter.

Two preliminary points should be flagged at the outset. First, while the background materials collected for this study includes information on all relevant laws and cases, the summary analysis provided below is largely restricted to the principal anti-trafficking statutes of the countries of focus and only those judicial decisions that are directly on point. This may, for example, leave out consideration of the concept of abuse of vulnerability in related contexts, such as child sexual abuse and violations of labour laws. Second, the scope of analysis varies considerably between surveyed countries. This reflects both the depth of the survey undertaken in a specific country, as well as the availability of relevant information and case law.

3.1 States that have included abuse of vulnerability and related “means” within the definition

Abuse of a position of vulnerability is explicitly referred to as a “means” of trafficking in the legislation of three of the twelve surveyed countries: Egypt, Moldova and the Netherlands.

⁵⁸ Egypt, the Republic of Moldova and the Netherlands.

⁵⁹ Nigeria and the United States of America.

⁶⁰ Belgium and Canada.

⁶¹ Brazil, India, Mexico, Switzerland and the United Kingdom of Great Britain and Northern Ireland.

3.1.1 Egypt

Article 2 of Egypt's 2012 *Law No. 64 regarding Combating Human Trafficking* incorporates into its definition of trafficking all of the "means" stipulated in the Trafficking in Persons Protocol, including abuse of power, "exploitation of a position of vulnerability or need", and "a promise to give or receive payments or benefits in exchange for obtaining the consent of a person to traffic another having control over him. The means are provided in the definition of "a person who commits the crime of human trafficking".⁶² The concept also exists in relation to child abuse by virtue of Law No. 12/1996, amended by Law No. 126/2008.

None of the cited means are defined in the legislation and there is very little direct case law available that sheds light on their substantive content and scope of application in relation to trafficking in persons. In one recent case involving trafficking of eleven young girls for the purpose of sexual exploitation, the prosecution referred to the taking advantage of the victims' vulnerable position and need, noting that "[t]he defendants committed a trafficking of human beings crime by dealing in natural persons... for the purpose of exploiting them in acts of prostitution for financial gains through taking advantage of their vulnerable position and their need."⁶³ Abuse of power owing to the relationship between some of the victims and the perpetrators was also relevant in this case, and reflected as aggravating circumstances. The Survey Report notes that legislation and case law have considered APOV and abuse of power in other contexts. For example, in the context of forced marriage "abuse of authority" has been interpreted by the Court of Cassation to require the existence of "real authority".⁶⁴ The Egyptian Civil Code identifies a range of vulnerability factors that can deprive, diminish or in general reduce the capacity of the person to form and exercise judgments, including lack of capacity (minors, mental disability); physical disability where this leads to an inability to express one's will; and "emotional deficiencies" including "manifest impetuosity and unruly passion".⁶⁵ In considering the concept of coercion, the Survey Report notes that the Egyptian Court of Cassation has acknowledged both physical and moral coercion. Such coercion must be established to have diminished the will of the victim such that the crime can be considered to have been committed against the will of the victim and without his or her consent.⁶⁶

62 Law No. 64 regarding Combating Human Trafficking (Egypt, 2010), article 2.

63 Case No. 8959/2012, Giza Criminal Court.

64 The defendant may, for example, be an ascendant, descendant, custodian or guardian of the victim or may otherwise have authority over the victim or be responsible for his or her supervision or care. The Survey Report cites several cases in support of this interpretation including Case No. 9077, Judicial Year 63, Session 6/6/1994, Year 45 of the Technical Bureau, Vol. 1, P. 714, Rule No. 9; Case No. 3874, Judicial Year 63, Session 5/6/1995, Year 46 of the Technical Bureau, Vol. 1, P. 893, Rule No. 1; and Case No. 3874, Judicial Year 63, Session 5/6/1995, Year 46 of the Technical Bureau, Vol. 1, P. 893, Rule No. 1. Survey Report, p. 55.

65 Survey Report, p. 55.

66 *Id.*

The relevant provision of the Egyptian legislation is particularly interesting because of the expansion of the concept to include “need” as well as “vulnerability”. One practitioner noted that “need” was explicitly included in the law to encompass poverty as a key vulnerability factor. In considering the scope and application of this provision, he also noted an apparent connection between abuse of vulnerability or need and the notion of “will” or “consent”: he asserted that if the position of vulnerability or need is considered to diminish the will of the victim, then the crime may come to be deemed to have been committed against his or her will.⁶⁷

3.1.1.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from a review of available materials and discussions with a practitioner:

- The absence of a definition of APOV has resulted in considerable confusion and the need for judicial interpretation.
- The concept of APOV has generally been applied in situations of sexual abuse and exploitation, often of minors, for whom APOV and other means need not be established in trafficking contexts.
- Relationship with other means: APOV was noted as having been relied on in conjunction with other means or, alternatively, where other means were not relevant or could not be proven on the facts of the case. Given that none of the stipulated means are defined in legislation, judicial discretion is required to attach meaning to concepts as well as the appropriate distinctions to be made between them⁶⁸.
- Relationship to consent: obtaining a conviction where APOV is at issue requires vitiation of victim consent. However, specific acts intended to vitiate that consent are not required of the perpetrator. It is sufficient that he or she takes advantage of the vulnerability of the victim, and that abuse results in the vitiation of the victim’s consent.

67 Correspondence, cited in Survey Report, p. 53. Article 3 of the Law states, inter alia, that: “The consent of the victim to exploitation in any of the forms of human trafficking shall be irrelevant as long as any of the means stipulated in Article (2) of this law have been used”.

68 For instance, Egyptian courts have recently tended to apply both APOV and abuse of power in cases concerning the marriage of minor girls for sexual exploitation. In one recent case (Case No. 1685/2010 Giza Criminal Court, Session 20 May 2010), the Court condemned the aging husband on charges of sexual abuse and molestation, and other parties (the victim’s parents, the mediators and the lawyer who oversaw the marriage formalities) on charges of facilitating her exploitation in accordance with Article 291 of the Penal Code on child trafficking and exploitation.”⁶⁸ According to information received from an expert practitioner, there is general agreement within the judiciary, that minority status and incapacity reflect the position of vulnerability set out in Law No. 64/2010, such that it undermines to the extent that “the minor or incapacitated has no realistic and acceptable alternative but to submit to exploitation”.

3.1.1.2 Evidentiary Issues

- Evidentiary challenges in proving APOV were noted to be more significant in situations where vulnerability is created by the trafficker, as opposed to in cases where pre-existing vulnerability factors are present (such as in the cases of youth, pregnancy and disability).
- Where APOV has arisen in sexual abuse cases (particularly of children), criminal courts are required only to prove that the offender was aware of the victim's vulnerability and intended to take advantage of that vulnerability, without any further investigation into the state of mind of the victim.
- APOV is established by proving that: (i) such abuse by the defendant vitiated the consent of the victim, and (ii) the trafficker knew of the victim's vulnerability. Knowledge is generally shown through the relationship between the perpetrator and the victim.⁶⁹

3.1.2 The Republic of Moldova

The crime of trafficking in persons in the Republic of Moldova is established through the 2005 *Law on Preventing and Combating Trafficking in Human Beings*, and the 2002 *Criminal Code*. The definition of trafficking in persons in the former generally corresponds to that set out in the Trafficking in Persons Protocol, including in respect of the element of "means". The only substantial difference is a considerably expanded definition of exploitation in relation to the "purpose" element. The definition of trafficking in persons in Article 165 of the Criminal Code and trafficking in children in Article 206 of the Criminal Code also generally follows the Protocol.

In 2004, the Supreme Court of Justice offered interpretative guidance on the concepts contained in Article 165 and 206 of the Criminal Code, including "taking advantage of vulnerability conditions" and other relevant means.⁷⁰ The Court stated that:

"Trafficking in human beings" means the recruitment, transportation, transfer, harbouring or receipt of a person for the purpose of sexual commercial or non-commercial exploitation, through forced labour or services, in slavery or in conditions similar to slavery, use in armed conflicts or in criminal activity, removal of organs or tissues for transplantation, performed through: threat with the use or actual use of physical or mental violence not dangerous to the life and health of the persons, including kidnapping, seizure of documents and bondage, aimed at the repayment of

⁶⁹ In cases involving child victims, the law presumes that the offender knows the age of the child.

See for instance Case No. 2213, Judicial Year 6, Session 16/11/1936, Year 4 of the Technical Bureau, Vol. 1, p.714.

⁷⁰ Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova on application of legislative provisions in cases of trafficking in human beings and trafficking in children, No. 37 of 22 November 2004, published in the SCJ Bulletin No. 8, 2005.

a debt, the amount of which is not reasonably established; deceit; abuse of the vulnerable condition or abuse of power, offering or acceptance of payments or other benefits in order to obtain the consent of a person holding control over another person, with the use of violence dangerous for the life and physical or mental health of the person; torture, inhuman or degrading treatment, in order to ensure the obedience of the person, or rape, taking advantage of physical dependence, use of arms, threat of disclosure of confidential information to the family of the victims or to other persons, as well as through other means.⁷¹

While this interpretation retains the three-element structure of the Protocol's definition, there are a number of distinctions that can be made, several of which are directly relevant to the issue under discussion. In relation to the "means" element, for example:

- "Abuse of vulnerable condition" replaces "abuse of a position of vulnerability".
- A number of additional and / or distinct "means" are identified: (i) "taking advantage of physical dependence"; (ii) threat of disclosure of confidential information to the family of the victims or to other persons; (iii) rape; (iv) torture, inhuman or degrading treatment in order to ensure the obedience of the person; and (v) debt bondage.
- Other means, not specified in the list are envisaged.

The same Court provided interpretations for several of the identified means including both abuse of power⁷² and "offering or receiving of payments or other benefits, in order to obtain the consent of a person holding control over another person".⁷³ The concept of abuse of vulnerability / vulnerable condition was determined by the Court to consist of traffickers taking advantage of the special state in which a person finds himself/herself, as a result of: an insecure situation from the viewpoint of social survival; a condition due to pregnancy, illness, infirmity,

71 Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova on application of legislative provisions in cases of trafficking in human beings and trafficking in children, No. 37 of 22 November 2004, published in the SCJ Bulletin No. 8, 2005. (Hereafter Supreme Court of Moldova: Decision 37/2004).

72 "Abuse of power [also the subject of a separate offence under Article 327 of the Criminal Code] is the exaggerated use by a special subject – responsible person, representing the public authority – of his/her powers, he/she has been vested with by the law." Ibid, para 5.9. Note that as abuse of power is limited to that power exercised by public authorities, it can be presumed that other power relationships (for example, between an employer and employee would fall within the Court's understanding of abuse of a position of vulnerability.

73 "Offering or receiving payments or benefits, in order to obtain the consent of a person holding control over another person consists of an understanding between the persons mentioned, interested in obtaining the consent regarding the transfer of the victim and his/her use for [exploitative ends]". Ibid, para 5.10. "A person holding control over another person is such a person that legally or illegally keeps under control the victim's activity and profits by such power in the process of trafficking. Id.

physical or mental disability; or an insecure and illegal situation in connection with entering or residing in a transit or destination country. The Court noted that: “the state of vulnerability may be conditioned by various factors: the victim’s isolation, his/her difficult material or mental state, family problems or the lack of social resources etc.”⁷⁴ It affirmed that the concept encompasses: “any kind of vulnerability: mental, affective, family, social or economic. It encloses the range of desperate situations that may make a human being accept his/her own exploitation”.⁷⁵ Unsurprising for a country of origin, abuse of that vulnerability is generally considered to be for the act of recruitment and appears to relate to pre-existing vulnerabilities, as opposed to those created by the trafficker.

Discussions with practitioners confirmed that, in Moldova, “abuse of a position of vulnerability” plays a critical role in differentiating situations of trafficking in persons from related crimes. Prior to legislative amendments introducing trafficking in persons, trafficking for the purpose of sexual exploitation would be prosecuted as pimping, generally with low sentences often waived in exchange for a fine. An investigation of pimping may now become an investigation of trafficking in persons when it is determined that an individual was forced into sex work or was in a socially vulnerable situation. Proving the element of “abuse of a position of vulnerability” is essential to differentiate consent given by a sex worker, and consent that has been vitiated in a trafficking context. Similarly, the fact of victim’s social vulnerability is referred to in qualifying the relevant crime as one of trafficking in persons as opposed to a crime of forced labour.⁷⁶

The Supreme Court decision cited above was the only case located in the course of the survey. Secondary sources, including NGO reports, provide some additional insight: suggesting, for example, that many persons identified as having been trafficked in Moldova were recruited through abuse of their vulnerable position.⁷⁷ Other sources appear to confirm that the overwhelming majority of convictions for trafficking in Moldova are related to sexual exploitation.⁷⁸ Whether, and to what extent, abuse of a position of vulnerability formed the basis of any prosecutions is unclear although practitioners interviewed provided anecdotal information on cases that touched on abuse of vulnerability as a means of trafficking.

3.1.2.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from the discussions with practitioners:

⁷⁴ Ibid, para 5.8.

⁷⁵ Id.

⁷⁶ Practitioner interviews, Survey Report, p. 87.

⁷⁷ Centre for Prevention of Trafficking in Women, Regional Legal Best Practices in Assistance to Victims of Trafficking in Human Beings (2007), p. 8.

⁷⁸ US State Department Trafficking in Persons Report 2011, Republic of Moldova Country Narrative.

- Practitioners are of the view that it is possible to successfully prosecute a human trafficking case in which “abuse of a position of vulnerability” is the only means used, though often other means are present, notably threat or use of force and deception (as to the conditions of work)
- “Abuse of a position of vulnerability” is considered essential to bolster other means such as deception. For example, deception can be made possible *through* abuse of an individual’s vulnerability.
- Relationship with other means: Because it is possible to run a prosecution on the basis of several different means, it may be counter-productive to attempt to draw clear distinctions between those means that have been defined in a way that confirms their close relation (specifically, APOV, abuse of power, and “offering or acceptance of payments or other benefits in order to obtain the consent of a person holding control over another person”). Practitioners did however make a distinction between “violent” means of committing trafficking acts (particularly recruitment) including threats or use of force and “non-violent” means, including deception and APOV.
- Relationship with coercion: The main difference between “abuse of a position of vulnerability” and “coercion” is considered to be the involvement of force (including threats and intimidation) in the latter case.⁷⁹ APOV, by contrast, is seen as involving subtle manipulation of the victim: through for example creation of an image of care and support for a person who has less control over his or her life (owing to low mental capacity for instance) and/or who is looking to escape their present circumstances (of poverty, emotional, physical or sexual abuse). After having achieved the trust and consent of a victim (for example, to move elsewhere for an opportunity), traffickers may then use coercion to control and exploit victims.
- Relationship with consent: Despite the law affirming the irrelevance of consent in establishing whether trafficking has occurred, consent is nonetheless important in distinguishing the crime of trafficking from other crimes (such as pimping). Consent is clearly vitiated through use of one of the more direct means such as force, or threats or use of violence. APOV is important in establishing that consent has been vitiated in less clear cases that could potentially also be prosecuted as pimping.

3.1.2.2 Evidentiary Issues

In relation to evidentiary issues, it was noted that proving APOV in Moldova requires: (i) proof of the victim’s vulnerable condition, and (ii) proof that this condition was abused by the defendant.

⁷⁹ Coercion is not defined in the relevant laws and Supreme Court of Moldova: Decision 37/2004 discussed above did not provide any guidance. However, this interpretation is supported by the reference to ‘threat or use of force or other means of coercion’ in the definition set out in Art 2(1) of the Trafficking Law.

In relation to *proving* vulnerability, the following key points were mentioned:

- Proof of a victim's vulnerability could relate to a single vulnerability factor or to several and the court is required to consider the totality of the victim's circumstances. For example, economic vulnerability may be established by proving that the victim has no assets, is unemployed or underemployed, and has qualified for social assistance. Such conditions are commonly established through testimony of neighbours, relatives or others who are aware of the victim's circumstances.
- Victim vulnerability may also be proven in court through evidence that shows social security assistance documents have been issued. It was noted by several persons interviewed that this approach can make APOV much easier to prove than deception, which may have occurred abroad and/or in private with no witnesses present or available. This evidentiary imbalance has served to further bolster APOV as a useful alternative to "deception" in the means element of the crime.
- Practitioners noted that while using the social security system to establish vulnerability objectively has distinct evidentiary advantages, it could also be problematic given the abuse of social security systems and allegations of corruption in relation to the issuing of benefits.
- Where the vulnerability relates to a physical or mental state, the testimony of expert witnesses including doctors, psychologists, social workers and pedagogues can be used.

In relation to *proving abuse of vulnerability*, the following key points were mentioned:

- This aspect was noted as being the more challenging than proving vulnerability, particularly in light of the Supreme Court's affirmation that "the subjective aspect of human trafficking is direct intention,"⁸⁰ and the resulting requirement to show proof of the defendant's knowledge of the victim's vulnerability.
- Practitioners considered that it is generally sufficient to establish that there was a relationship between the trafficker and the victim, such that the trafficker knew of the victim's vulnerability. This is not difficult as many victims are related to or from the same community as their traffickers.
- Establishing knowledge of vulnerability can be difficult when victims refuse to testify against or otherwise incriminate their exploiters. This challenge underscores the need for victims to be properly supported including with adequate psychological care.

⁸⁰ Supreme Court of Moldova: Decision 37/2004, paragraph 11.

- Other practical evidentiary challenges raised included the difficulty of proving precarious situations of persons who had been trafficked for exploitation abroad and the limited capacity of law enforcement with respect to proactive investigations that could potentially uncover evidence of abuse of vulnerability.

3.1.3 The Netherlands

Article 273f of the Dutch Criminal Code, which defines trafficking, includes a means element that is relevant to establishing the crime of trafficking in adults. This element generally corresponds to that of the Trafficking in Persons Protocol definition. It includes: “misuse of a vulnerable position”, as well as “misuse of authority arising from the actual state of affairs”, and “giving or receiving remuneration or benefits in order to obtain the consent of a person who has control over this other person”.

In October 2009 the Supreme Court issued interpretative guidance on the concept of “abuse of a vulnerable position”.⁸¹ The case concerned six Chinese irregular migrants who, desperate for work and afraid of being discovered by authorities, approached a Chinese restaurant owner. They were provided accommodation and work that paid well below the statutory minimum wage. A district court initially ruled that this set of facts did not constitute trafficking in persons because “abuse of a position of vulnerability” implies that the perpetrator takes the initiative. In this case, the victims took the initiative by approaching the restaurant manager, in some instances, “begging” him. The Court of Appeal upheld this decision, confirming that “abuse of authority arising from the actual state of affairs” and “abuse of a vulnerable position” requires a certain initiative and positive action on the part of the perpetrator, whereby the weaker or vulnerable position of the victims is consciously abused. The case was appealed to the Supreme Court, which took the view that it was *not* necessary for the perpetrator to take initiative. It also disagreed with the lower court that the perpetrator must “intentionally abuse” the vulnerable position of the victims. The Supreme Court held that “conditional intent” is sufficient: it is enough that the perpetrator was aware of the state of affairs that must be assumed to give rise to power or a vulnerable position.

The Supreme Court also offered guidance in respect of “exploitation”; noting that while general definitions cannot be provided as cases must be assessed on their circumstances, the frame of reference should be generally accepted standards in Dutch society. In this case, the relevant measure was Dutch (not Chinese) minimum wages. Exploitation was found on the basis that the payments made were about half the Dutch minimum wage for long working hours, few days off and accommodation in shared bedrooms. The case was referred back to the Court of

⁸¹ Supreme Court, 27 October 2009, LJN: B17099408. See also: L. van Krimpen, ‘The interpretation and implementation of labour exploitation in Dutch Case Law’, in C. Rijken (ed), ‘Combating Human Trafficking for Labour Exploitation’, 2011, p. 498.

Appeal, which subsequently convicted one of the two suspects on the charge of human trafficking.⁸²

While previous cases appear to point to an initially broad reading of the concept of “misuse of a vulnerable position”,⁸³ it is clear that the 2009 Chinese restaurant case has significantly strengthened “misuse of a vulnerable position” as a means of trafficking. Certainly the breadth of the new understanding of this means has been affirmed in subsequent cases.⁸⁴ The decision has also reportedly led to a rise in the number of prosecutions and convictions for labour trafficking.⁸⁵ One report states that, following the decision, “[t]he means of coercion most often charged is misuse of a vulnerable position.”⁸⁶

Importantly, the concept of “abuse of authority arising from the actual state of affairs” in Dutch legislation is considered to be broader in scope than “abuse of power” as set out in the Trafficking in Persons Protocol. Practitioners noted that there was no clear distinction between this means and that of abuse of a position of vulnerability and that, in their view, such a distinction was not useful. Though abuse of authority may have more to do with the relationship between the perpetrator and the victim, (indeed, the National Rapporteur has clarified that there does not have to be inequality in a relationship for there to be abuse of a vulnerable position)⁸⁷, situations in which power is abused also may give rise to abuse of a situation of vulnerability.⁸⁸

82 Den Bosch Court of Appeal, 17 September 2010, LJN BN7215. A third suspect was convicted for human trafficking earlier that year: Den Bosch Court of Appeal, 19 February 2010, LJN: BL5492.

83 See for instance, Fleurtop case, The Hague District Court, 21 November 2006, LJN: AZ2707 (Fleurtop).

84 For example, the Mehak case (involving the trafficking of Indians into domestic labour), where the court stated “The fact that they perhaps also believed they were doing these people a favour by allowing them to work for them in the Netherlands does not detract from [the human trafficking (The Hague, District Court, 14 December 2007, LJN: BC1195 and LJN: BC1761).

85 Trafficking in Human Beings, Seventh Report of the National Rapporteur, p. 536.

86 Van Krimpen, L., ‘The interpretation and implementation of labour exploitation in Dutch Case Law’, in Connie Rijken (ed), ‘Combating Human Trafficking for Labour Exploitation’, 2011, p. 498.

87 NRM, Trafficking in Human Beings, Seventh Report of the National Rapporteur, (BNRM, 2009), p. 413.

88 Several cases were cited in this regard: Leeuwarden District Court, 10 February 2009, LJN: BH2373, referred to in NRM, Trafficking in Human Beings, Seventh Report of the National Rapporteur, (BNRM, 2009), p. 517-518 (involving abuse of power and vulnerability by a social worker of his client); Amsterdam District court, 21 December 2007, LJN: BC1037, referred to in NRM, Trafficking in Human Beings, Seventh Report of the National Rapporteur, (BNRM, 2009), p. 413 (Court found “abuse of authority arising from the actual state of affairs” in relation to a victim’s deep love for the suspect who pretended he wanted to build a life with her); and Den Bosch District Court, 19 February 2009, LJN: BH3388, referred to in NRM, Trafficking in Human Beings, Seventh Report of the National Rapporteur, (BNRM, 2009), p. 413 (Court found no “abuse of authority arising from the actual state of affairs” in a situation where the suspect told the victim, who was in love with him, that he had debts and they could buy a house together).

3.1.3.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from the discussions with practitioners and those monitoring the prosecution of trafficking cases in the Netherlands as well as from a review of relevant literature:

- The *Chinese Restaurant Case* is praised for offering clarity and precedent for other courts to apply and is seen to have improved opportunities for prosecution in both theory and practice. While significant increases have been seen in prosecutions for labour exploitation, similar increases are evident across the range of exploitative purposes.
- It was noted that since the decision, “abuse of a position of vulnerability” is the easiest “means” to prove. In some cases (for example those involving abuse of a romantic relationship), it is the only available means.
- There is some unease, however, about whether all convictions achieved for human trafficking as a result of the guidance offered by the Supreme Court were indeed crimes of human trafficking. It is possible that there has been some blurring of the line between irregular employment of irregular migrants and human trafficking; and between unfair or difficult employment and human trafficking. (This is discussed further below in the context of the connection between APOV and exploitation).
- Relationship with abuse of power: APOV is seen to overlap with abuse of power / authority. In the *Chinese Restaurant Case*, for example, the victims’ vulnerable position gave rise to the perpetrator’s position of power. The court did not distinguish between the two means, simply emphasizing the perpetrator’s “conditional intent” [to exploit].
- Relationship with coercion: APOV and other means are ultimately considered to be forms of coercion: while coercion (a “severe” means) may appear to imply more force than APOV (a “softer” means),⁸⁹ the distinction is not really relevant to securing a conviction for trafficking. It may however be relevant to sentencing decisions: with cases involving “severe” means attracting higher penalties than cases not involving violence or threats.
- Relationship with exploitation: The relationship between “means” and “exploitation” (i.e. as the purpose of trafficking) was considered to be an important but a difficult one, with several different dimensions. Sometimes, establishing a “means” such as APOV can help when there are questions about whether “exploitation” was the intended purpose. For example, proper

⁸⁹ See, for example, Amsterdam District Court, 9 June 2009, LJN: BI6950, referred to in NRM, *Trafficking in Human Beings*, Seventh Report of the National Rapporteur, (BNRM, 2009), p. 415 (coercion does not necessarily have to consist of physical violence, threats or financial coercion, but can also arise because the victim finds herself in a situation of dependence in which, under the circumstances, she has no other choice but to enter or stay in a situation of exploitation).

application of means could ensure that persons trafficked for criminal purposes (such as drug smuggling) are identified and not prosecuted.⁹⁰

- The meaning of exploitation has become more significant in light of the broadening of the concept of “abuse of a position of vulnerability”. One expert stressed that exploitation should not be construed too broadly and that not everyone who receives below minimum wage is exploited. There does appear to be some indication that the courts are in fact interpreting “exploitation” more narrowly. In one case for example, while finding that victim vulnerability may well have been abused, the court was unable to find intent to exploit as the victims appeared free to leave the situation.⁹¹
- Conversely, a broad interpretation of exploitation, coupled with the broader understanding of APOV, appears to have resulted in cases that do not amount to trafficking being successfully prosecuted as trafficking.⁹²

3.1.3.2 Evidentiary Issues

In relation to evidentiary issues, the following key points were mentioned:

- It is now established that to prove “abuse of a position of vulnerability”, it is sufficient to prove “conditional intent” on the part of the suspect.
- Proof of conditional intent is not straightforward. The courts have held, for example, that in relation to mental impairment, conditional intent requires more than evidence of such impairment and evidence that the suspects had sought out persons with mental impairment. It is also necessary to show that the suspects *knew* of the impairment.⁹³
- Proof of vulnerability can be adduced from victim and witness statements as well as expert testimony. The standard of proof for establishing the accused

⁹⁰ Note however, that in the Fleurtop case (irregular immigrants used exploitatively to cultivate cannabis), the Court found that the requisite means had been established (abuse of authority arising from the actual state of affairs and abuse of vulnerable position) but that intention to exploit was not. The charge of trafficking was accordingly dismissed. The Hague District Court, 21 November 2006, LJN: AZ2707, referred to in NRM, *Trafficking in Human Beings*, Seventh Report of the National Rapporteur, (BNRM, 2009), pp.504-505. Similar facts were at issue in the Van stekkie tot stickie case (Rotterdam District Court, 5 July 2007, unpublished), referred to on pp. 507-508.

⁹¹ Referred to in NRM, *Trafficking in Human Beings*, Seventh Report of the National Rapporteur, (BNRM, 2009), pp.520-521. For more on Dutch interpretations of exploitation, see also Van Krimpen, L., ‘The interpretation and implementation of labour exploitation in Dutch Case Law’, in Connie Rijken (ed), ‘Combating Human Trafficking for Labour Exploitation’, 2011, pp. 499-502.

⁹² One example provided was the “phone contracts case” in which fraud and threats made against persons with respect to their mobile phone contracts were found to have put the victims in a position in which they had no reasonable alternative other than to subscribe to the phone contracts. The suspects in that case were convicted of human trafficking. Dordrecht District Court, 20 April 2010, LJN: BM1743).

⁹³ Van Krimpen, *supra* at p. 503, referring to the Moroccan Drug Smuggling Case, Hague District Court, 17 February 2010, LJN: BL4298 and LJN: BL4279.

person's knowledge of that vulnerability is unclear. Practitioners noted that defendants can argue they were unaware of the victim's mental illness, or that the romantic relationship alleged to have been the source of abuse is a genuine one. Others considered the standard of proof to be quite low.

- Those who are being exploited may consider themselves better off than they would be if they were outside that situation. The evidentiary obstacles to proving APOV are greater when the victim does not identify as such and thereby has no incentive to cooperate in the prosecution of their exploiter.

3.2 States that have included only a restricted range of “means” within the definition

In some States, the definition of trafficking includes the three elements provided for in the Trafficking in Persons Protocol but does not refer to certain aspects of the Protocol's “means” element, including abuse of a position of vulnerability. That is the situation in two of the countries surveyed for this Issue Paper: Nigeria and the United States of America.

3.2.1 *Nigeria*

Article 64 of Nigeria's 2003 Trafficking in Persons (Prohibition) Law Enforcement and Administration Act states that:

“Trafficking” includes all acts and attempted acts involved in the recruitment, transportation within or across Nigerian borders, purchases, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion or debt bondage for the purpose of placing or holding the person whether for or not in involuntary servitude (domestic, sexual or reproductive) in force or bonded labour, or in slavery-like conditions.

Article 19 of the same act also criminalizes enticing a child or a person of unsound mind out of the country without lawful consent, as well as the use of deception or compulsion “to induce any person to go from any place”. No purpose is stipulated in relation to both offences although they appear to be used in combination with Article 16, concerning foreign travel of a person for the purpose of prostituting that person.

For present purposes, it is relevant to note that only deception, coercion and debt bondage are provided for as “means” of trafficking in Nigerian legislation. The legal framework around trafficking is currently under review.

The absence of APOV in legislation means that there are no cases available that explicitly consider the use of this means. However, a review of available cases did provide some general insights into how the “means” element of the definition is understood and applied by the courts – as well as into situations where the

availability of “abuse of a position of vulnerability” in legislation could have made a difference to prosecutions.

Generally, judgments do not appear to consider carefully or distinguish between the means used in a particular situation. However, where deception is advanced as the relevant “means” in cases of trafficking for sexual exploitation abroad, the Courts appear reticent to convict a suspect where the victim knew that he or she would be working in prostitution.⁹⁴ However, one practitioner expressed the view that courts are always willing to convict when the elements of section 16 and other relevant sections are proven. Judgments also appear to imply that the taking of “juju” oaths is a coercive means resulting in victims feeling that they have no real or acceptable alternative to submit to the exploitation, though it is not necessarily categorized as “deceit”, “threat” or other particular type of coercion.⁹⁵

3.2.1.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from a review of materials and discussions with practitioners and researchers:

- While the concept of abuse of a position of vulnerability is not part of the relevant legal framework, practitioners considered this to be a frequent means by which individuals are moved into or maintained in situations of exploitation. Several practitioners considered that APOV was “implied” in the definition as well more directly inferred in other provisions of the act relating to sexual abuse of children.
- Practitioners confirmed a strong overlap between the various stipulated means in terms of their substantive meaning as well as in terms of how they are used. In practice, stipulated means are often accompanied by an abuse of vulnerability. For example, it is easier for traffickers to deceive vulnerable people who they will target on the basis of their vulnerability.
- More specifically, it was argued that APOV is implied as a key component of deceit, in that some people are so vulnerable that they do not have the capacity to question offers made. Victims’ lack of economic capacity, education and literacy makes them highly susceptible to trafficking through the means of inducement, deceit and threats or force.

94 See for instance Case of AG v Hussaina Ibrahim and Idris Aminus Suit No. K.1TPP.2003, Case of AG v Samson Ovensari, Suit No. B.15c.06 and Case AG v Samuel Emwiovbankhoe, Suit No. B.20C.2005. In the latter case there was conflicting evidence as to whether or not the victims and their families knew that they were being transported for prostitution.

95 See, Case of AG and Felicia Okafor, Suit No. A.12C.06, Case of Federal Republic of Nigeria and Favour Anware Okwuede, Charge No. FHC.ASB.24C.09; Case of AG v Samuel Emwirovbankhoe, Suit No. B.20C.2005; and Case of AG v Constance Omoruyi, Charge No. B.31C.2004.

- Relationship with abuse of power: Abuse of power (also undefined by legislation) is generally understood to include power wielded by public officials and by anyone else who exercises control over another person.
- Abuse of a position of vulnerability was considered to be a particularly common means of trafficking with respect to children. Coercion was noted as being a less common means because generally minors will resist less than adults.
- Relationship with coercion and other means: Coercion was differentiated from the stipulated means of deception and from APOV on the basis that it is less “subtle”. For example, where initial abuse of a victim’s vulnerability through deceitful offers fails, coercion may be then applied. Similarly, where abuse of a position of vulnerability and deceit *are* successful at the recruitment phase, coercion may be used at the transit or destination phase where the victim becomes less cooperative.

3.2.2 *United States of America*

The 2000 Trafficking Victims Protection Act (TVPA)⁹⁶ is the major legislative instrument on trafficking in persons in the USA. While there are some distinctions between the definition of trafficking set out in the TVPA and that contained in the Protocol, the former adopts the Protocol’s three-element approach: requiring an “action” (recruitment, harbouring, transportation, provision, or obtaining) through a “means” (force, fraud, or coercion) for a specified purpose (subjection to involuntary servitude, peonage, debt bondage, or slavery).⁹⁷ As with the Protocol, the means element is waived in the case of trafficking in children.

The principle questions to be asked in the present context are whether the stipulated means of force, fraud or coercion incorporate aspects of abuse of a position of vulnerability and, if so, how and to what extent.

A review of relevant case law and discussions with practitioners appears to confirm that, in relation to establishing the offence, aspects of victim vulnerability are most often and most closely associated with “coercion” which, in this context, must amount to “threat of serious harm” (see definition below). In the words of one practitioner, vulnerability is thereby “an adjective describing someone’s susceptibility to coercion”.

Key points that have been drawn from relevant case law include the following:

96 Trafficking Victims Protection Act (2000) Pub.L.No. 106–386, para. 2A, 114 Stat. 1464 (2000) (TVPA), as supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L.No. 108–193, 117 Stat. 2875 (hereinafter 2003 TVPRA), the Trafficking Victims Protection Reauthorization Act of 2005, Pub.L.No. 109–164, 119 Stat. 3558 (2006) (hereinafter 2005 TVPRA), and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub.L.No. 110–457, 122 Stat. 5044 (2008) (hereinafter 2008 TVPRA) (codified at 22 USC, para.7101).

97 TVPA, para.103(8).

- The victim's special vulnerabilities serve to amplify the defendant's coercive scheme.⁹⁸
- The victim's special vulnerabilities including their background, experience, education, socioeconomic status, and inequalities vis-à-vis the defendants "are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve".⁹⁹
- "Special vulnerabilities" of the victim may be considered in determining if a victim felt compelled to work,¹⁰⁰ and in determining "whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain the victim's labor or services".¹⁰¹
- Special vulnerabilities can also include the victim's age, status as an illegal alien, physical and mental condition and lack of contact with anyone other than the defendant.¹⁰²
- Special vulnerabilities have been found in respect of victims where they were in the United States on temporary-work visas sponsored by the defendants, had little money on arrival in the United States, and were entirely dependent on the defendants for their housing and transportation.¹⁰³

In summary, it appears clear that while APOV is not included as an explicit means in the US understanding of trafficking in persons, considerations about the existence of vulnerability and its abuse can be relevant to both proving the listed means of 'coercion', and the exploitation. Similar to the approach taken in other countries (notably in Canada and Belgium) where APOV is at issue, it is relevant to proving exploitation, not as a means of committing the 'act'.

The standard of proof in such cases has been the subject of internal guidelines issued by the Department of Justice, which states that:

In determining if the defendants' scheme coerced the victims to perform labor or services, the relevant inquiry is not whether their conduct would have been sufficient to intimidate or coerce an educated, English-speaking American to remain in the defendants' service. Rather, the proper analysis

98 See *United States v. Farrell*, 563 F.3d 364, 374 (8th Cir. 2009) (citing *Kozminski*, 487 U.S. at 952).

99 *Kozminski*, 487 U.S. at 948 (interpreting 18 U.S.C. § 1584).

100 *Bradley*, 390 F.3d at 152-53 (upholding jury instruction in 18 U.S.C. § 1589 prosecution).

101 *United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002).

102 *United States v. Djoumessi*, 538 F.3d 547, 552 (6th Cir. 2008) (applying 18 U.S.C. § 1584); *Bradley*, 390 F.3d at 152-53. Also *Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002) (discussing the vulnerability sentencing enhancement under 18 U.S.C. § 1584); H.R. Rep. No. 106-939, at 101 (2000) (Conf. Rep.) ("[S]ection 1589's terms and provisions are to be construed with respect to the individual circumstances of victims that are relevant in determining whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain the victim's labour or services, including the age and background of the victims.").

103 *Farrell*, 563 F.3d at 374.

*is whether the defendants' conduct would intimidate and coerce a reasonable person in the victim's situation to believe he or she must remain in the defendants' service.*¹⁰⁴

This guidance echoes the definition of "serious harm" (that establishes coercion), which is included in the statutory prohibition on forced labour as a means of "providing or obtaining the labor or services of a person":

"Serious harm" means any harm, whether physical or non-physical, including psychological, financial or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or continue performing labor or services in order to avoid incurring that harm.¹⁰⁵

In addition to its relevance in establishing the offence of trafficking, vulnerability is also relevant to sentencing within stipulated minimum and maximum penalties. Federal sentencing guidelines, which apply irrespective of the precise basis of the prosecution, require an increase in penalties "if the defendant knew or should have known that a victim of the offense was a vulnerable victim".¹⁰⁶ The attached commentary refers to "a victim who is unusually vulnerable due to age, physical or mental condition or who is otherwise particularly susceptible to the criminal conduct". The commentary further notes that the adjustment applies in situations where the defendant "knows or should have known" of the victim's unusual vulnerability".¹⁰⁷ There is some case law available in which "special vulnerabilities" in the context of trafficking are discussed in relation to sentence enhancement.¹⁰⁸

In relation to the application and broader context of the relevant concepts, the following additional points emerged from the discussions with practitioners:

- The trafficking rubric in the US very much reflects the historical concept of slave owner and slave. The idea of powerful persons exploiting the less powerful underlies the US statute and also the theme of the case from the perspective of judges and juries, as well as prosecutors.
- The US had long-established case law around concepts such as "vulnerability". The language of the TVPA emerged from and in many respects codified this body of common law.
- Statutory definitions of concepts such as "vulnerability", "serious harm", and "abuse" draw on court decisions and jury instructions.

104 Emphasis added.

105 18 U.S.C. § 1589.

106 Federal Sentencing Guidelines Manual (2011), Adjustment 3.A.1.1.

107 Id.

108 For example, Calimlim Case (United States Court of Appeals for the Seventh Circuit, Nos. 07-1112, 07-1113 & 07-1281 (2008))

- Prosecutors who worked on such cases were involved in drafting the relevant statutes. This has contributed to legislation that is familiar to courts. The “reasonable person” concept provides a case in point: while such a concept is inherently vague, it benefits from a strong history and courts are generally comfortable in considering and applying it.
- The relevant tests permit courts to distinguish between cases that are severe enough to constitute trafficking (or forced labour) and those that are not. Even if some measure of exploitation is made possible through a person’s vulnerability, this is not, of itself sufficient. The conduct itself must meet the “relative severity” test.

3.3 States in which the “means” element is not explicitly included in the definition

At least two States surveyed for this study have adopted a definition of trafficking that comprises only two elements: an “action” and an exploitative “purpose”.¹⁰⁹ Within this group there are substantial differences in how the means by which the action occurs or is made possible, including abuse of vulnerability, are considered. Of the countries surveyed for this Issue Paper, both Belgium and Canada fall into this category.

3.3.1 Belgium

Belgium criminalized trafficking in 2005 through several pieces of legislation.¹¹⁰ The law does not explicitly require proof of means in order to establish trafficking in persons; only the act, (any form of recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that persons), and the exploitative purpose (sexual exploitation, forced labour, employment in circumstances contrary to human dignity, removal of tissues or organs, and forcing a person to commit a crime against their will) need to be established. In practice, this means that sexual exploitation and employment in conditions contrary to human dignity will amount to trafficking in persons, regardless of whether any means were used.

Under Belgian law, the “means” element only becomes relevant when determining whether the established offence was accompanied by “aggravated circumstances” and thereby subject to different and harsher penalties. Three levels of “aggravated

109 Note that legislation in several of the States categorized under 3.4 below could also fall into this category).

110 Trafficking in persons is criminalized by the Law containing Provisions to Combat Trafficking in Human Beings and Child Pornography (13 April 1995, with the Law of 10 August 2005 amending various provisions to strengthen the fight against trafficking human beings, and smuggling as well as the practices of slum lords). The Law of 10 August 2005 made trafficking in human beings an autonomous offence in the Belgian Criminal Code.

circumstances” are provided: two of which are relevant for the present study. The first level relates to an offence committed through “abuse of authority”.¹¹¹ The second level concerns offences committed against a minor or through a range of means including fraud, violence and coercion, as well as:

“by abusing the (particularly) vulnerable situation in which a person is, because of their illegal or precarious administrative situation, their precarious social situation, a pregnancy, illness, a disability or physical or mental impairment, such that the person actually has no real and acceptable alternative but to submit to the abuse.”¹¹²

None of the terms in this provision are further defined.¹¹³ However, the relevant interpretative note confirms that the provision refers to a situation in which the victim has “no real and acceptable choice” but to submit to the abuse. Further, practitioners assert that the listed circumstances of vulnerability offer sufficient guidance to allow practitioners understand the concept.

A ministerial directive establishing priorities in respect of trafficking investigations and prosecutions refers to: “the infringement of human dignity and abuse of a position of vulnerability” as prioritizing factors.¹¹⁴

Two cases were referred to in which the victim’s vulnerability was at issue. In a case of economic and domestic exploitation, the Correctional Court of Liège established abuse of the victim’s vulnerability on the basis that the victim was an orphan and that it was easier to submit her to trafficking in persons as she was alone. However, in this case, deception appears also to have been at issue. That the victim did not speak any Belgian national language and had no home in Belgium except with the traffickers, were also considered to be vulnerability factors.¹¹⁵ In another case, of sexual exploitation, the judge indicated that abuse of vulnerability can be established by the fact that the Bulgarian citizens were in a precarious administrative situation as a consequence of the fact that they need a work permit to exercise a job in Belgium and that without this document it is easy for the traffickers to exercise pressure on victims.¹¹⁶

111 The relevant provision of the Criminal Code refers to abuse of power in the context of an offence committed by a person who has authority over the victim or who abuses authority or facilities conferred by his functions, or by an officer or public officer, custodian or agent of the police force acting on the occasion of the exercise of its functions.

112 Ibid, Art. 433septies. <Inserted by L 2005-08-10/61, art. 12; Effective: 12-09-20.

113 There is some suggestion that abuse of a position of vulnerability also exists in prostitution-related crimes. Surveyed practitioners further noted that there was a harmonization of the concept in November 2011 and that a distinct ‘abuse of vulnerability’ offence has since been created. No further information was available.

114 Ministerial Directive Col 01/2007 concerning Investigative and Prosecutorial Procedure on Trafficking in Human Beings.

115 8eme, Chambre correctionnelle de Liege, 28 September 2011.

116 Cour d’Appel de Bruxelles, 17 October 2011.

Publicly available reports and summaries¹¹⁷ confirm that there have been a number of cases involving prosecutions for trafficking for purposes of employment in conditions contrary to human dignity. In one recent case, migrant workers were forced to work through threats of legal action for breach of contract. Their documents were also withheld. In another case, middle-aged East European men working in public restrooms for wages well below the official minimum were found to have been trafficked for employment in conditions contrary to human dignity. Vulnerabilities related to age and origin, were cited in the informal reports received on this case.

Information was made available on several cases in which abuse of vulnerability was found to constitute an “aggravated circumstance”. In a 2007 judgment, the Correctional Court in Ghent found such abuse of vulnerability with respect to migrant workers who were exploited for a long period of time, such exploitation being facilitated by their irregular status and their dependence on the suspects. The fact that the victims had themselves taken the initiative to seek work from the suspects did not alter the finding that their vulnerable position had been abused.¹¹⁸ In another trafficking case heard by the Bruges Correctional Court in 2007, abuse of the “precarious situation” of the victims (as defined in the Belgian Criminal Code) was found to constitute aggravating circumstances under the Code.

A number of cases addressing exploitative tendencies have offered additional insight into the concept of “vulnerability”. In several recent cases that were informally reviewed, the precarious administrative situation of the renters, who were migrants with no right to stay in Belgium and unable to rent elsewhere, was seen to have created vulnerability which was known to and abused by the accused.¹¹⁹

3.3.1.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from presentations made by practitioners as well as through discussions with practitioners and those monitoring the prosecution of trafficking cases in Belgium:

- Abuse of a position of vulnerability is generally understood to mean that the victim has no real other choice than to be exploited.
- The term “vulnerability” was intentionally left undefined in legislation. Concerns have apparently been raised by the judiciary about potential problems applying this concept in the absence of a clear definition. At the

117 Principally, the 2010 Annual Report of the Centre for Equal Opportunities and Opposition to Racism, ‘Trafficking in and smuggling of human beings (2010).

118 This case was referred to in Trafficking in Human Beings (Netherlands), Seventh Report of the National Rapporteur, p. 413.

119 Case citations and additional information available in background documents and Survey Report.

same time, some practitioners assert that the enumerated vulnerability factors constitute adequate guidance on how the concept of APOV is to be understood.

- Practitioners propose three elements to the concept: (i) difficult or precarious social situation arising not just from poverty but also illiteracy and other factors; (ii) unclear administrative situation, for example, illegal entry or residence; withholding of papers, threats to disclose irregular status; and (iii) physical and mental state and health of the victim.
- Relationship with abuse of power: Opinions differ on whether “abuse of power” is entailed within the concept of abuse of a position of vulnerability. Certainly there is a strong overlap: abuse of power almost invariably includes abuse of vulnerability. However, abuse of a position of vulnerability can occur without there also being abuse of power.
- Relationship with coercion: The concept of “coercion” (also only relevant to establishing “aggravating circumstances”) was seen to involve violence and threats as well as less direct means of forcing a victim to act against his or her will including withholding of documents; physical detention and threats to the victim or the victim’s family. Practitioners noted a distinction between coercion and APOV but this was not clearly explained.
- Relationship with exploitation: The concept of exploitation is particularly important given the absence of the means definition. As exploitation is defined to include violation of human dignity, this potentially creates a wide scope of application of the trafficking definition. Indeed, external reports have noted that non-compliance with labour laws and collective agreements have resulted in convictions for trafficking. The challenge of distinguishing between trafficking for economic exploitation and illegal employment, and between sexual exploitation and trafficking-related sexual exploitation, has also been noted.¹²⁰ However, one practitioner stressed that she has not seen evidence of such erroneous convictions. In her view, such concerns relate to potential risks rather than actual outcomes.

3.3.1.2 Evidentiary Issues

In relation to evidentiary issues, the following key points were mentioned:

- The evidentiary burden of establishing APOV appears to be somewhat low, because of the fact that this relates to penalties and not to the offence itself. Practitioners note that legislators deliberately sought to reduce the burden of proof for the Public Prosecutor.
- Establishing the vulnerability of victims is, in any event, considered to be generally very straightforward, particularly given that most identified victims

¹²⁰ US TIP Report 2011, Belgium country profile.

are irregular migrants without a right to work and are thereby inherently vulnerable.

- It is considered easier to establish APOV in situations of trafficking for sexual exploitation than in respect of trafficking for labour exploitation.

3.3.2 Canada

The crime of trafficking under Canadian law is comprised of only the “action” and “purpose” elements: both of which are differently phrased and somewhat wider in scope than the corresponding provisions of the Protocol’s definition.

The Canadian Criminal Code defines trafficking as: recruiting, transporting, transferring, receiving, holding, concealing or harbouring a person, or exercising control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation.¹²¹ A person “exploits” another for the purposes of this article if they:

- cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service; or
- cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed.

Proving exploitation under subsection 279.04(1) is a two-stage process. First, it must be established that the accused intended to cause a person to provide or offer to provide their labour or services. Second, it must be established that the labour or service was provided or would be provided as a result of conduct that, in all the circumstances, could reasonably be expected to cause the victim to believe that their safety or the safety of someone known to them would be threatened if they failed to provide their labour or service.

The concept of safety has been broadly interpreted by Canadian courts. It is not simply limited to physical harm but also includes mental, psychological or emotional safety. The test as to whether someone believed that their safety would be threatened if they failed to provide or offer to provide their labour or service requires proof that the conduct used by the trafficker is such that a reasonable person in the victim’s position, having regard to all of their circumstances, would have had such a belief. In other words, it is the nature of the conduct and the context in which the accused engages in that conduct that is integral to the determination of the reasonably expected effect on the victim.

121 Criminal Code (Canada), Art 279.01.

Recent *Criminal Code* amendments have created an evidential aid to assist the courts in Canada to determine whether a person has exploited another person under subsection (1). Subsection 279.04(2) states that:

In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused:

- (a) used or threatened to use force or another form of coercion;
- (b) used deception; or
- (c) abused a position of trust, power or authority.

Section 270.02 of the *Criminal Code* creates an indictable offence of receiving a financial or other material benefit, “knowing that it results from the commission of a [trafficking] offence”. Section 279.03 criminalizes the taking or withholding of travel or identity documents in order to commit or facilitate the commission of a trafficking in persons offence. Another relevant legislative provision is found in the *Immigration and Refugee Protection Act*, which creates the criminal offence of “knowingly organizing the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion”.¹²²

The role that “abuse of trust, power or authority” plays in determining whether exploitation has occurred under the Canadian trafficking offence has yet to be explicitly analysed by the courts. However, these concepts are familiar to Canadian law and have been considered in the context of other offences. For example, section 153 creates an offence of sexual exploitation that prohibits, among other things, anyone in a position of trust or authority over a young person or any person with whom the young person is in a position of dependency from engaging in sexual acts with that young person. It has been suggested that the concept of ‘position of trust’ should be interpreted in accordance with its primary meaning of confidence or reliance. The concept of “authority” has also been interpreted as not being limited to cases in which the relationship of authority stems from a role of the accused but extending to any relationship in which the accused actually exercises such a power.

The vast majority of convictions for trafficking in persons in Canada are, to date, the result of guilty pleas. This has resulted in very little analysis by courts, to date, in relation to the elements of the offence. However, as would be expected given the test for proving exploitation, a review of available case law does appear to confirm that “means”, including abuse of power or a position of vulnerability, are considered by the courts in the context of the narrative to establish exploitation. Certainly, factors commonly associated with vulnerability have been present in all cases examined. For example, in the first conviction achieved under Section 279.01 of the *Criminal Code*, exploitation was made possible through abuse of an

¹²² *Immigration and Refugee Protection Act* 2002, Article 118(1). The Act defines “organize” in this context, with respect to persons as including: “their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons. *Ibid*, Article 118(2).

emotional relationship followed by threats, intimidation and violence.¹²³ Similar means – abuse of an emotional or other relationship followed by more direct measures of intimidation and coercion – were present in other cases.¹²⁴

There has also been some consideration of the “action” element that indicates potential for this element to incorporate consideration of the means by which a person is placed or maintained in a situation of exploitation. Section 279.01 of the Criminal Code includes the “exercise of control, direction or influence” as a prohibited act, where it is committed for exploiting a person or facilitating their exploitation. In their limited consideration of the issue, Courts appear to have understood the concept as involving behaviour that leaves little choice to the person controlled. In one case involving a charge under Article 279.01,¹²⁵ the Court referred to a previous case,¹²⁶ in which the concept of “control, direction or influence of the movements of a person” was considered and the following definition offered:

“Control refers to intrusive behaviour, to holding sway over someone, leaving little choice to the person controlled and therefore includes acts of direction and influence. Exercise of direction over the movements of a person exists when rules or behaviours are imposed. The exercise of direction does not exclude the person directed having some latitude or margin of initiative. The exercise of influence includes less constricting actions. Any action done with a view to aiding, abetting or compelling that person to engage in prostitution would be considered influence.”

The Court explained the specific reference to prostitution as owing to the facts of that case, and pointed to section 279.04 which defines exploitation (see 1.2. above), and noted beyond reasonable doubt that the accused sought a financial or material benefit, knowing it resulted from “the exercise of control, direction or influence over the movements of” the complainant, with the intent of exploiting her. The court also found beyond reasonable doubt that the facts of the case showed that the accused exercised influence over the complainant’s movements with a view to abetting her to engage in sex work. The context of this act was one of “physical, psychological, sexual and material violence that could reasonably be expected to cause her to believe that her safety was or would be threatened if she were to show any reluctance to engage in this activity.”¹²⁷

123 R v Nakpagni (24 June 2008).

124 See, for example, Her Majesty the Queen v Juan Pablo Urizar (13 August 2010) and Her Majesty the Queen v Domotor and Kolompar, Karadi, (Domotor 2011 ONSC 626, 26 January 2011).

125 Her Majesty the Queen v Juan Pablo Urizar, Court of Quebec, Criminal Division, FILE NO: 505-01-084654-090, August 13, 2010.

126 Quebec Court of Appeal, R v Perreault, 113 CCC (3d), 573.

127 Her Majesty the Queen v Juan Pablo Urizar, Court of Quebec, Criminal Division, FILE NO: 505-01-084654-090, August 13, 2010, p. 26.

3.3.2.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from a review of materials and discussions with a practitioner:

- The legislative purpose behind the omission of the “means” element is said to have been to minimize the evidentiary burden and to focus the offence on the conduct which is critical to proving trafficking in persons, namely the intent to exploit another.
- The lack of legislative specificity regarding the conduct that can be relied upon to prove whether a person has exploited another person could be considered a major strength of the Canadian system, in that it can adapt to the facts of any given case.
- It was asserted that regardless of how a court defined a particular set of facts as constituting an “abuse of power”, or an “abuse of a position of vulnerability”, or something else, it had to be recognized that it all amounts to the same thing; a form of coercive practice used to maintain control over a person in order to compel that person to provide their labour or services.. In practice, therefore, a combination of means may be relevant to prove the exploitative purpose of the accused.

3.3.2.2 Evidentiary Issues

In relation to evidentiary issues, the following key points emerged:

- As noted above, the omission of “means” element of trafficking is said to have been aimed at decreasing the evidentiary burden on prosecutors and thereby increasing prosecutions. Proving exploitation will be context specific, requiring evidence of the nature of the conduct and the context in which the accused engaged in that conduct in determining the reasonably expected effect on the victim.
- The definition of exploitation does not require proof of a particular outcome, but rather requires proof of conduct “that in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service”. Application of this test will invariably require a consideration of the totality of the circumstances of the victim including the nature of his or her relationship with the accused. Case law confirms that pre-existing vulnerability, as well as physical, psychological, sexual and material violence are factors to be considered in such an assessment (although not as “means” to commit the crime of trafficking in persons).

- The undefined nature of exploitation is noted as offering evidentiary advantages in situations where more intangible control mechanisms are used by the perpetrator.

3.4 States where the legislative situation does not fit into the above or is unclear

In five of the twelve surveyed countries, the legislative situation was not sufficiently clear to enable their placement in one of the three categories set out above. In at least several cases, the relevant legal framework does not appear to contain a definition of trafficking at all. In other cases, the fragmented character of the legal framework meant that different determinations were possible in relation to “means” for different forms of trafficking. Note that the passing of a new law in Mexico after the initial country survey has resulted in the moving of this country from 3.2 (States that have included a restricted range of means within the definition) to the present category. The relevant analysis covers both the previous and current situations. Amongst the surveyed countries, Brazil, India, Mexico, Switzerland and the United Kingdom are included in this group.

3.4.1 Brazil

The legislative framework around trafficking in persons in Brazil is unclear. Indeed, the question of whether a means element actually exists in respect of Brazil’s anti-trafficking legislation cannot be directly answered.

The *National Policy to Combat Human Trafficking* officially and explicitly recognizes and incorporates the definition of trafficking provided by the Trafficking in Persons Protocol.¹²⁸ The only substantial variation between the National Policy and the Protocol on the matter of definition, is the failure of the former to reproduce the affirmation that consent is irrelevant when any of the stated means have been used. Concern has been expressed that this omission somehow serves to obviate the means element: in effect it creates a definition that comprises only the ‘action’ and ‘purpose’ elements.¹²⁹ However, as this particular provision of the Protocol does not appear to have any impact on the definition one way or another, such concern is likely misplaced.¹³⁰

128 Decree No. 5,948 promulgating the National Policy to Combat Human Trafficking.

129 GAATW, *Collateral Damage*, pp. 89-90.

130 See A. Gallagher, *The International Law of Human Trafficking* (2010) at pp. 27-28, noting the confusion that has resulted from this clumsy provision and stating that: “the reference to the non-applicability of consent merely affirms that the means element of trafficking (coercion, deception, abuse of authority, etc.) operates to annul meaningful, informed consent”. Ibid, p. 28. The author cites the UNODC Legislative Guide on this point: “[o]nce it is established that deception, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence”, and notes that it reflects a long-standing principle of international human rights law: ‘the intrinsic

It is generally understood that the National Policy requires legislation to be amended to integrate the accepted definition of trafficking. However, despite the apparent issuance of a decree to that effect, this has not yet happened. The various sections of the Penal Code that address trafficking for sexual exploitation and trafficking-related offences (such as reducing persons to conditions analogous to slavery – *trabalho escravo*) certainly do not fully reflect the Protocol’s definition, including with respect to the “means” element. For example, while mention is made of violence, threats and fraud, such means are relevant only to determining the applicable penalty, not to establishing the offence itself. Notably, trafficking in persons for labour exploitation is not specifically criminalized in Brazil. While the offence of reducing a person to conditions analogous to slavery would cover many end-purposes of such trafficking including forced labour, the relevant provisions are broader than trafficking, extending to include less-than-trafficking situations such as poor labour conditions.

There is very limited case law available to help clarify the situation in Brazil. It appears that few trafficking or *trabalho escravo* cases have in fact been prosecuted and reports are anyway rarely made public. While no directly relevant cases were found, it was noted that some case judgments have included consideration of issues related to abuse of a position of vulnerability: for example, the courts have, on occasion, noted the reliance of traffickers on the poverty, ignorance and helplessness of victims as well as on their lack of opportunity.¹³¹

3.4.1.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from discussions with practitioners:

- Practitioners asserted that abuse of a position of vulnerability is present in all cases of trafficking in persons, and that they had not encountered cases of trafficking in which the victim was not vulnerable.
- As noted previously, the concept is not defined and practitioners had different understandings as to its meaning. One considered that it is related to the “lack of a good expectation of life” which is then abused through deception. Another considered APOV to be related to a reduced capacity for self-defence (determined by a person’s social and economic position) that is taken advantage of.
- Relationship with coercion: The concept of “coercion” was generally viewed as involving an element of violence; with APOV being seen to involve psychological intimidation, deception or other non-violent means. Coercion

inalienability of personal freedom renders consent irrelevant in a situation in which that personal freedom is taken away”. Id.

¹³¹ These cases are discussed in more detail in the Survey Report at pp. 33-34.

was considered to be sufficient to establish “aggravating circumstances” while the less direct means associated with APOV were not.

- Relationship with abuse of power: The concept of abuse of authority / power (undefined in law and the subject of a separate offence under the Criminal Code) was also understood differently by those interviewed. One practitioner viewed it as relating both to situations involving officials and to situations involving family members. Another considered it restricted to family situations and a third explained the concept as pertaining to any type of power.

3.4.1.2 Evidentiary Issues

In relation to evidentiary issues, the following key points were mentioned:

- The evidentiary burden of establishing trafficking in persons is such that trafficking crimes are often prosecuted as pimping, participation in an organized criminal group, promotion of prostitution or maintenance of a house of prostitution.
- Victim unwillingness to cooperate in the prosecution of their exploiters is another challenge, made worse by the fact that victims see little or no value in being identified as having been trafficked. Returning victims are frequently not protected or supported, leading to their routine disappearance and a consequent failure to prosecute exploiters.

3.4.2 India

Trafficking in persons is prohibited by the Indian Constitution (Article 23) along with “begar [compulsory or bonded labour] and other similar forms of forced labour” as well as in the Immoral Traffic Prevention Act (ITPA). Neither instrument defines trafficking in persons and no reference is made to “means” of trafficking.¹³²

A further complication is introduced by the fact that the purpose of the ITPA is to prohibit “traffic” for the purposes of commercial sexual exploitation as an organized means of living. This has the effect of apparently conflating “traffic” with prostitution. Therefore, while the ITPA appears to encompass “means”-related notions such as abuse of power,¹³³ and inducement,¹³⁴ these means relate only to “seduction for prostitution”.

132 Although one expert has argued that abuse of a position of vulnerability is implicit in Section 6 of the ITPA, which refers to withholding of property and threats of legal proceedings in connection to detaining a person in a brothel.

133 ITPA Section 9.

134 ITPA Section 9.

Proposed amendments to the ITPA include the introduction of the following definition:

- 5A. Whoever recruits, transports, transfers, harbours, or receives a person for the purpose of prostitution by means of,—
- (a) threat or use of force or coercion, abduction, fraud, deception; or
 - (b) abuse of power or a position of vulnerability; or
 - (c) giving or receiving of payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons.

It is important to note that while proposed Section 5A would explicitly introduce concepts of “abuse of power”, “abuse of a position of vulnerability” and the “giving or receiving of payments or benefits...”, it would only be for “the purpose of prostitution” of another person.

The Indian Penal code criminalizes a number of offences that are not specifically dealt with in the ITPA, including procuring, buying and selling of human beings, importing or exporting human beings, buying and selling minors, coercing or forcing marriage of minors, kidnapping / abducting act using force for the purpose of trafficking, slavery and slavery like conditions, servitude, bondage and unacceptable forms of labour and other acts. Apart from coercion, which is defined in by Section 15 of the Indian Contract Act (1872) in relation to any act forbidden by the Penal Code,¹³⁵ no relevant definitions or offence elements are provided. A number of other pieces of Federal legislation are also relevant including the Bonded Labour (System) Abolition Act 1976; the Child Labour (Prohibition and Regulation) Act, 1986; the Transplantation of Human Organs Act, 1994; and the Juvenile Justice Act 2000.¹³⁶

Although several judgments on forced labour mention vulnerability, the survey did not find any cases in which the concept of APOV was explicitly addressed by the court. There have been a significant number of prosecutions for trafficking under the ITPA in the lower courts. However, as the central offence of the prostitution of another is considered akin to human trafficking, the means by which a victim was recruited or consent vitiated are not relevant to establishing the offence. A review of several cases nevertheless indicates that means are sometimes discussed and appear to be part of establishing whether or not an offence did take place.¹³⁷

135 Section 15 of the Indian Contract Act (1872) defines coercion as the “committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.”

136 The Goa Children’s Act 2003 contains a definition of trafficking in persons, which includes APOV as a ‘means’.

137 For example, *Mariakutty @ Thangam vs State of Tamil Nadu, Udthagamandalam Town Police Station (Criminal Appeals Nos. 62 an 64 of 1992, decided on 07.06.2002).*

While the parameters of the definition of trafficking in persons in the Constitution have not been adjudicated, the related concepts of *begar* and forced labour (including through abuse of vulnerability) have been subject to judicial interpretation.¹³⁸ In *PUDR v Union of India*,¹³⁹ the Indian Supreme Court offered the following guidance:

“...in a country where like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract, the employee, by reason of his economically helpless condition, may have been faced with Hobson’s choice, either to starve or to submit to the exploitative terms dictated by the powerful employer.”¹⁴⁰

Force (in the context of forced labour) was explained in the same case as follows:

“It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternative and compels him to adopt one particular course of action may properly be regarded as “force” and if labour or service is compelled as a result of such “force”, it would be “forced labour”. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour of service provided by him would be clearly “forced labour”. The word “forced” should not be read in a narrow and restricted manner so as to be confined only to physical or legal “force”...”¹⁴¹

138 See for instance *Sageer & Others vs State of U.P. & Others Habeas Corpus Writ Petition No. 70403 of 2011*, decided on 05.01.12 (judgment paras 32 – 34), *Bachpan Bachao Andolan vs. Union of India (UOI) and Ors, Writ Petition (C) No. 51 of 2006*, decided on 18.04.2011, and *Bandhua Mukti Morcha v Union of India* [1982 (2) SCC 253].

139 *PUDR v Union of India (The Asiad Games case)* AIR 1982 S.C. 1473. For further analysis of the case also see *Forced Labour and Human Trafficking: Casebook of Court Decisions* (ILO, 2009), pp. 42-45.

140 AIR 1982 S.C. 1473 at 1489.

141 AIR 1982 S.C. 1473.

3.4.2.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from a review of materials and discussions with practitioners and researchers:

- Several practitioners asserted that APOV and related concepts are implicitly contained in the laws and that the lack of specific reference was no hindrance to prosecuting trafficking. One expert believed that introduction of APOV and related means into the definition of trafficking would have no effect on convictions.
- The link between trafficking and forced labour in the Indian context is crucial, not the least because of the absence of a clear understanding of trafficking and the greater clarity around the constitutional prohibition of forced labour. One researcher argues that “abuse of a position of vulnerability” is integral to the notion of “force” that, at least in the Indian context, has been interpreted to extend to the “force of circumstance”.¹⁴² However this interpretation does not yet appear to have strong and consistent juridical support and the scope of its potential application is not clear.
- Relationship with abuse of power: Differences are apparent in practitioner understanding of the concept of “abuse of power” and its relevance to trafficking situations. One practitioner suggested that abuse of power is always present in any trafficking situation. Another argued that the concept is the flipside of abuse of a position of vulnerability, in that a broad view of the latter would be mirrored by abuse of a power. There is agreement that the concept is not limited just to the actions of public officials but extends more broadly to include other power relationships.
- Relationship with “giving or receiving of payments to secure the consent of a person having authority over another person”: This concept did not have great resonance with Indian practitioners, one of whom expressed the view that this is an overly complicated way of referring to situations of child trafficking.
- Relationship with coercion: Practitioners were also divided over the (in the Indian context, essentially theoretical) question of any link between coercion and abuse of vulnerability: one asserted that APOV can occur without coercion, another said that APOV is similar to coercion and that the former can not occur without the latter, given that coercion is understood to entail psychological or emotional pressure as well as physical force or duress.

142 P. Kotiswaran, ‘A Legal Realist Critique of ‘Anti-Trafficking’ Law’ DRAFT, p.7. Kotiswaran, one of the few academics to have considered these issues, argues more generally that abuse of a position of vulnerability is a “outlier” when compared with other ‘means’ stipulated in the Trafficking in Persons Protocol, most of which can be easily absorbed under the umbrella of the bound and familiar concepts of “force, fraud and coercion”.

3.4.2.2 Evidentiary Challenges

Evidentiary challenges were not directly relevant to the Indian situation given the nature of the legal framework. One expert commented that, in theory, there would be no great challenge to proving abuse of a position of vulnerability, because victims of trafficking are always vulnerable.

3.4.3 Mexico

Anti-trafficking legislation in Mexico exists at both the federal and state levels. States are responsible for investigating and prosecuting trafficking except where it occurs on federally administered territory or where Federal jurisdiction is invoked through reason of transnationality, involvement of organized crime, or involvement of public officials. Most States of the federation have passed legislation criminalizing trafficking, and many of them include APOV as a 'means' of trafficking. Yet there are significant inconsistencies between states including in the way in which the crime is defined. A new federal law, aimed at ensuring consistency across state and federal levels in terms of concepts applied and penalties imposed, entered into force in June 2012. As the survey was conducted prior to this change, the following analysis covers both the previous and current legislative situations.

Prior to the enactment of the new law, Article 5 of the 2007 Federal Law to Prevent and Sanction Trafficking in Persons prohibited:

“Promoting, soliciting, offering, giving, getting, transferring, delivering or receiving for himself or another person, a person, through physical or moral violence, deception or abuse of power to subject to sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of an organ, tissue or its component.”

The definition provided for three “means”: physical or psychological violence, deception and abuse of power by which an individual was (or was intended to be) “subjected to” (or “subjugated” into) exploitation. It did not refer to other means such as abuse of power or of a position of vulnerability. One expert, who was involved in the drafting of Mexico's original anti-trafficking legislation, explained that “abuse of a position of vulnerability” was originally included in an early draft of legislation, but ultimately removed because of the concern that all victims of trafficking are inherently vulnerable. Another expert noted that while all victims are indeed in a position of vulnerability, the need to prove the additional element of subjection, in addition to any means used would have been sufficient to overcome the risk of too many situations being classified as trafficking in persons. The term “subjected to” was undefined by the law. The precise translation into English is unclear, as is the question of whether the term introduced a fourth element into the offence that must be separately proven.¹⁴³

143 Practitioners explained “subjection” or “submission” as implying a state similar to but lower than domination. They asserted that “subjection” is in fact an additional element of the crime of

The new General Law on the Prevention, Punishment and Eradication on Trafficking in Persons and the Protection and Assistance to Victims creates a range of offences *related to* trafficking in persons, but does not address human trafficking per se. 'Means' and the element of subjection have been omitted from the understanding of trafficking related offences, such that the focus of the law is now on acts for the purpose of exploitation, explained in Article 10 as:

"Any act or omission of one or more people to attract, recruit, transport, transfer, retain, deliver, receive or harbour one or more persons for the purpose of exploitation."¹⁴⁴

Exploitation includes practices cited in the Protocol definition as well as forced begging; use of persons under eighteen years in criminal activity; illegal adoption of persons under eighteen years; and unlawful biomedical experimentation on humans.

Although the means element has been omitted, the use of certain means is identified as aggravating circumstances leading to harsher penalties. The victim's 'situation of vulnerability' is one such aggravating circumstance in relation to sexual exploitation of individuals and forced labour.¹⁴⁵ 'Situation of vulnerability' is defined in Article 4 as a:

"XVII. A particular condition of the victim arising from one or more of the following circumstances, that could result in the victim carrying out the activity, service or work asked or required by the perpetrator of the criminal offence:

Origin, age, sex, precarious socioeconomic status;

Level of education, lack of opportunities, pregnancy, violence and discrimination suffered prior to trafficking related crimes;

Immigration status, physical or mental disorder or disability;

Being a member or to come from an indigenous community

Being a person older than sixty years;

trafficking that must be proved in cases of both child and adult trafficking. The relationship between 'means' and the element of subjection was discussed with practitioners but the outcome is unclear. Certainly there is a view that in some cases the means (such as use of force) constitute the main element, whereas in other cases, the means complements or supplements the element of subjection. In this sense, subjection can be understood as a function of other factors, including abuse of a position of vulnerability. See further Survey Report at pp 69-70; 73.

144 Unofficial internet translation.

145 Also provided among aggravating circumstances are the means of situation of vulnerability force, deception, physical or psychological violence, coercion, abuse of power, addictions, a trust or hierarchical position, giving or receiving of payments or benefits in order to obtain the consent of a person who control over another person, serious injury or threat of serious injury, threat to report the victim's (irregular) immigration status to authorities, or other circumstances that reduce or eliminate the victim's will to resist. serious injury or threat of serious injury, or threat to report the victim's (irregular) immigration status to authorities. Not all of these means have been provided for as aggravating circumstances for all offences, and not all are defined by the General Law.

- Any type of addiction;
- A reduced ability to form judgments for being a minor, or
- Any other characteristic that is harnessed by the perpetrator of the criminal offence.¹⁴⁶

Prosecution and conviction rates in Mexico for trafficking and related offences are very low. At the State level, trafficking prosecutions are rarely pursued: trafficking-like situations appear to be prosecuted as other, less serious crimes such as pimping. No cases could be obtained from experts surveyed for the purpose of this report. Several case summaries were made available through another UNODC research initiative but these relate to pending trials and are thereby confidential. A small number of cases were found on existing databases. While vulnerability factors appeared to be relevant to the placing or maintaining of the victims in situations of exploitation, this angle was not explored.

3.4.3.1 Understanding / Application of the Law

At the time of conducting surveys with practitioners in Mexico, the new law had not yet entered into effect. The following key points emerged from a review of materials and discussions with practitioners and researchers relating to their understanding and application of the previous legal framework:

- While absent from legislation, the concept of abuse of vulnerability was seen to be an essential part of how trafficking is understood in Mexico. Practitioners were emphatic that considerations of abuse of vulnerability could be introduced through the additional element of “subjection” (i.e. that abuse of vulnerability can be referred to in order to prove subjection). The ambiguity of the term, the lack of any definition and the absence of any insight from case law makes it extremely difficult to understand how this worked in practice. (As noted above, the new Federal Law does not include ‘means’ as an element of the crime of trafficking, but rather, as aggravating circumstances of trafficking-related offences).
- Relationship with abuse of power: Abuse of power (specifically included as a “means” prior to 2012 legislation) was not defined and its application was correspondingly problematic. Practitioners considered that the term was to be understood as referring to situations of dependency arising from law, dependency, necessity, custom or belief. The “power” in question is one allows one individual to impose his or her will on the victim who cannot reject this. The new Federal Law of 2012 defines abuse of power, but as an aggravating circumstance for trafficking-related offences rather than an element of the crime of trafficking offence.¹⁴⁷

¹⁴⁶ Unofficial internet translation.

¹⁴⁷ Abuse of Power is defined by Article 4, XII of the 2012 General Law on Trafficking as harnessing the person by the perpetrator to commit the crime stemming from a relationship of family ties,

- Relationship with coercion: Practitioner views on “coercion” were less relevant as this concept was not part of the relevant legal framework. However, those interviewed did view coercion as implying some level of violence that would not seem to be present in the case of APOV. This understanding is affirmed by 2012 legislation that refers to forms physical and mental coercion as well as to physical and mental violence. Practitioners also noted overlaps between various means and the fluidity of the different concepts. For example, the means of “physical or moral violence” (both undefined) can very easily co-exist with deception or abuse of power.
- Relationship with consent: The role of “consent” in establishing a trafficking offence under the previous legal regime was unclear. If the victim appeared to have consented to the trafficking, then the law apparently required the prosecutor to show that the victim was not free to exercise his or her will and that, in fact, the consent was coerced. In practical terms, it seems that this requirement was nullified by the means element. However, prosecutors were insistent that victims are often shown to have “consented” to their exploitation and that this severely hampered prosecutions. Article 40 of the 2012 legislation explicitly states that “the consent given by the victim, regardless of age and in any type of offences under this Act shall to constitute grounds for excluding criminal responsibility.” Absent the consent-vitiating means from new offences under the Act, trafficking-related offences would seem to be construed very broadly.
- Relationship with exploitation: Under the new federal law enacted in 2012, exploitation has now become the key element of relevance to trafficking related crimes.

3.4.3.2 Evidentiary Issues

In relation to evidentiary issues, the following key points emerged:

- Relevant evidentiary issues raised by practitioners in respect of the previous law, all concerned the challenge of proving “subjection”: that element of the offence that is proven with reference to either one of the stated means (violence, deception, abuse of power) or with reference to the victim’s vulnerability. It is unclear whether it was sufficient to establish vulnerability of the victim or whether abuse of the victim’s vulnerability by the accused was required to be proven. (Note the element of subjection has been eliminated by the 2012 federal law).
- Vulnerability was considered to be most easily established through victim testimonies and difficult to establish in the absence of such testimony. In situations where it was necessary to show vulnerability (where the stipulated

sentimentality, trust, custody, employment, training, education, care, religious or any other relationship that involves dependence or subordination of the victim to the offender, including anyone with public office or holding him, or belonging to organized crime.

means of force, deception, abuse of power cannot be shown), victims often do not consider themselves as having been exploited. Typically, physical evidence supporting vulnerability is unavailable so victim unwillingness to testify makes successful prosecution very difficult.

- Partly in response to these challenges, Mexico has recently implemented, on a small scale, the use of expert, multi-disciplinary assessments to assist in understanding how the crime of trafficking was committed and to establish vulnerability. Such individualized assessments enable the full range of (often invisible) cultural, economic, social and personal factors to be considered in deciding whether a situation of vulnerability existed such that a person was coerced or deceived. The assessment report is provided in written form to the prosecutor, who, along with the judge, decides the weight that is attached to it. Overall however, practitioners considered that this new tool considerably strengthens the prosecutorial process. It is not clear whether, and if so how the reports go beyond providing insight into the victim's vulnerability to include insight into how that vulnerability was abused. The impact of the new law, particularly, removal of the means element, on these assessments is yet to be determined. Arguably, multi-disciplinary assessments will still be relevant for proving acts and exploitation, as well for providing appropriate protection and assistance.

3.4.4 Switzerland

Swiss legislation contains no explicit "means" element. The relevant provision of the Penal Code reads as follows:

Art. 182

Any person who, as a supplier, intermediary or customer, engages in the trafficking of a human being for the purpose of sexual exploitation, exploitation of his or her labour or for the purpose of removing an organ shall be liable to a custodial sentence or to a monetary penalty. The soliciting of a person for these purposes is equivalent to trafficking.

If the victim is a minor or if the offender acts for commercial gain, the penalty shall be a custodial sentence of not less than one year.

In every case, a monetary penalty must also be imposed.

Any person who commits the act abroad is also guilty of an offence. Articles 5 and 6 apply.

The Penal Code does not define "trafficking of a human being". This throws into some doubt how the (seemingly indispensable) "action" element of the offence is to be established.

Certain cases of trafficking in persons may also be prosecuted under specific sexual offences provisions of the Penal Code, several of which refer specifically to abuse of dependency status and the vulnerable position of a victim. For example, Article 195 criminalizes several forms of sexual exploitation including inducement into prostitution *through exploitation of a dependence or financial advantage*. Article 193 of the Code criminalizes inducement of a person to commit or submit to a sexual act by *exploiting a position of need or a dependent relationship based on employment or another dependent relationship*. Sexual acts with a minor over 16 years through *exploitation of a dependent relationship arising from the minor's education, care, employment or other circumstance* are prohibited under Article 188 of the Code, as is encouraging a minor to commit a sexual act by exploiting such a relationship.

Although the concept of “abuse of a position of vulnerability” is not explicitly contained in Swiss legislation, it has been considered by Swiss Courts. This appears to bear out a strong assertion of practitioners that international understandings of trafficking (as embodied in the Protocol) are accepted and applied by Swiss Courts.

Two key cases decided in the Federal Supreme Court in 2000 and 2002 respectively,¹⁴⁸ offer particularly useful guidance on the concept of “abuse of a position of vulnerability”. A relatively detailed analysis of the judgments in these early cases is warranted because of the influence they appear to have exercised over subsequent cases. It is relevant to note that these and all other cases cited in the following paragraphs concerned the trafficking of non-nationals for sexual exploitation.

In the 2000 case, the Court held that the question as to whether an individual working in prostitution was free or not must be answered on the basis of the actual circumstances of the individual case.¹⁴⁹ This must include a consideration of the particularities of the environment. In the case of prostitution, it is relevant to consider that those working in this industry are repeatedly exposed to discrimination and double standards, and a corresponding degree of social isolation. In both personal and financial terms, there are many potential dependencies, notably on pimps, brothel and saloon operators, particularly for prostitutes who do not have legal status in Switzerland. Therefore, the level of self-determination involved in a party relocating from one establishment to another must be viewed with more scrutiny than it is with other professions.¹⁵⁰

The key principle to emerge from the 2002 case was that a victim's consent is irrelevant if the perpetrator exploits her economic plight (considering her situation in the country of origin), such that the person can be considered a victim of trafficking.¹⁵¹ In its judgment, the Court reaffirmed that the particularities of the

148 BGE 126, IV.225 (2000) and BGE 128, IV.117 (2002).

149 BGE 126 IV.225 at p. 230.

150 BGE 126 IV.225 at p. 229.

151 In this case it was found that the individuals concerned, who were predominantly from Latvia, had come to work in prostitution in Switzerland to escape harsh economic conditions. Their

prostitution sector that must be borne in mind in assessing the “freedom” of sex workers to transfer from one brothel to another with the help of a mediator. Again it was noted that the question of whether sexual freedom is injured must be decided on the basis of the actual circumstances. The formal consent of the victim is not enough; it is imperative to ensure that such consent is effectively free of constraints.¹⁵² It was further noted that Swiss law must be read in accordance with international standards, including the Trafficking in Persons Protocol. This required the Court to consider, when assessing whether consent is vitiated, the conditions, in particular social and economic, in which the individual concerned agreed to be recruited for prostitution.¹⁵³ The Court affirmed that consent can be vitiated and trafficking can thereby occur if the person is in a “vulnerable state”, which may result from “economic or social conditions or difficult relationships of personal dependence and / or financial straight-jacket.”¹⁵⁴ The concept of consent must be interpreted restrictively, taking into account the multiple relations of dependence in which prostitutes can be, especially if foreign.¹⁵⁵ It further noted that: “In the case of people who go abroad for prostitution, the actual agreement must be accepted with extreme caution as the risk of exploitation of a situation of poverty is particularly acute.”¹⁵⁶

Subsequent cases of trafficking of women into Switzerland for purpose of prostitution have affirmed the central findings of the above two judgments. In a 2009 case, for example, the Federal Supreme Court asserted that: “the elements of trafficking in persons are established in instances in which young, foreign women in a situation of vulnerability are recruited to engage in prostitution in Switzerland.”¹⁵⁷ Such a situation of vulnerability was confirmed as including economic and social difficulties or personal and financial dependencies or liabilities. In such situations, any consent to prostitution is considered void.¹⁵⁸ This reasoning was echoed in a 2010 decision of the Swiss Federal Tribunal, which explicitly noted that proof of a situation of economic, social, personal or financial liabilities will render any consent given by the victim irrelevant.¹⁵⁹

situation of vulnerability meant that their consent could not be regarded as genuine. The respondent was found to have knowingly taken advantage of the needs of the young women. BGE 128, IV.117, at p. 128.

152 BGE 128, IV.117, at p. 123.

153 BGE 128, IV.117, at p. 124.

154 BGE 128, IV.117, at p. 126. (unofficial translation).

155 BGE 128, IV.117, at p. 126

156 BGE 128, IV.117, at pp. 126-127 (unofficial translation).

157 6B_1006/2009.

158 6B_1006/2009, para. 4.2.2., interpreting abuse of a position of vulnerability under Article 182 of the Penal Code.

159 6B_81/2010 and 6B_126/2010 (Based on UNODC’s commentary in the UNODC Human Trafficking Case Law Database). See also: 6B_277/2007 and an earlier case, *Switzerland v A & B*, ILDC 342 (CH 2002).

3.4.4.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from a review of materials and discussions with a practitioner:

- The limited case analysis suggests that vulnerability is understood very broadly by the Courts to include any situation of economic, social, personal or financial difficulty. In practice, social and economic factors are considered in the context of the victim's country of origin, and the particular vulnerability of those people who are potentially in a dependent relationship as compared to others in the sex industry, for example, in an illegal situation. It is assumed that the law could potentially extend to capture other vulnerability factors.
- It is unclear whether the same criteria would apply to domestic victims of trafficking or to trafficking into sectors other than prostitution. One practitioner expressed the view that there would be no difference, at least with respect to trafficking for labour exploitation. However, the Courts insistence on the particularities of the sex industry points to a potentially different threshold of vulnerability for situations outside that industry.
- Relationship with coercion: Discussions around the relationship between APOV and other means such as coercion were somewhat theoretical, as the concepts are not formally incorporated in the legal framework. However, practitioners expressed the view that coercion was often associated with forms of force and may exist even without specific vulnerability being present.
- Relationship with abuse of power: Abuse of power was expressed as that exercised in a relationship of dependence by public officials or others, including for instance staff in prisons or establishments caring for children or disabled persons. The removal of a victim's passport or withholding money from her was expressed as a manifestation of abuse of power. It is relevant to note that abuse of power was considered to be from the perspective of the perpetrator, whereas APOV was from the point of view of the vulnerable person. From a practical point of view it was considered unnecessary to separate the concepts.
- Relationship with "giving or receiving of payments or benefits...": This concept was considered to be too long and complicated to be useful and practitioners questioned whether there could be any situations in which the concept would be applied that could not be addressed by other means.
- Relationship with consent: While concept is a recognised legal concept in Swiss law, it is not directly addressed in the legal framework relevant to trafficking. However, Swiss authorities have confirmed that, with respect to relevant case law, "it is irrelevant whether the victim [of human trafficking] may have agreed to the activity; the decisive factor is whether the victim was exploited as a result of economic hardship."¹⁶⁰ Case analysis shows that in

¹⁶⁰ See 'A Fact Sheet by the Swiss Coordination Unit against Trafficking in Persons and Smuggling of

practice, consent can serve to distinguish situations of prostitution from those of exploitation. However, the relatively low threshold established by Swiss Courts in finding consent-nullifying “abuse of a position of vulnerability” does appear to have certain implications for the range of practices that could be considered trafficking. For example, it may imply that any woman from a developing country could not choose to work as a prostitute in Switzerland without being considered a vulnerable “victim”. One interviewer countered this suggestion strongly, asserting that the Courts insistence on an individualized (case by case) assessment of vulnerability means that merely coming from a particular (poor) country would, of itself, be insufficient to establish vulnerability.

3.4.4.2 Evidentiary Issues

In relation to evidentiary issues, the following key points emerged:

- The standard required to establish abuse of a position of vulnerability is that the perpetrator *knows* of the vulnerability. The standard does not appear to require proof that the perpetrator actually abused that vulnerability.
- Establishing vulnerability of the victim is considered to be technically not very difficult, as evidenced by the case survey. However, practitioners did point to the need to rely on victim testimony and the problems that arise when victims are reluctant to participate in the prosecution of their exploiters and/or provide unreliable, contradictory testimony. It was noted that establishing vulnerability *prior* to the trafficking situation is relatively less difficult than establishing vulnerability during the trafficking situation.
- The practitioner noted that establishing victim vulnerability requires an understanding on the part of criminal justice officials about vulnerability factors. It is particularly important that cultural factors are properly understood (the example of voodoo practices that exert a powerful influence over victims was given). Vulnerability should be assessed from the victim’s point of view.

3.4.5 United Kingdom of Great Britain and Northern Ireland

The United Kingdom’s legislative framework around trafficking in persons is complex and contains no specific definition of “trafficking in persons”.¹⁶¹

Migrants (KSMM)’, January 2012, p.2 available at <http://www.ksmm.admin.ch/content/ksmm/en/home/dokumentation.html>.

¹⁶¹ However, the crime is described by the Crown Prosecution Service in terms very similar to the Protocol definition follows: “Trafficking involves the transportation of persons in the UK in order to exploit them by the use of force, violence, deception, intimidation or coercion. The form of exploitation includes commercial sexual and bonded labour exploitation. The persons who are trafficked have little choice in what happens to them and usually suffer abuse due to the threats and use of violence against them and/or their family.” Crown Prosecution Service,

Trafficking and related offences are addressed through various Acts, the key ones of which are the Sexual Offences Act 2003 which is used to prosecute trafficking to, within and from the United Kingdom for the purposes of sexual exploitation, and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which criminalizes trafficking for all other forms of exploitation.¹⁶² Also relevant are the Coroners and Justice Act 2009 (Section 71, Slavery, servitude and forced or compulsory labour)¹⁶³ and the Nationality, Immigration and Asylum Act 2002 (which was repealed in May 2004).

The Asylum and Immigration Act creates offences only in respect of those persons who arrange or facilitate the arrival into, travel within (but only in respect of those it is believed have first been trafficked into the UK) or departure of individuals from the United Kingdom, for the purpose of exploitation. This is a severely truncated version of the “action” element set out in the Trafficking in Persons Protocol and it is unclear whether the provisions would apply to other actions specified in the Protocol definition such as receipt and harbouring. Exploitation is defined with reference to slavery and forced labour as well as organ transplant. Importantly, from the perspective of the present study, the concept of exploitation also includes:

- Subjecting a person to force, threats or deception designed to induce him (i) to provide services of any kind; (ii) to provide another person with benefits of any kind, or (iii) to enable another person to acquire benefits of any kind,¹⁶⁴ or
- Using or attempting to use a person for any one of the three purposes above, having chosen him for that purpose on the grounds that (i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person; (ii) and a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.¹⁶⁵

These provisions, linked to the ‘exploitation’ element rather than the ‘act’ element, have the effect of introducing a means element into the concept of trafficking (force, threats, deception, abuse of vulnerability on the grounds of age, mental or physical illness, disability or family relationship). It also appears to have the effect of expanding the concept of “exploitation” to include “services or benefits of any kind” and “any activity” provided it relates to one of the means immediately noted above.

Sections 57, 58 and 59 of the Sexual Offences Act 2003, which came into force on 1st May 2004, criminalize trafficking into, trafficking within, and trafficking out of

http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a19.

162 Note that the 2012 Protection of Freedoms Act amends trafficking in persons legislation to bring consistency to the wording of the Sex Offences Act 2003 and the Asylum and Immigration (Treatment and Claimants) Act 2004.

163 The US Trafficking in Persons Report 2011 notes that section 71 of the 2009 Coroners and Justice Act has not yet been used to prosecute trafficking in persons.

164 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Section 4(4)c.

165 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Section 4(4)d, as amended by Section 54 of the Borders, Citizenship and Immigration Act 2009.

the United Kingdom for sexual exploitation. It is an offence for a person to arrange the arrival, entry, travel within or departure out of the United Kingdom of another person if the first person intends to do anything that will involve the commission of a relevant offence or believes that another person is likely to do so. Relevant offences are defined under Part 1 of the Sexual Offences Act 2003 and section 1(1)(a) of the Protection of Children Act 1978 and cover a range of crimes including rape, sexual assault, exploitation of prostitution, child sex offences, abuse of children through prostitution or pornography etc. The structure of the relevant provisions makes a direct comparison with the three-element definition in the Trafficking in Persons Protocol difficult. As with the Asylum and Immigration Act 2004, the “action” element appears to be severely truncated. The means element does not appear to be present at all.

There is an emerging body of case law in the United Kingdom related to trafficking in persons. The issue of victim vulnerability was considered in a number of cases surveyed. However, the way in which APOV and related “means” are reflected in the United Kingdom understanding of trafficking makes it difficult to ascertain whether and to what extent vulnerability of victims - or knowledge thereof on the part of the accused - are relevant to establishing whether or not trafficking has taken place.¹⁶⁶ The following is a selection of cases that appear to have at least some bearing on this question.

*R v Khan, Khan v Khan*¹⁶⁷ concerned the exploitation of foreign workers legally living and working in the United Kingdom. A significant challenge for the prosecution in this case was presented by the fact that the victims had left their situation of exploitation, returned to their home country and subsequently chose to return to their employers in the United Kingdom. The prosecution was able to show that the extreme vulnerability of the victims meant that they were limited from a financial point of view. The Court noted the relative economic poverty of the victims and their dependency on the defendants, referring specifically to abuse of vulnerability at destination as an accepted indicator of recruitment into force labour.¹⁶⁸ It found that “the return of the workers does not constitute evidence that the conditions to which the workers were subjected were acceptable but, in the circumstances of the present case, is evidence of further exploitation by the

166 For example, *R v N* [2012] EWCA Crim 189, a February 2012 case in the UK Court of Criminal Appeal¹⁶⁶ involved a Vietnamese minor, aged 16, who was put to work in a cannabis factory in the UK and was convicted of cannabis cultivation. He was sentenced to a Detention and Training Order of 18 months’ duration. N’s appeal was brought on the basis that he was a victim of trafficking who had been compelled to undertake the work that he was convicted of and punished for. N’s appeal against his sentence was successful and his DTO was reduced to the lowest possible custodial sentence. N’s appeal against his conviction failed. Vulnerability related to age, illegal status, a death threat from his trafficker if he escaped and his inability to leave his place of exploitation without his trafficker’s consent were all considered but in the Court’s view these were relevant only in the context of whether these were mitigating factors with respect to the penalty imposed. The case is being taken to the European Court of Human Rights.
<http://www.bailii.org/ew/cases/EWCA/Crim/2012/189.html>

167 <http://www.bailii.org/ew/cases/EWCA/Crim/2010/2880.html>.

168 *R v Khan, Khan and Khan* [2010] EWCA Crim 2880, para 12.

offenders of personal circumstances of which they knew they could take advantage.”¹⁶⁹ The defendants in this case were convicted of conspiracy to traffic for exploitation under section 4 of the *Asylum and Immigration Act 2004* and sentenced to terms of imprisonment.

Trafficking case law in the United Kingdom also contains a growing body of decisions related to asylum claims sought on the basis that the applicant is a victim of trafficking who would face persecution and be vulnerable to re-trafficking upon returning to his or her country of origin. The relevant question in this regard is whether return exposes the applicant to the risk of persecution on one of the stipulated grounds. With respect to the risk of re-trafficking, there is a series of cases considering aspects of vulnerability in the context of the risk of persecution.¹⁷⁰ These are important for establishing the relationship between vulnerability and the risk of trafficking more generally, but do not pronounce directly on the questions examined in this study.

The “means” of trafficking, including abuse of vulnerability, were raised more directly in *AA (Iraq), R (on the application of) v Secretary of State for the Home Department*.¹⁷¹ In this case, the Court of Appeal was required to decide whether a person who was initially smuggled into the country but was raped or coerced into having sex with her smuggler en route was potentially a victim of trafficking who was being groomed for exploitation. An expert witness emphasized on the initial facts the apparent “abuse of [the appellant’s] position of vulnerability”, expressing the view that she had no real and acceptable alternative to submit to the abuse. However, in finding that trafficking had not been established on the facts as they later emerged, the Court referred to international guidance on abuse of vulnerability (including the Interpretative Note attached to the Protocol and the Explanatory Report attached the European Trafficking Convention), requiring there be “no real and acceptable alternative”. It further held that there were no reasonable grounds to assume that the required exploitative purpose had been made out.

3.4.5.1 Understanding / Application of the Law

In relation to understanding and application of the law, the following key points emerged from a review of materials and discussions with practitioners:

169 *R v Khan, Khan and Khan* [2010] EWCA Crim 2880, para 18.

170 For example, *PO (Nigeria) and Secretary of State for the Home Department* [2011] (22 February 2011) EWCA Civ 132; *M and BM (Trafficked women) Albania* CG [2010] UKUT 80 (IAC); *AZ (Trafficked Women) Thailand v Secretary of State for the Home Department*, GC [2010] UKUT 118 (IAC); *HC & RC (Trafficked women) China*, CG [2009] UKAIT 00027; *SB (PSG - Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002; *M v the United Kingdom*, Application No. 16081/08 [2008] ECHR 522 (10 June 2008) and 16081/08 [2009] ECHR 1229 (29 January 2010).

171 [2012] EWCA Civ 23 (24 January 2012), available from: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/23.html>.

- Practitioners noted that APOV is at least partly captured within Section 4(4)d of the Asylum and Immigration Act 2004 but expressed concern that the concepts were vague and undefined and that they did not fully capture the elements set out in the Protocol and the European Trafficking Convention. However, the fact that they are vague and undefined does mean that practitioners are not constrained by precise characterization in the range and types of cases to which they apply the legislation.
- There was disagreement between practitioners as to whether the current legislative framework was sufficient and appropriate with respect to “means”. Some practitioners expressed the view that the absence of this concept had not hampered prosecutions in any way; investigators particularly noted that their perspectives, the elements of “movement” and “exploitation” are more tangible and therefore easier to prove than APOV. They considered that introducing the idea (via APOV) that victims must be able to demonstrate they had no alternative carries certain risks. The evidentiary challenges to proving APOV were also noted as a potential drawback. However, another practitioner emphasized the centrality of APOV to most, if not all, trafficking situations - asserting that a lack of understanding about *how* vulnerability is abused has proved to be an obstacle to convictions. The capacity of APOV to expand the scope of situations of exploitation that could then be considered as trafficking was at least implicitly acknowledged.
- Relationship with abuse of power: One expert distinguished “abuse of a position of vulnerability” from “abuse of power” on the basis that the focus of abuse of power is on the abuser’s behaviour, rather than the circumstances or state of mind of the abused. Another characterized the distinction by noting that while abuse of power relates to relationships, abuse of vulnerability relates to circumstances. However, another practitioner was of the view that the two concepts were two sides of the same coin and that it is futile to distinguish them: a person is in a position of power because *another* person is in a situation of vulnerability.
- A police investigator interviewed understood “abuse of power” to be straightforward corruption, that is abuse of power by public officials, as opposed to family members, teachers, or respected members of society. It was in effect, the abuse of power by public officials in active duty. Legislation in the United Kingdom addresses this phenomenon in various acts. If anyone other than a public official, (for instance, a family or friend of the victim) is involved, it would be considered an aggravating factor in sentencing rather than a specific offence.
- Relationship with coercion / deception: APOV and coercion were described by one interviewee as distinct but potentially overlapping means, depending on where in the trafficking process it occurs. A similar overlap was identified with respect to deception. Another practitioner noted that the victim does not have to be vulnerable in order to be coerced. The success of some indirectly

coercive measures (such as psychological coercion) can be enhanced where the victim is of low intellect, is poor, or has learning disabilities.

- Relationship with “giving or receiving of payments...”: This concept was considered to amount to buying and selling of people. In practice, it was noted that “giving or receiving...” would not stand alone as a means but would always involve abuse of power or abuse of a position of vulnerability. On the whole, this means was not considered a particularly important one.

3.4.5.2 Evidentiary Issues

In relation to evidentiary issues, the following key points emerged:

- Practitioners generally agreed that trafficking in persons is a serious crime that *should* be difficult to prove. Jury trials were seen to present a challenge with respect to applying APOV-related means such as those specified in 4(4)(d)(i) of the Asylum and Immigration Act 2004 of illness, disability, youth or family relationship. The notion of APOV is sometimes difficult to grasp, even for prosecutors, and practitioners pointed to the difficulties of explaining this to juries. In addition, the relevant concepts are not defined and the parameters of the application not clearly established. The test (that a person without the illness, disability, youth or family relationship would be likely to refuse the request or inducement) does appear to be a subjective one (although one practitioner disagreed with this characterisation of the test). The provision also requires establishing that the victim has been “chosen” on the grounds of his or her vulnerability, presumably through establishing specific intent on the part of the perpetrator.
- In relation to trafficking for sexual exploitation, the absence of a clear means element in the legislation complicates assessments of evidentiary difficulty. While evidence of vulnerability is indeed relevant to establishing trafficking for sexual exploitation, practitioners were not clear on specific details, including whether evidence needed to be adduced of both vulnerability *and* the fact of its abuse by the perpetrator.

4 National Law and Practice: Key Findings

A central finding of this study is that there is a widespread lack of clarity and consistency around the definition of trafficking in general, and aspects of the means element including abuse of a position of vulnerability in particular. While practitioners were generally supportive of the particular legislative approach taken by their country, it was widely acknowledged that the concept of APOV is not one that is easily adapted into relevant civil and common law legal frameworks. Indeed, the diversity of approaches taken to interpreting and applying the concept to the 'act' and/or the exploitative purpose, is evidence of its complexity. The present Part captures the major findings of the survey.

4.1 The place of abuse of vulnerability in the crime of trafficking

All those surveyed agreed that vulnerability is central to any understanding of trafficking: that abuse of vulnerability is an inherent feature of most, if not all, trafficking cases. Responses to questions about specific vulnerability factors were remarkably similar across very different countries of origin and destination. As noted previously, most practitioners identified: age (youth and, less commonly, old age); irregular legal / migration status; poverty; precarious social status; pregnancy; illness and disability (mental and physical); gender (typically being female, but also transgender); sexuality, religious and cultural beliefs; isolation caused through inability to speak the language, lack of social networks; dependency (on employer, family member, etc); threats to disclose information to family members or others; and abuse of emotional / romantic relationships.

Some of these vulnerability factors, such as age, illness, gender and poverty, were acknowledged to be pre-existing or intrinsic to the victim. Others, such as isolation, dependency and irregular legal status are vulnerabilities that can be created by the trafficker in order to maximize control over the victim. Both types of vulnerability were acknowledged as capable of being subject to abuse. However, in identifying vulnerability factors, few practitioners noted the distinction between pre-existing and created vulnerabilities, or indeed between vulnerability as *susceptibility to trafficking*, and abuse of vulnerability as a *means by which trafficking occurs or is made possible*.

Suggestions for consideration and discussion

APOV has been noted as an increasingly relevant to the way in which trafficking occurs, pointing to a need for better understanding of this modus operandi.

- *How can training of investigators, prosecutors and judges be strengthened so that APOV is identified and prosecution / adjudication is strengthened?*

Some vulnerability factors are pre-existing (for instance, age, poverty and gender). Other vulnerability factors are created by traffickers (for instance, use of religious rituals or cultivation of a romantic or emotional attachment that is subsequently abused).

- *Should a distinction be drawn between these two categories at trial? For instance, should the creation of vulnerability be considered to reflect more deliberation and stronger evidence of “intent” on the part of the trafficker relative to a situation in which he or she merely “knows” about a person’s pre-existing vulnerability?*
- *Could this notion of varying culpability be addressed in sentencing (e.g. through establishing cultivation of vulnerability as an aggravated offence?)*

APOV is contextually relative and is properly assessed on the basis of situation-specific analysis, taking into consideration both the individual circumstances of the alleged victim and the specific abuse of the identified vulnerability by the alleged perpetrator.

- *How can a universal understanding of APOV be achieved, while also supporting a case-by-case approach that captures all situations of APOV?*

The use of APOV has been shown in some countries to be relevant to establishing that a given set of facts constitutes a crime of trafficking, as opposed to another (typically less serious) offence.

- *How can trafficking in vulnerable persons for the purpose of exploitation be distinguished from “mere” illegal employment of irregular workers below minimum wages and standards?*
- *Do considerations change in this respect when irregular workers are employed in the sex industry? How? Why?*

4.2 Relationship of abuse of vulnerability with other means

One of the central questions of this study was whether abuse of vulnerability could ever stand alone as the *sole* means by which an individual is moved into or maintained in a situation of exploitation. Though there was general agreement that APOV could indeed constitute the sole means of trafficking, there appear to have been very few cases prosecuted on this basis alone. Importantly, those examples that are available do not demonstrate that the success of the prosecution depended on the availability of that means. The country survey suggested two possible situations of APOV that required no additional means to achieve their purpose: (i) trafficking through emotional manipulation of the victim (for example through an existing or created relationship); and (ii) trafficking through the use of ritual oaths. However, it should be noted that, depending on how various means are understood in a given jurisdiction, these means may *also* involve elements of deception, threats or coercion. The use of ritual oaths and rituals in general could for instance be

convincingly argued to be a form of coercion, in which the person entering into the oath is threatened with supernatural retaliation if he or she breaks the conditions of the oath. However, such rituals will have no coercive impact on a person who does not hold particular beliefs that can be abused in this way. As such, this particular means may be considered one of APOV. Another hypothetical raised in the context of the Expert Group Meeting was the re-trafficking of victims. It was suggested that deception, threats or coercion would not necessarily be required to re-traffic such persons whose vulnerability (as persons who have been trafficked) could simply be abused to re-traffic them.

In practice, the relationship between APOV and other “means” appears to depend on how APOV is reflected, or not, in the relevant legal framework. In some cases, abuse of vulnerability is used as a *subsidiary means*: its function appears to be to bolster or substantiate other means, for instance to show why a given victim was deceived where another person would not be. In other cases, establishing APOV is an important means by which an explicit element of the offence can be established.

Certainly there is a high level of fluidity between the various “means” stipulated in the Protocol and in various national laws. This is due, at least in part, to the absence of definitions. While opinions on relationships between the various means were diverse, some general conclusions can nevertheless be drawn.

Coercion: A number of practitioners considered there to be an important distinction between coercion and APOV: principally related to the presence or absence of physical force. This interpretation is supported by the definition in the Trafficking in Persons Protocol, which links coercion to the threat and use of force. However, an appreciation of this distinction did not always flow through to discussion on specific situations and cases. For example, many of those interviewed noted that coercion could in fact extend beyond physical force to include threats and practices commonly associated with APOV such as psychological manipulation.¹⁷² Some were of the view that it is unnecessary to specify APOV as a separate means; that this is merely one of the many ways in which a person can be coerced. International efforts to specify what coercion actually entails in the context of forced and exploitative labour appears to lend support to this view.¹⁷³ However, other practitioners expressed the view that the concepts were not so readily interchangeable: for example, persons who would not be considered vulnerable could be coerced into trafficking.

Abuse of power: The concept of abuse of power was understood very differently across and within countries surveyed for this report. In some legal systems, abuse of power can only ever relate to the conduct of public officials. In other legal systems the concept is a much broader one, encompassing the full range of possible relationships of dependence: from family based relationships to those with

172 This overlap is evident in the UNODC Model Law, which suggests that “psychological pressure” is a form of coercion that would satisfy this aspect of the means element. UNODC, Model Law against Trafficking in Persons, p. 11.

173 See the discussion at 2.4, above on ILO efforts to identify indicators of coercion.

employers, guardians and caregivers. In countries where abuse of power was either not present or was undefined in the relevant law, practitioners had different views on its meaning and relationship with APOV, although there was general consensus that there is an overlap between them. In some cases the two concepts were seen as inextricably related, as two sides of the same coin: it is the victims' vulnerable position that gives rise to the perpetrator's position of power. It follows that abuse of that power necessarily involves abuse of the victim's vulnerability. Several of those interviewed expressed the view that the distinction was not particularly important in practice: courts will often consider them together and not trouble to determine whether one, or the other, or a combination of both, constitute the "means" element.

Giving or receiving of payments or benefits to achieve the consent of a person having control over another person: Generally, respondents did not evidence a particular understanding of, or interest in, this means. For some, the term was simply seen to refer to the buying and selling of people; albeit expressed in a rather convoluted way. However, as both buying and selling are necessarily included in the "action" element of the trafficking definition, it is unclear what their inclusion of this "means" adds to the definition. Participant responses to this question appear to support a conclusion, made earlier in this paper, that the main concern of the drafters of the Protocol was to ensure that every possible means of moving or maintaining people in exploitation would be covered.

Suggestions for consideration and discussion

While the Protocol definition and the legislation of many countries requires proof of the means used by traffickers in committing their crimes, court reasoning often does not clearly identify which "means" of trafficking were used in arriving at a decision. For instance, where a set of facts points to a situation that could constitute both APOV or abuse of power, determining which "means" are revealed by the facts is not necessarily essential to successful prosecution in practice.

- Should it be important to be able to specifically identify which means are used in a given trafficking situation?*
- What are the criminal justice consequences of prosecuting a person for trafficking without clearly identifying which trafficking "means" he or she used?*
- Are there specific challenges for judges adjudicating trials where APOV is the means asserted by the prosecutor? How can judges be better equipped to identify whether APOV (and other means) are proven or not proven in a given trafficking trial?*

Vulnerability and its abuse can change over the course of the trafficking process. In some situations, the pre-existing vulnerability of a person increases the likelihood that courts will find that the case is one of trafficking, even where such vulnerability does not appear to have been abused.

- *How can understanding of APOV be strengthened so that mere vulnerability alone does not lead to the “means” element being satisfied?*
- *Similarly, how can understanding of APOV be increased so that trafficked victims who were not necessarily vulnerable prior to being trafficked are still appropriately identified?*
- *How can understanding of APOV as a means of trafficking be strengthened so that vulnerability that is created and abused during the trafficking process is also identified and appropriately prosecuted alongside the abuse of pre-existing vulnerability?*

4.3 Relationship of abuse of a position of vulnerability with the ‘act’ element

The relationship between APOV and the ‘acts’ of trafficking was not directly considered during the country surveys. However, this emerged at the Expert Group Meeting as an important issue and therefore deserves brief, if inconclusive attention.

The Trafficking Protocol’s definition makes clear that the ‘means’ of trafficking, including APOV, are to be understood as means *by which certain ‘acts’ are committed*, for the purpose of exploitation. As such, the ‘means’ element of the definition can be usefully viewed as a supplementary component of the *actus reus* of trafficking in persons: i.e. of the act of recruiting, transporting, transferring, harbouring or receiving persons. A consequence of this link is that APOV should, strictly speaking, always be linked to a specific act. In other words, an offender should be shown to have abused the victim’s vulnerability *in order to* recruit, transfer, harbour, or receive that person.

In practice, and in much the same way that specific ‘means’ are often not identified, the specific ‘act’ on which a prosecution is relying, is rarely made clear. The country surveys indicated that ‘recruitment’ is the act most frequently cited in connection with APOV. Not surprisingly, this emphasis has resulted in attention to pre-existing vulnerabilities such as youth, poverty and irregular legal status as susceptibility to trafficking - rather than vulnerability as a means by which trafficking is made possible. There is very little information available on APOV being linked to other specified acts such as harbouring or receiving.

Additional study is required to fully understand the implications of the relationship between the ‘act’ and ‘means’ elements of the trafficking definition, including the evidentiary burdens this relationship imposes.

Preliminary suggestions for consideration and discussion include:

- *In cases where APOV is alleged as a ‘means’, is it necessary to specify the act to which APOV relates?*

- *What are the risks associated with prosecutions where APOV is not attributed (or attributable) to a specific act?*
- *Is APOV more relevant for some trafficking 'acts' (such as recruitment) than others?*
- *Are there different evidentiary challenges for establishing APOV depending on the act to which it relates?*

4.4 Relationship with exploitation

The relationship between the “means” of trafficking and the exploitative purpose is a complex one. Simply understood, the exploitation element of the trafficking definition can inform what is meant by ‘abuse’ of vulnerability, in the sense that it means only that the trafficker *used* the victim’s vulnerability for the criminal purpose of exploiting him or her. It is beyond the scope of the present study to explore exploitation in any depth beyond this basic understanding. The following brief comments are restricted to insights that arose in the context of the survey process and Expert Group Meeting.

A number of countries, (including several that have dispensed with the means element altogether and others that have incorporated only direct means such as force and coercion), have integrated abuse of vulnerability into their understanding of exploitation. In such situations, the victim’s vulnerability is typically explored alongside other means, such as deceit, to point to the trafficker’s exploitative intent. Where trafficking in persons is addressed across a spectrum of legislation rather than in a single legislative act, considerations of “abuse of a position of vulnerability” is not a means that needs to be established as a standalone element of the crime, but the victim’s vulnerability and its abuse by traffickers may be relevant to ascertain the overall narrative of the crime, and to substantiate evidence of exploitation.

It can be convincingly argued that a lower threshold for establishing abuse of a position of vulnerability should be matched by a higher threshold for establishing exploitation. Where exploitation is relatively easy to establish (for instance where trafficking is synonymous with prostitution-related crimes or labour that falls short of a prescribed minimum wage) and where there is a low threshold for establishing abuse of a position of vulnerability (for instance, where mere existence of vulnerability appears to be sufficient to establish APOV, irrespective of its abuse) there appears to be an enhanced risk that trafficking will be incorrectly or too easily prosecuted.

The country survey confirmed that exploitation is contextually relative, particularly from the perspective of the victim. For example, foreign victims who are being paid wages considerably below national standards may be objectively found to be exploited. However, from the perspective of the victims themselves they may be earning significantly more than they would at home, and therefore may not

consider themselves exploited but rather empowered by their situation. Certainly there are strong arguments for discounting the views of victims in determining whether they have in fact been subjected to exploitation, so as to instead assess exploitation on the basis of the benefit derived by the trafficker. However, it is also necessary to consider where the line should be drawn - for example between non-compliance with labour laws and exploitation that rises to the level of trafficking. This is particularly important from the perspective of ensuring that anti-trafficking law and policy does not operate to further restrict the options available to individuals (including those identified as vulnerable) to improve their situations. These are just some of the issues that arose in the course of the country surveys. The question of how exploitation should be defined is complex, and extends well beyond the scope of the present paper.

There is widespread agreement among practitioners that APOV should be considered and applied consistently, irrespective of the exploitative purpose. Further, it was agreed that APOV should not be more or less easily proved in the context of some forms of trafficking (e.g. trafficking for sexual exploitation) over others. Irrespective of the exploitative purpose, consideration should focus squarely on the extent to which a person's vulnerability was abused in the commission of acts for the purpose of exploitation.

*Suggestions for consideration and discussion:*¹⁷⁴

Often APOV will occur at the exploitation phase of the trafficking process, this can lead to difficulties in separating the "means" from the "purpose" element.

- Is APOV a potentially important way of proving exploitative intent? Does this potential exist also in respect of other "means"?*

APOV is equally relevant to all forms of trafficking, regardless of exploitative purpose.

- Should APOV be understood and applied the same way, irrespective of the exploitative purpose for which it was employed? Conversely, should it be construed and considered differently according to the exploitative purpose?*
- In practice, is the exploitative purpose relevant to judges and juries in finding APOV? How can the concept of APOV be better explained so that preconceptions about the contexts in which people can be exploited, do not distract from analysis of APOV as the 'means' used?*
- Can APOV be made out even where the specific exploitative purpose cannot be established?*

¹⁷⁴ See also the suggestions for consideration and discussion in relation to evidentiary issues, at 4.5, below.

4.5 Relationship with consent

The Trafficking in Persons Protocol is unambiguous on the point that consent is irrelevant in relation to trafficking in children, or, in the case of adults, where any of the specified means, including APOV have been used. In the case of trafficking in adults therefore, it appears clear that the existence of ‘means’ operated to vitiate consent. Despite confusion caused by the inelegant wording of the relevant provision, its intention and effect both appear to be clear: “[o]nce it is established that deception, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence”.¹⁷⁵ However, it is equally clear that the mere use of means alone is not enough; the result of the use of those means to achieve the relevant ‘act’ must be that the victim’s consent was vitiated. Use of deception will not vitiate consent for instance, where the victim is not deceived. Likewise, abuse of a position of vulnerability alone is not enough to fulfil the ‘means’ element of the offense; that abuse must have been sufficiently serious so as to have negated the victim’s consent. This understanding is affirmed by the Interpretative Note in its reference to APOV being established where the victim is left with no alternative but to submit to the trafficker.

In practice, the issue of consent has indeed arisen in the context of abuse of vulnerability. For instance, in some countries APOV may only be considered relevant as a potential “means” where the victim appears to have given his or her consent to the situation: it is the victim’s vulnerability that is used to explain away and nullify the apparent consent. Where other, more physical means are used to move or maintain the individual into a situation of exploitation (such as force or abduction), the consent of the victim is not at issue. Similarly, where APOV is not explicitly included as a “means” in legislation it may nevertheless be relevant to explaining how consent was vitiated: i.e. how a person could be deceived or coerced by the trafficker, where a non-vulnerable person would not have been.

The relationship between APOV and consent will sometimes be an issue in other countries in situations where the victim does not explicitly identify him or herself as such. In this sense, the presence of consent can be relevant to establish whether a given set of circumstances points to a crime (and whether that crime is indeed trafficking). Where a person has consented, and that consent has not been nullified, what may have initially looked like a situation of trafficking may be proven not to be. This matter is explored in more detail below in the context of evidentiary challenges. However it is relevant to note that practical problems often have a sharper political edge. For example, in countries where all prostitution is assumed to be exploitative, APOV can be used to categorize all persons working in prostitution as victims of trafficking and all persons otherwise involved in prostitution (including pimps, brothel owners and managers) as traffickers. The effect can be to both reduce the agency of the presumed ‘vulnerable’ person, or potentially to exclude people who are presumed not to be vulnerable. For instance, where economic or social “difficulties” and irregular status (and the defendant’s

175 UNODC Legislative Guide, para 37. See also note 119, above.

knowledge of these facts) operate to vitiate consent of women in the sex industry, it is not clear that the same standard would operate in respect of regularized or non-foreign sex workers.

Suggestions for consideration and discussion:

As with all means provided for in the Trafficking in Persons Protocol, the degree of abuse in APOV must be sufficiently serious so as to vitiate the consent of the victim. In relation to certain of the stipulated means (most particularly coercion) the nullification of consent will generally be easy (or unnecessary) to establish. In cases where APOV is the means, the victim may continue to assert that he or she has consented, and in some cases may have directly sought out the situation in which he or she is exploited.

- What are the specific investigative and prosecutorial challenges of establishing that a victim's consent has been nullified through APOV when victims do not identify themselves as victims?*
- Should APOV be considered to nullify the possible victim's consent, even in situations where he or she has proactively sought out the situation in which he or she is exploited?*
- How can APOV be considered a consent-nullifying means, without also inadvertently reducing the agency that vulnerable persons have in exploring options to better their circumstances and improve their lives?*
- What role, if any, should the victim play in identifying or confirming whether his or her vulnerability has been abused?*

In some situations, analysis of consent is relevant to determine the type of crime at issue. For instance, what may appear to be a crime of trafficking will in some countries be found to be one of pimping where consent was not vitiated through the use of means. Alternatively what may appear to be a situation of trafficking in persons for the purpose of labour exploitation or exploitation for criminal purposes, may be proven to be one of migrant smuggling followed by irregular work or criminal activity, also in a situation where consent was not vitiated through the use of means.

- What should the role of consent be, in differentiating between trafficking in persons and other crimes where APOV is at issue?*
- Does the use of APOV as a "means" contribute to a blurring of the distinction between crime types where consent is at issue?*
- Is consent more likely found to have been vitiated by APOV in cases of trafficking for some types of exploitation (for instance, sexual) compared to*

others (for instance, criminal purposes such as cultivation or smuggling of drugs)?

- *Is consent more likely found to have been vitiated by APOV in cases of trafficking of some people (for instance, women or irregular migrants) compared to others (men or persons with regular migration status)?*

Assessments of the conditions and types of work that people can in fact consent to (i.e. that do not meet the “exploitation” criteria) are often relative. Even within a country such assessments may depend on the personal views and beliefs of individual judges and prosecutors.

- *To what extent do the personal opinions or biases as to what a person will consent to, impact on the finding that consent was or was not vitiated by APOV?*
- *How can guidance be offered on APOV so as to harmonize understandings of how consent may – or may not be – vitiated through the use of this “means” across the range of sectors in which exploitation may occur?*

4.6 Evidentiary issues

Leaving aside the ambiguous Interpretative Note attached to this provision (see 4.8, below), APOV, as it is set out in the Trafficking in Persons Protocol, appears to comprise two separate evidentiary requirements:

- Proof of the existence of vulnerability on the part of the victim; and
- Proof of abuse of (or intention to abuse) that vulnerability for the purpose of exploitation.

Practitioners agree that the elements of proof used to establish APOV should be the same elements that are required to establish other aspects of the offence. For example, as is required with respect to other means, the perpetrator must have intended to use the means to commit an act for the purpose of exploitation, and the degree of ‘abuse’ of that vulnerability must be sufficiently serious so as to vitiate the consent of the victim.

Despite agreement on these points, even among those countries that have included APOV within their definition of trafficking, case analysis and discussions with practitioners revealed that, with one notable exception,¹⁷⁶ the focus of inquiry is

¹⁷⁶ Moldova has sought to meet the evidentiary obstacles associated with APOV by establishing an objective test. In an approach that appears to be consistent with the Protocol (but not necessarily with the Interpretative Note, see 4.8, below), this test requires that both the vulnerability and the abuse of that vulnerability be proven. Criteria have been developed to help ascertain vulnerability and a range of factors, including knowledge of the vulnerability and the defendant’s state of mind, are brought to bear in proving the second element. See further discussion of Moldovan law and practice at 3.1.2 above.

generally on establishing the fact of vulnerability, rather than proving its abuse. In effect, this means that the mere *existence* of vulnerability may be sufficient to satisfy the means element and thereby to secure a conviction.

In a variation of this approach, some countries have established that abuse of or intention to abuse vulnerability may be inferred from a defendant's mere knowledge of the (proven) vulnerability, expressed in one country as 'conditional intent'. Practitioners noted that "knowledge" refers to a mental state and can be correspondingly difficult to prove, particularly in comparison with other, more tangible means such as force or deception that require a specific action on the part of the trafficker. The threshold of proof does not appear to be very high. This, coupled with the readiness with which intention is inferred from knowledge, raises concerns, particularly in light of the more general risk, explored at 4.7, below, that APOV may open the door to prosecute behaviour as trafficking that does not really rise to the level of human trafficking. Indeed the low standard set in some countries, whereby perpetrators are not required to have taken any initiative in order for the element to be proven, differentiates APOV from other means, all of which appear to require some level of action or initiative by on behalf of the alleged perpetrator. Some practitioners pointed to their states' low threshold for proving APOV as evidence of legislative efforts to exceed the minimum standards established in the Protocol.

In countries where the concept of APOV does not explicitly exist in law, evidentiary concerns were raised in respect of establishing APOV in a prosecution. Some practitioners were firmly of the opinion that, particularly in the absence of an agreed definition and clear guidelines, the concept is too vague to be effectively justiciable (see further 4.7, below). Others noted the apparent redundancy of the concept in light of other "means" such as coercion and deception that can be interpreted to accommodate vulnerabilities and their abuse.

It is widely accepted that the significant evidentiary obstacles associated with trafficking crimes renders the involvement of victims in the criminal justice process vital to the success of prosecutions.¹⁷⁷ Practitioners interviewed for this study generally affirmed this assessment, noting that when a prosecution relies on APOV (often because other means were not available), these challenges would be particularly acute. Persons who are trafficked through abuse of a position of vulnerability often do not identify as such: they have typically escaped a bad situation and ended up in a less-worse one. They have no incentive to cooperate in the prosecution of the exploiters, who they may well have approached in the first instance and feel grateful towards. Lack of victim testimony, or unhelpful testimony, can make it extremely difficult to establish APOV, even if the fairly low standards noted above are in place. Some practitioners stressed the need to engage multidisciplinary cooperation with specialized psychologists, social workers,

177 See, A Gallagher and P Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line' International Criminal Justice Review (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292563.

anthropologists, cultural advisers, civil society actors and others to ensure that evidence of APOV is effectively gathered and brought to trial. Such multi-disciplinary involvement is also important to ensure that victims, particularly those who are involved in the prosecution of their exploiters, receive the support and assistance they require.

A further challenge of evidencing APOV arises particularly in cases of transnational trafficking. Where evidence of pre-existing vulnerability is located in the country of origin, and prosecution occurs in a country of destination, substantial cooperation including through mutual legal assistance, may be required to secure a successful prosecution. Article 10 of EU Trafficking Directive 2011/36/EU establishes extraterritorial jurisdiction for all member states of the EU with respect to trafficking in persons offences, with the result that criminal proceedings can take place without victims ever being in the jurisdiction where the perpetrator resides and has organised trafficking. In situations where APOV is to be established there may be different challenges and considerations in obtaining evidence to prove APOV where that abuse (whether pre-existing or created) has taken place anywhere but the jurisdiction where trial proceedings take place.

Suggestions for consideration and discussion:

The standard (or elements) of proof for establishing APOV as a means of trafficking should be the same as for all other elements of the crime. However, in practice APOV is sometimes established by simply proving vulnerability of the victim, rather than by also proving the abuse of that vulnerability by the alleged perpetrator. One result can be that persons who irregularly employ vulnerable persons may be prosecuted as traffickers.

- *What should be the elements of proof for proving the abuse of vulnerability?*
- *Would reverse burden of proof be useful, requiring alleged traffickers to prove that they did not abuse vulnerability? Are there potential risks with this approach?*
- *What are the potential risks of setting a low threshold for the requisite mental state? How can those risks be mitigated?*
- *How can the perpetrator's state of mind be proven in establishing APOV?*

Victims of trafficking often do not identify themselves as victims. Particularly where APOV appears to be the only "means" used, victims may have suffered no particular violence or force at the hands of their abusers. They may in fact be in a romantic relationship with their abuser, or grateful to him or her for providing an escape from vulnerability caused by poverty or other factors.

- *Are there specific challenges unique to APOV that make it particularly difficult to gain the cooperation of victims? If so, how can these specific challenges be addressed?*

- *How can APOV be used to establish victimization where the victim does not testify against his or her trafficker?*
- *What are the specific protection and assistance considerations, to empower a victim to support the criminal justice process where APOV was the means of trafficking used?*

Depending on the nature of APOV in a given situation, and the ‘acts’ for which it was used, evidence of APOV may be present in countries of origin, transit and/or destination. In addition, the exploitation may have occurred in a different jurisdiction to where the APOV occurred. Additionally, vulnerability and its abuse may change throughout the process of trafficking.

- *Are there different considerations in proving APOV in origin, transit and destination countries? If so, what are they?*
- *Are pre-existing vulnerability factors more relevant for origin countries, and are created vulnerability factors more relevant in transit and destination countries? If so, what are the implications for proving APOV?*
- *What are the investigative and prosecutorial consequences of the changing nature of APOV throughout the trafficking process?*
- *Are there investigative and prosecutorial implications (including different evidentiary challenges) where APOV occurred in a different location to the exploitation?*

Certain “means” of trafficking can result in significant harm, irrespective of whether any exploitation has taken place. Proof of that harm can support prosecutions in cases where evidence of exploitation is weak or unavailable. However, APOV may not result in any visible harm to victims. In some cases, it may even be considered, from both an objective and subjective point of view, to have improved their situation (for example, by removing them from a vulnerable position).

- *What are the challenges of proving APOV when its use results in no visible harm to the victim?*
- *How is APOV easier or harder to prove relative to other more or “tangible” means of threat or use of force, abduction, fraud or deception?*
- *Can APOV ever be proven without considering the exploitative purpose?*

4.7 Practitioner perceptions of the value of the APOV concept and risks associated with its application

The spectrum of views about the legislative value of the concept of abuse of a position of vulnerability ranged from “vital” and “essential” (given the convictions that would not be achieved otherwise), to “neutral” (no impact one way or another); to “harmful” (given the problematic convictions that could result from its misapplication).

Some experts from countries that have included the concept in their national law expressed the view that omission of this means from the definition of trafficking would result in fewer convictions: particularly in cases of exploitation where the victim did not identify as such or where direct means were not present or could not be proved. These practitioners saw APOV as providing them with an additional (and sometimes, the only) angle through which to both capture and explain trafficking that occurs through means more complex, subtle and ambiguous than force, fraud and coercion. In this regard it was noted by many practitioners that traffickers are becoming increasingly adept at recognizing and manipulating vulnerability to create dependencies, expectations and attachments. Indeed, the use of other more “tangible” or “direct” means such as force and violence was noted to have decreased in recent years, as more subtle strategies of abuse of vulnerability are refined. This fact was stressed as increasing the relevance of APOV and the need to strengthen understanding of it.

However, practitioners from States that have included *only* these more direct means noted that the essence of abuse of vulnerability, including its modern and changing manifestations, can indeed be captured through an appropriate interpretation of these means. In one country, for example, vulnerability and its abuse (concepts which have the benefit of long-established case law) are a major consideration in establishing the relevant offences as well as in determining appropriate sentences.

Other practitioners agreed that inclusion of APOV as a “means” would likely support more convictions for trafficking, but noted that this may not necessarily be a desired outcome. They noted that trafficking is an extremely serious crime carrying severe penalties and expressed the view that it is appropriate that proving a charge of trafficking is not made easy. In addition, trafficking convictions should be strictly for trafficking crimes: the definition should not lend support to prosecutions for behaviour that does not really rise to the level of human trafficking. One practitioner with wide prosecutorial experience in several countries was particularly concerned about the dangers associated with a concept as vague and ill-defined as APOV. The following extract is from his written submission:

I was always uncomfortable with the abuse of vulnerability phrase. Abuse of power or authority seems less problematic to me because power differentials are more easily quantifiable and can be based on well-recognized legal concepts such as “colour of law,” guardianship, employment, parental and in loco parental relationships. But “vulnerability”

seems awfully imprecise, with uncertain legal foundation. As a general statement in the Protocol it may be fine, but when that phrase is imported into a national criminal statute without limiting language or clear definitions, it is a problem. In my view, the phrase violates fundamental due process and fairness by failing to make clear what is and is not prohibited. Also, because the phrase is subject to various interpretations, it allows for inappropriate or politically driven prosecutions. This is a particular concern in countries with weak institutions under pressure to demonstrate results in the area of trafficking. I have seen evidence of this in my work: examples of abuse of vulnerability being frequently used, without much analysis, to justify a number of prosecutions that did not in fact appear to be trafficking at all. Given the high sentences provided in many new TIP laws, vague and imprecise language criminalizing conduct can have serious consequences.

It is important to acknowledge that these concerns were not universally shared: at least one expert was explicit on the point that they did not accord with her experience. However, some of the points raised do appear to be borne out by the Survey Report, which notes that in some countries where the concept has been imported into national law, there is still considerable ambiguity about what is – or is not – human trafficking. The survey also revealed a number of prosecutions for “trafficking” that would not necessarily be considered trafficking under the Protocol definition.¹⁷⁸ In some of these cases, the prosecution was supported by a broad interpretation of both vulnerability and abuse of that vulnerability. In other cases, it appears that the absence of a means element altogether can support an expansion of the concept of trafficking beyond what is currently accepted at the level of international law and policy.

Suggestions for consideration and discussion:

It is a widely accepted principle that laws, particularly criminal laws, must be formulated with sufficient precision to enable persons subject to those laws to reasonably foresee the legal consequences that may result from a given action.

- ***How can APOV be formulated in national law in a way that upholds and protects this principle?***
- ***How can APOV, as a means of trafficking, be addressed in criminal proceedings in a way that upholds and protects the rights of accused persons to a fair trial?***
- ***How can APOV be maintained as a “means” of trafficking in a way that does not facilitate an unreasonable or otherwise detrimental expansion of the crime of trafficking?***

¹⁷⁸ For example, the Chinese Restaurant case in the Netherlands, where a prosecution for trafficking through abuse of vulnerability succeeded despite the facts showing that none of the victims had any debts or obligations to their employers and all were free to depart any time they wished. See further 3.1.3 above.

APOV may be relevant to establish that a person involved in an illegal activity was trafficked for criminal purposes and should therefore not be prosecuted or punished for that involvement.

- *What role should APOV play in implementation of the principle that victims of trafficking should not be prosecuted for offences related to their status or committed in the course of their trafficking?*
- *Is there a risk that APOV could be misused in this context to excuse criminal activity that should be sanctioned? If yes, how can that risk be managed?*

Irrespective of the prosecutorial utility of APOV, the concept is relevant to understanding how trafficking occurs and how victims can be identified, protected and supported. Indeed, in many situations, traffickers target particular people for victimization on the basis of their vulnerability and subsequent susceptibility to trafficking.

- *How can understanding of APOV as a modus operandi of traffickers be harnessed to strengthen capacity to prevent trafficking?*
- *What are the specific protection and assistance considerations when APOV has been used in trafficking?*
- *What are the distinct considerations in training on APOV for identification, investigative, or protection purposes, as opposed to prosecutorial purposes?*
- *How can understanding of APOV be strengthened in all countries so as to maximize preventative capacity, regardless of whether or not the concept forms part of the definition of trafficking in national law?*

4.8 Practitioner perceptions of the value of the Interpretative Note

As noted previously, the *travaux préparatoires* to the Trafficking in Persons Protocol include an Interpretative Note to the effect that reference to the 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.” The substance of the Note has been generally incorporated into guidance provided in respect of other legal instruments including the European Trafficking Convention and the EU Trafficking Directive 2011/36/EU. The Interpretative Note does not explain what is meant by “real and acceptable alternative” and further guidance is not available elsewhere. As detailed at 2.5 above, it has been suggested that the ambiguity of the concept and the Interpretative Note was deliberate: enabling consensus to be reached between States with very different views on whether, and how, the issue of prostitution should be dealt with under the Protocol.

Practitioners interviewed for the survey were asked their views on the value of the Interpretative Note. Unsurprisingly, views on the Note generally reflected

respondent's views on the value of the concept itself. However, there were noticeable deviations from this general trend and, even amongst interviewees from the same country, views often differed sharply.

While some practitioners were satisfied with the Note, many others expressed concern about its vague and subjective formulation, commenting that this prevented the Note from providing useful legal guidance. It was observed that while such a general explanation might be useful in applying APOV in other contexts – for example, in identifying victims or developing prevention programs – it did not provide much help to prosecutors. The Note was widely considered to raise many more questions than it answered; including, for example: what does an *acceptable* alternative actually mean; and is it necessary to objectively establish the existence of an alternative?

More critically, the Note apparently confirms that the means element is fully satisfied once it is shown that the victim had no real and acceptable alternative but to “submit to the abuse involved”. It therefore appears to reject as unnecessary any subsequent inquiry into whether the alleged perpetrator actually abused or intended to abuse the vulnerability of the alleged victim. In short, the guidance relates only to the vulnerable position of the victim, not the abuse of that vulnerability. As a consequence, the mere fact of a victim's vulnerability (whether construed as lack of alternatives or belief in lack of alternatives) would be sufficient to support a conviction of an individual who may not have knowledge of that vulnerability or, if he or she does have such knowledge, does not abuse – or does not intend to abuse – that vulnerability.

A number of practitioners pointed out that this unsatisfactory situation could be ameliorated, at least in part, by refining the guidance to focus on the belief of the victim. This is the approach taken in the Netherlands and very much in line with the suggestion in the UNODC Model Law, which refers to “any situation in which the person involved *believes* he or she has no real and acceptable alternative but to submit”.¹⁷⁹ However, the Model Law proposal does not define the key concepts or otherwise address the question of how such belief can or should be established. It also does not address the reality that assessing the state of mind of a person who may be the victim of serious exploitation is a fraught task. Discussions at the Expert Group Meeting on this point explored the idea of overcoming evidentiary obstacles by using the common law concept of the “reasonable person”. A more generally applicable formulation of this concept could refer to the victim's reasonable belief,

179 UNODC, Model Law against Trafficking in Persons, pp 9-10. Note that the Model Law also proposes a second alternative: “Abuse of a position of vulnerability” shall mean taking advantage of the vulnerable position a person is placed in as a result of [list of relevant vulnerability factors to be inserted]”. This proposal may be useful in helping to establish vulnerability in the context of victim identification but it is submitted that its utility and the safety of its application in the context of criminal prosecutions is extremely limited by the same evidentiary obstacles and complications flagged in this section.

considered from an objective point of view in light of his or her particular vulnerability.¹⁸⁰

An alternative suggestion, also made in the UNODC Model Law, is that States consider adopting a definition of APOV that focuses on the offender and his or her intention to take advantage of the situation of the victim. This approach is advocated on the basis that: “these may also be easier to prove, as it will not require an inquiry into the state of mind of the victim but only that the offender was aware of the vulnerability of the victim and had the intention to take advantage of it”.¹⁸¹ This approach may offer another underlying advantage in its apparent affirmation that persons should be convicted for crimes they commit or intend to commit, and not be prosecuted because another person is in a vulnerable position.

Suggestions for consideration and discussion

The Interpretative Note raises the following questions, which require clarification:

- *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?*
- *What does an acceptable alternative mean? Must it be acceptable from an objective point of view (and against what standard?) or is the acceptability of an available (“real”) alternative to be measured from the point of view of the alleged victim?*
- *To what extent should the victim’s belief in the existence of a real and acceptable alternatives be relevant? To what extent should that belief be reasonable and how could such reasonableness be established?*
- *How can guidance be strengthened to reflect situations where the victim may be aware of real alternatives, but still submits to the abuse because he or she believes it is the best alternative available?*

The Interpretative Note does not address abuse of vulnerability.

- *How can interpretative guidance be strengthened to better reflect the Protocol’s emphasis on abuse of a position of vulnerability, so that prosecutions do not occur on the basis of the mere existence of vulnerability?*

¹⁸⁰ See discussion of the US legal framework above. (Note that the “reasonable person” is itself defined very carefully: “the relevant enquiry is whether the defendant’s conduct would intimidate and coerce a reasonable person in the victim’s situation to believe he or she must remain in the defendant’s service”).

¹⁸¹ UNODC, Model Law against Trafficking in Persons, pp. 9-10.

- *To what extent should the requisite state of mind of the perpetrator be reflected in the interpretative note?*

* * *

ANNEX 1: Survey Instrument

PART I: General

Date / Time of Interview:

Personal / Professional Details

Name:

Position:

Experience:

Telephone:

Email:

1. What is your view of how trafficking in persons is defined or understood in your national legislation?

Do you think it is too broad / not broad enough?

What are the main problems, if any, with the definition?

Are there specific evidentiary concerns associated with the definition?

Is prosecuting difficult / easy with this definition?

2. What role does the 'means' element as defined in article 3 of the Trafficking in Persons Protocol play in your domestic criminal offences, if any?

Must the means established in the Protocol be proven as means of to establish the TIP offence in domestic law?

PART II. Abuse of a position of vulnerability

(A) If incorporated into the definition / relevant law:

1. What is your understanding of 'abuse of a position of vulnerability' in the context of trafficking in persons?

i.e. what sort of things do you think are or could be included?

2. How does the law capture different situations?

What does it actually define? E.g. are particular vulnerabilities or vulnerable categories of persons specified?

3. Do you think the provision sufficiently makes clear what is and what is not permitted?

4. Do you think that the provision makes clear whether it is the victim's or the perpetrator's state of mind that is relevant?

What is your view on this?

What have the consequences been either way?

5. Does the provision draw a distinction between abuse of existing vulnerability and abuse of vulnerability created by the trafficker?

What do you think is the difference in practice?

6. How is abuse of a position of vulnerability different to coercion?

Can there *ever* be abuse of a position of vulnerability without coercion of some kind?

Are there any cases in which abuse of a position of vulnerability has been an element of the offense, without coercion being present?

Is 'coercion' defined in any laws or has it been subject to judicial interpretation?

If defined, does the definition / interpretation include abuse of a position of vulnerability?

7. How has the concept been used or applied in practice (by criminal; justice agencies and courts)?

Please provide specific examples that show how the term/concept is used in practice.

Was this element the only 'means' relied on to establish the relevant crime or was it additional or supplementary to other means such as force, coercion or deception?

Conversely, please provide specific examples of where the concept could have been but was not applied.

What vulnerability factors were involved?

8. Are there evidentiary challenges with this concept in practice (both potential and actual)?

Challenges in understanding the definition?

Challenges in proving position of 'vulnerability':

How is vulnerability proved?

Evidentiary challenges in showing that the victim is vulnerable?

What is the evidential test? (actions / victim's state of mind or beliefs / objective conditions / combination thereof?)

What types of evidence can be used?

In practice, it is enough to prove vulnerability or must abuse of that vulnerability also be proven?

Challenges in proving 'abuse of vulnerability'?

Types of evidence used to prove 'abuse of vulnerability'?

Must it be shown that accused knew of the victim's vulnerability and intentionally manipulated the victim on this basis?

Or must it be shown that the victim believed he or she had no reasonable alternative but to submit?

9. The interpretative note to this provision in the Trafficking in Persons Protocol states that the concept is to be understood as referring to "any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved."

Do you think this is a useful guide?

Do you see any practical problems with this approach? (either generally or in the context of your country's own laws)

This approach does not require the victim's subjective belief that there is no alternative – what are your thoughts on this?

10. Has 'abuse of a position of vulnerability' been relied on because other means (such as use of force, coercion, abduction, fraud, deception) were either not stipulated in legislation, or were available but could not be proven?

Relative to these other means, how difficult or easy is it to prove 'abuse of a position of vulnerability'? Why?

Can you offer examples of 'abuse of a position of vulnerability' being relied on where other means could not be established? Which means could not be established?

Alternatively, have these other means been relied on where 'abuse of a position of vulnerability' could not be established? Which means were relied on?

To what extent do you think 'abuse of a position of vulnerability' overlaps with these other means of trafficking?

11. How well do you think investigators, prosecutors and judges understand and apply the term / concept?

12. Is there any specific guidance (e.g. operational indicators for investigators, guidelines for prosecutors on elements of proof etc.) on applying this concept?

If yes, how helpful do you think this is? Who has access to it? Can we have copies?

If no, do you think there should be? What should such guidance address?

13. Do you think 'abuse of a position of vulnerability' is an important / useful concept in trafficking in persons and related cases?

14. Do you think your country's legislative approach on this issue is (more or less) the right one? Why / why not?

15. Is the notion of 'abuse of a position of vulnerability' present in any other laws?

[\(B\) If not incorporated into the definition / relevant law:](#)

1. What is your understanding of 'abuse of a position of vulnerability' in the context of trafficking in persons?

i.e. what sort of things do you think are or could be included?

2. Absent specific reference in the law, can 'abuse of a position of vulnerability' be introduced as a consideration in deciding whether a specific situation is 'trafficking'?

If yes, how? (for example, could abuse of vulnerability be relevant to a consideration of means specified in the law such as 'coercion'?)

3. Can you provide specific examples of cases where of 'abuse of vulnerability' has arisen? Please provide specific examples explaining what happened.

What vulnerability factors were involved?

4. Has the absence of the concept in the law been a hindrance to the identification and prosecution of trafficking-related exploitation?

5. More generally: do you see any issues or problems with this concept (either potential or actual)?

6. The interpretative note to this provision in the Trafficking in Persons Protocol states that the concept is to be understood as referring to 'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.'

Do you think this is a useful guide?

Do you see any practical problems with this approach? (either generally or in the context of your country's own laws)

How do you compare this approach to that requiring a victim's subjective belief that he or she has no alternative?

7. Do you think 'abuse of a position of vulnerability' is an important / useful concept in trafficking in persons and related cases?

8. Do you think your country's legislative approach on this issue is (more or less) the right one? Why / why not?

9. Is the notion of 'abuse of a position of vulnerability' present in any other laws?

PART V. OTHER

1. What is your understanding of the concept of 'abuse of power' in Trafficking in Persons situations?

How do you think this concept is related to 'abuse of a position of vulnerability'?

2. What is your understanding of the concept of 'giving or receiving of payments or benefits to achieve the consent of a person having control of another person'?

How do you think this concept is related to 'abuse of a position of vulnerability'?

3. How do you think the above concepts overlap or are linked?

Are all three of the concepts linked?

Are two concepts linked, for instance abuse of power and giving or receiving of benefits...?

How do these links play out in practice in your country?

4. Are any / all of these concepts addressed in criminal justice training?

If yes, how? Can you share any training materials that shed light on how these concepts are explained to practitioners?

If no, how do you think these concepts should be explained to practitioners?

5. Are there any other questions you would have liked to have been asked in the context of this interview?

If so, what are they and how would you answer them?

ANNEX 2: List of persons consulted, including Expert Group Meeting participants

Mr. Obiwulu Agusiobo (Nigeria)

Ms. Amanda Aikman (International Labour Organization)

Ms. Beate Andrees (International Labour Organization)

Ms. María Eleatriz García Blanco (Mexico)

Ms. Yuriria Alvarez Madrid (Mexico)

Ms. Fernanda Alves dos Ajos (Brazil)

Mr. James Behan (United Kingdom of Great Britain and Northern Ireland)

Ms. Carmela Buehler (Switzerland)

Ms. Pamela Bowen (United Kingdom of Great Britain and Northern Ireland)

Mr. Eduard Bulat (The Republic of Moldova)

Ms. Tatiana Buianina (La Strada, the Republic of Moldova)

Mr. Delano Cerqueira Bunn (Brazil)

Ms. Tatiana Catana (The Republic of Moldova)

Ambassador Luis CdeBaca (United States of America)

Mr. Alexandru Ceban (The Republic of Moldova)

Ms. Anamika Chakravorty (United States of America)

Ms. Parosha Chandran (United Kingdom of Great Britain and Northern Ireland)

Mr. Viorel Ciobanu (The Republic of Moldova)

Ms. Catherine Collignon (Belgium)

Mr. Frank Demeester (Belgium)

Mr. Juan Carlos Dominguez (Mexico)

Ms. Federica Donati (Office of the High Commissioner for Human Rights)

Ms. Luuk Esser (The Netherlands)

Ms. Denisse Velazquez Galarza (International Organization for Migration, Mexico)

Ms. Dorothy Gimba (Nigeria)

Mr. Alberto Gross (Switzerland)

Ms. Angélica Herrera (Mexico)

Mr. Paul Holmes (Asia Regional Trafficking in Persons Project)

Dr. Prabha Kotiswaran (India)

Ms. Martha Lovejoy (United States of America)

Judge Adel Maged (Egypt)

Ms. Eurídice Marquez Sanchez (International Organization for Migration, Vienna)

Mr. Jorge Antonio Maurique (Brazil)

Mr. Boris Mesaric (Switzerland)

Mr. Robert Moossy (United States of America)

Mr. Albert Moskowitz (International Organization for Migration, the Republic of Moldova)

Dr. P. M. Nair (India)

Ms. Joy Ngozi Ezeilo (United Nations Special Rapporteur on Trafficking in Persons, Especially Women and Children)

Mr. Arinze Orakue (Nigeria)

Ms. Elvira Luna Pineda (Mexico)

Mr. James Puleo (United States of America)

Ms. Nilce Cunha Rodrigues (Brazil)

Ms. Deepa Rishikesh (International Labour Organization)

Ms. Ina Rusu (International Organization for Migration, the Republic of Moldova)

Dr. Geeta Sekhon (India)

Mr. Abdulrahim Oputu Shaibu Esq (Nigeria)

Ms. Rosinda Silva (International Labour Organization)

Ms. Klara Skrivankova (La Strada, United Kingdom of Great Britain and Northern Ireland)

Ms. Liliana Sorrentino (Organization for Security and Co-operation in Europe)

Ms. Junko Tadaki (Office of the High Commissioner for Human Rights)

Mr. Warner ten Kate (The Netherlands)

Mr. Matthew Taylor (Canada)

Mr. Irina Todorova (International Organization for Migration, the Republic of Moldova)

Mr. Hans van de Glind (International Labour Organization)

Ms. Linda Van Krimpen (The Netherlands)

Ms. Margarita Vazquezmota (Mexico)

Ms. Guido Vigeveno (The Netherlands)

Mr. Stephen Warnath (United States of America)

Mr. Steve Wilkinson (United Kingdom of Great Britain and Northern Ireland)

Ms. Christine Wilwerth (Belgium)



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