



Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

1. Introduction

1.1. The purpose of this Guidance Note is to assist criminal justice practitioners in understanding and applying ‘abuse of a position of vulnerability’ (APOV) as a means of trafficking in persons, as this concept is included in the definition of trafficking in persons in the Trafficking in Persons Protocol (Trafficking Protocol).¹

1.2. The Guidance Note draws on the UNODC Issue Paper on the same subject,² and practitioners are encouraged to consult that document for further information, including insight into national law and practice.

2. Key points

2.1. As the crime of trafficking in children is constituted by the ‘act’ of recruitment, harbouring, etc. for an exploitative ‘purpose’, APOV or any other means is not required to be shown in relation to any prosecution for child trafficking.

2.2. Establishing the existence of victim vulnerability will be important for many aspects of a trafficking case. For example, vulnerability can be a critical indicator when identifying victims; and accurate assessment of vulnerability can help to ensure that victim witnesses are appropriately supported and protected. However, more is required in criminal prosecutions. The mere existence of proven vulnerability is not sufficient to support a prosecution that alleges APOV as the means by which a specific ‘act’ was undertaken. In such cases both the *existence* of vulnerability and the *abuse* of that vulnerability must be established by credible evidence.

¹Article 3(a) of the Trafficking in Persons Protocol states that “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.

² United Nations Office on Drugs and crime, Issue Paper on Abuse of a Position of Vulnerability and Other Means within the Definition of Trafficking in Persons, October 2012, available from: <http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menuaside>



2.3. The **existence** of vulnerability is best assessed on a case-by-case basis, taking into consideration the personal, situational or circumstantial situation of the alleged victim. Personal vulnerability for instance, may relate to a person's physical or mental disability. Situational vulnerability may relate to a person being irregularly in a foreign country in which he or she is socially or linguistically isolated. Circumstantial vulnerability may relate to a person's unemployment or economic destitution. Such vulnerabilities can be pre-existing and can also be created by the trafficker. Pre-existing vulnerability may relate (but not be limited) to poverty; mental or physical disability; youth or old age; gender; pregnancy; culture; language; belief; family situation or irregular status. Created vulnerability may relate (but not be limited) to social, cultural or linguistic isolation; irregular status; or dependency cultivated through drug addiction or a romantic or emotional attachment or through the use of cultural or religious rituals or practices.

2.4. Critically, a victim's vulnerability may be an indicator of APOV, but it will not constitute a means of trafficking in persons unless that situation of vulnerability has also been abused to the extent that the victim's consent is negated.

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

3. Relationship of APOV to the 'act' element of the trafficking definition

3.1. APOV can be the means by which any of the trafficking 'acts' (recruitment, transportation, transfer, harbouring or receipt of persons) are committed.

3.2. The Trafficking Protocol definition establishes a clear link between the 'act' and the 'means'. Accordingly, where APOV is being alleged as the 'means', an offender should be shown to have abused the victim's vulnerability *in order to* recruit, transport, transfer, harbour, or receive that person.

4. Relationship of APOV to the exploitative 'purpose' element of the definition

4.1. APOV, like any other 'means', is relevant to all forms of trafficking and to all exploitative purposes listed in the Trafficking Protocol. It is also relevant to other exploitative purposes that have been identified in national and international laws including begging and exploitation in criminal activities.

4.2. APOV should not be more or less easily found in relation to certain exploitative purposes than in relation to others. A finding of APOV depends only on credible evidence that establishes the existence of a position of vulnerability on the part of the victim and an abuse of that position of vulnerability by the trafficker for the purpose of exploiting the victim. The particular form of the exploitative purpose in a specific case is not relevant to that analysis.

5. Evidentiary challenges and considerations in establishing APOV

5.1. The standard of proof to establish APOV should be the same as for establishing the elements of any crime under national law, including the other elements of the crime of trafficking in persons. Specifically, credible evidence must prove that the perpetrator intended to use APOV to commit an act (recruiting, transporting, transferring, harbouring, or receiving) for the purpose of exploitation.

5.2. As indicated above, evidence must show that the individual's personal, situational or circumstantial vulnerability was intentionally used or otherwise taken advantage of, to recruit, transport, transfer, harbour or receive that person for the purpose of exploiting him or her, such that the person believed that submitting to the will of the abuser was the only real or acceptable option available to him or her, and that this belief was reasonable in light of the victim's situation. The use of "means" must be of a sufficiently serious nature and extent as to vitiate the consent of the victim.

5.3. Evidence of APOV may be less tangible than for other means of trafficking (such as use of force). Furthermore, victims may not identify themselves as victims, particularly where they continue to remain dependent on or otherwise attached to those who have abused their vulnerability. Practitioners should be able to access the cooperation of specialists (e.g. psychologists, social workers, anthropologists and cultural advisers) at the investigative phase to ensure that evidence is effectively and appropriately collected, and brought to trial at the prosecutorial phase for instance, through or supported by expert witness testimony. Such cooperation may also be essential to gain the trust of victims and empower them to testify at trial. Evidence of APOV may be located in a jurisdiction other than that in which prosecutions are taking place. Procedures should be in place to facilitate and support cross-border cooperation between practitioners to ensure such evidence is identified and made available.

6. Identifying and managing risks

6.1. The lack of a clear definition of APOV and resulting ambiguities create certain risks that should be identified and managed. Misapplication of the concept could potentially compromise the rights of victims to be recognized as such, as well as the rights of accused persons to a fair trial. There is also a risk that misapplication could lead to an expansion of the concept of trafficking that detracts from its essential nature as an extremely serious crime and violation of human rights.

6.2. Where the concept of APOV is explicitly included in the definition of trafficking in domestic legislation, it should be carefully defined to provide clarity and guidance to practitioners and to protect against the risks outlined above. The definition should confirm the necessity of establishing both the existence of a position of vulnerability and the offender's abuse of that position of vulnerability. The definition should also take into account the issue of consent so that APOV, however it is defined, is of a sufficiently serious character as to negate consent.

6.3. Trafficking in persons is a serious crime that carries severe penalties. Safeguards should be put in place to ensure that a common sense approach can be taken to understanding and applying APOV, to promote an effective criminal justice response to trafficking and protect against the risks outlined above.



7. Improving practitioner understanding of APOV

7.1. The effective investigation and prosecution of trafficking in persons cases requires that criminal justice practitioners keep abreast of the methods used by traffickers to subjugate victims to one of the acts required by the definition of trafficking. Irrespective of whether or not APOV is part of the domestic definition of trafficking, it is crucial to ensure practitioner understanding of how a victim's position of vulnerability may exist or arise and how its abuse may operate in the context of trafficking crimes.

7.2. Specific training and guidance on abuse of a position of vulnerability should be provided to criminal justice practitioners to ensure that potential victims are appropriately identified, alleged perpetrators are effectively investigated, suspects are fairly prosecuted, and convicted traffickers are subject to sanctions that are proportionate to the gravity of their offence.

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