

UNDERSTANDING AND APPLYING THE DEFINITION OF TRAFFICKING IN PERSONS

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Summary:

- 1. Definitional challenges**
- 2. Key findings of the UNODC studies**
- 3. Towards the future**

KEY ELEMENT	UN TRAFFICKING PROTOCOL
1. An action: What traffickers do	Recruitment, transportation, transfer, harbouring or receipt of persons
2. By means of: How they do it	Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another
3. For the purpose of: Why they do it	Exploitation (including, 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)

DEFINITIONAL CHALLENGES

- The importance of the definition
- The challenge of complexity and lack of internal definitions
- Application of definition is difficult: compounding investigative / prosecutorial difficulties
- Key problem: scope / parameters of “trafficking” highly fluid

UNODC DEFINITION STUDIES

Three 'problematic' concepts:

- “Abuse of a position of vulnerability” as a ‘means’ by which trafficking occurs
- The concept of consent being irrelevant when any means are used
- The meaning / scope of the purpose element: “exploitation”

UNODC DEFINITION STUDIES: THE PROCESS

- Understanding of the intention of the drafters
- Country case studies: *what is happening on the ground?*
- Close involvement of practitioners at all stages
- Practice-based outcomes

ABUSE OF A POSITION OF VULNERABILITY: KEY FINDINGS

- History and intent: introduced to ensure a sufficiently wide range of conduct established as TIP “subtle means”
- But drafters unprepared to establish key parameters “no real or acceptable alternative”
- States interpreting and applying APOV very differently: often leading to overly broad conceptions of “what is TIP”
- Guidance note: need to define APOV; establish parameters, make the concept justiciable and predictable

ABUSE OF A POSITION OF VULNERABILITY: GUIDANCE NOTE

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.

THE PRINCIPLE OF THE IRRELEVANCE OF CONSENT: KEY FINDINGS

History and intent: recognition of danger of consent being used as a defense – especially where consent given at some point. But difficult questions remain: must ‘means’ actually nullify / be sufficiently serious to consent? And consent to what?

High acceptance among States of the principle: reflecting underlying attitudes re impunity / basic values

Consent often **highly relevant in practice** – from identifying victims to deciding which cases to prosecute

- Indications of consent make **cases difficult to prosecute**; can impact on how victim is perceived and how actions are interpreted, sentencing
- Relevant to **establishing exploitative purpose** (e.g. forced marriage, forced labor) and **intention** of accused

THE PRINCIPLE OF THE IRRELEVANCE OF CONSENT: CONCLUSIONS

- Clear guidance required – but need to balance clarity and flexibility
- **Risk 1:** rigid application of principle, combined with liberal interpretation of means (esp. APOV) can widen the understanding of TIP beyond the apparent spirit of the Protocol (e.g. poor situations of employment v. trafficking)
- **Risk 2:** Lack of attention to the principle could narrow understanding of what is TIP – indications / assertions of consent operate to reduce focus on difficult / unclear cases

THE CONCEPT OF EXPLOITATION: KEY FINDINGS

- **Intention of the drafters:** secure sufficient clarity around core practices without undue narrowing or restriction on future expansion
- **Key interpretative aspects:** existing legal definitions applicable; meaning of concepts not defined can be reasonably inferred; list not exhaustive
- **National findings:** concept not well or uniformly understood; significant differences between States: some narrower, others have expanded (forced begging, forced criminality, forced surrogacy; illegal adoption); culture and national context relevant.

THE CONCEPT OF EXPLOITATION: CONCLUSIONS

- Need for breadth and flexibility: new & emerging forms of TIP; changes in m/o of traffickers; improved understanding of how TIP happens
- But also a need for clear parameters perhaps including clear, operationally focused definitions of stipulated forms of exploitation

GENERAL FINDINGS ACROSS THE STUDIES

Conceptual clarity around the definition of TIP remains elusive - two sides:

- **Vagueness and imprecision obstructs effective responses** – and enables potentially harmful expansion: a vague law is usually not a good law: basic principles of legality and justice require laws to be delineated with a measure of certainty and to be capable of consistent application
- **But rigidity in approach can be counterproductive:** m/o of traffickers is evolving: new and less direct means; new ways of manipulating consent; new forms of exploitation – a consequent need to keep definitional tools sharpened and against the evolving landscape of exploitation

TOWARDS THE FUTURE

- Second and third generation law reform that reflects lessons learned
- Need for flexible legal tools / approaches to ensure *more and better* prosecutions – e.g. related crimes
- Role of WG in supporting greater conceptual clarity and promoting coordinated approaches
- The model of the Studies: possible replication?