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Issue Paper

**THE CONCEPT OF 'EXPLOITATION'
IN THE TRAFFICKING IN PERSONS PROTOCOL**



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Abbreviations and Acronyms

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(a) 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 action/means): namely, exploitation. Exploitation is not specifically defined in the Protocol but stipulated to 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.”¹ The definition further clarifies in Article 3(b), that consent of the victim to the intended exploitation is irrelevant when any of these ‘means’ have been used. All three elements (act, means and purpose) must be present to constitute ‘trafficking in persons’ in the Trafficking in Persons Protocol. The only exception is that when the victim is a child, the ‘means’ element is not part of the definition.

The Protocol definition 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 that definition and its practical application. This is important because to characterize certain conduct as ‘trafficking’ has significant and wide-ranging consequences for the alleged perpetrators of that conduct, and for the alleged victims. There may also be consequences for States – both internally in terms of constructing a national understanding of the nature and extent of the ‘trafficking problem’, and externally, in relation to various institutions and mechanisms that concern themselves with States’ response to ‘trafficking’. The potential breadth and narrowness of the definition has raised several issues to which States have taken quite different positions. Those who support a conservative or even restrictive interpretation of the concept of trafficking consider that too wide a definition may encompass practices that do not meet the high seriousness threshold expected of ‘trafficking’. Those who advocate for a more

¹ The full definition set out in Article 3 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.

expansive interpretation consider that too narrow an understanding of what is ‘trafficking’ may impede investigations, prosecutions and convictions related to practices that should indeed fall within this term – or indeed operate to exclude such practices altogether. Claims that ‘all trafficking is slavery’ and ‘all forced labour is trafficking’ are just two manifestations of what has been termed ‘exploitation creep’.

The risk that important concepts contained in the Protocol are not clearly understood and, therefore, are not consistently implemented and applied has been acknowledged by States Parties. In 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) recommended that UNODC prepare a series of Issue Papers “to assist criminal justice officers in penal proceedings” on several concepts identified as problematic. The first Issue Paper, on the concept of “abuse of a position of vulnerability and other ‘means’” was completed and issued in 2012, along with a Guidance Note for Practitioners. The second study, which dealt with the issue of “consent” was completed and issued in 2014. That study did not lend itself to a Guidance Note but a list of “Key Considerations” for practitioners was formulated and included as an annex to the Issue Paper. The present study focuses on the third definitional concept identified as requiring attention: the concept of “exploitation”.

Each study has adopted a similar methodology, with occasional refinements to reflect lessons learned. The methodology includes (i) a desk review of relevant literature including legislation and case law; (ii) a survey of States representing different regions and legal traditions through legislative and case review as well as interviews with practitioners; (iii) preparation of a draft issue paper; (iii) review of the draft issue paper and development of additional guidance at an international expert group meeting; and (v) finalization of the Issue paper and any associated guidance.

This present Issue Paper is divided into five parts. Part 1 sets out introductory and background material. Part 2 provides an overview and analysis of the international legal and policy framework around exploitation with a particular focus on the Trafficking in Persons Protocol. Part 3 summarises and analyses the results of the survey conducted of national law and practice as it relates to exploitation within the definition of trafficking. Part 4 seeks to draw together the findings from the survey. The final part, Part 5, provides guidance emanated in the process of developing this paper, including through the surveys and expert interviews as well as in the expert group meeting in October 2014.

The following provisional conclusions emerge from a review of the Trafficking in Persons Protocol and the *Travaux Préparatoires* as well as a range of interpretative and supporting texts undertaken in Part 2:

Considerations of exploitation were critical to establishing both the definition and the Protocol’s scope of application: Member States were concerned to not unduly narrow the exploitative purpose of trafficking, while also providing sufficient clarity regarding the nature of exploitation being addressed by the Protocol. There was a high level of agreement around a core set of practices to be included as forms of exploitation. However, some forms of exploitation proposed for inclusion were not accepted – either because they were seen as already being encompassed within another form of exploitation to be explicitly listed, or because they were felt to fall outside the scope of the Protocol. In regard to the latter, it is relevant to note that that the term “labour exploitation” was proposed but not accepted and proposals to explicitly include a profit or benefit element to the concept of exploitation were also rejected during Protocol negotiations.

The existing international legal definitions of slavery and forced labour are directly relevant to interpreting their substantive content within the context of the Trafficking in Persons Protocol: Slavery is defined in international law as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. Forced labour is defined in international law as “all work or service which is exacted from any person under the menace of any penalty, and for which the said person has not offered himself voluntarily”. While these definitions date back to the early part of the twentieth century, their continuing validity has been affirmed through both treaty and case law. Recent developments around the two terms (for example, judicial consideration of the indicators of ownership associated with slavery and refinements of understanding with regard to the concepts of ‘involuntariness’ and ‘menace of any penalty’ in the definition of forced labour) are relevant to interpreting their substantive content within the context of the Trafficking in Persons Protocol.

The existing legal understandings of servitude, ‘practices similar to slavery’ and ‘exploitation of prostitution’ are directly relevant to interpreting their substantive content within the context of the Protocol: While none of these three concepts is subject to clear international legal definition, there does exist a general understanding at law as to their substantive scope and content. The term ‘practices similar to slavery’ encompasses debt bondage, sale of children for exploitation, serfdom and servile forms of marriage, which have all been defined in international law. Definitions of these forms of exploitation are applicable to their use in the Trafficking in Persons Protocol. Servitude entails these four practices and additionally includes egregious exploitation of one person over another that is in the nature of slavery but does not reach that very high threshold of slavery. It is important to note that the Protocol does not equate prostitution with trafficking. For prostitution involving adults to fall within the definition of trafficking all three definitional elements (act, means and purpose). The relevant ‘purpose’ is ‘exploitation of prostitution’. This term refers not to prostitution *per se* but rather, to deriving some benefit from the prostitution of another person.

The meaning of terms not subject to international legal definition / understanding may be reasonably inferred from the Protocol’s context and drafting history and from supplementary sources of insight: The term ‘forced services’ is not defined in international law but may be inferred to extend the coverage of ‘forced labour’ to practices and conditions that may not be universally regarded as ‘work’ but exacted from a person under the menace of any penalty, and for which the said person has not offered him or herself voluntarily. While the meaning of ‘sexual exploitation’ is not fixed, a contextual analysis reveals certain parameters. When used in the context of the Protocol, this term could not be applied to prostitution generally as States made clear that was not their intention.

The ordinary meaning of ‘removal of organs’ is applicable – but the Protocol is unclear on certain points: ‘Removal of organs’ is unique among the stipulated forms of exploitation in that unlike slavery, servitude, exploitation of prostitution and sexual exploitation, it does not constitute a practice that may be considered inherently exploitative. The Protocol’s Interpretative Note, that “the removal of a child’s organs for legitimate medical or therapeutic reasons cannot form an element of trafficking if a parent or guardian has validly consented” is unhelpful, particularly as it may be construed to imply that a different rule may apply in the case of consensual removal of an adult’s organs “for legitimate medical or therapeutic reasons”.

The list of exploitative purposes set out in the Protocol is not exhaustive and may be expanded provided the integrity of the Protocol is retained: The non-exhaustive character of the Protocol’s definition is manifested in two ways: (i) through the term ‘at a minimum’; and (ii) through the absence of definitions relating to concepts that are not otherwise defined in international law. States are permitted to expand that list by either adding new concepts or by interpreting undefined concepts in a way that captures certain conduct relevant in a given country or cultural context. They are similarly permitted to include only the stipulated forms of exploitation and attach to those a narrow interpretation. In terms of expansion there are some limits, which may potentially include a threshold of seriousness that operates to prevent the expansion of the concept of trafficking to less serious forms of exploitation such as labour law infractions. It should be noted, however, that the Protocol does not clearly establish any such threshold.

* * *

The survey of national law and practice set out in Parts 3 and 4 confirmed that exploitation is considered to be critical to the concept of trafficking. It also found that there is general, high-level agreement among practitioners in different States as to the conduct and practices that should fall within the ‘purpose’ element of trafficking in persons. However, it is apparent that States have also taken the opportunity presented by the Protocol’s flexible approach to exploitation to tailor their understanding of the crime of trafficking in persons to national contexts and priorities. The following points summarise the major findings of the survey. Note

that detailed “issues for consideration and discussion” are provided in Annex 1 in respect of these findings.

Significant differences in legislative approaches to the ‘purpose’ element of the definition of trafficking in persons: Only one State surveyed (Canada) offers a stand-alone definition of exploitation in its legislation. Another State (Colombia) appears to provide a definition of exploitation but in fact adds criteria (financial gain or other benefit) to a list of exploitative purposes. The other ten surveyed States follow the approach taken by the Trafficking in Persons Protocol: offering a list of exploitative forms, rather than defining exploitation itself. The stipulated forms of exploitation vary from country to country. Some have followed the list set out in the Protocol. Others have added one or more other forms of exploitation to that list. A few have contracted the list to one or two of the Protocol’s stipulated forms. Some States have included definitions of the stipulated forms of exploitation in their legislation, while others have not. The list of exploitative purposes is exhaustive in some States, and open-ended – or unclear on this point – in others.

Exploitative purpose – exploitation of the prostitution of others / other forms of sexual exploitation: Neither ‘exploitation of the prostitution of others’ nor ‘sexual exploitation’ is defined in international law and it is clear that the drafters of the Protocol deliberately avoided attaching any definitions to these stipulated purposes. All States surveyed have included sexual exploitation (either explicitly or effectively) within their understanding of exploitative purposes in relation to trafficking in persons. In the majority of States surveyed, sexual exploitation is considered to be the most prevalent form of trafficking-related exploitation – or at least it is the most commonly investigated and prosecuted form. In some States the concept of sexual exploitation has been interpreted to include practices such as commercial surrogacy and forced or servile marriage. With the exception of one State (Brazil), practitioners generally agreed that trafficking for purposes of sexual exploitation is well understood and, relative to other forms of exploitation, is easier to investigate and successfully prosecute (though the reasons as to why varied). Unsurprisingly, the national approach to prostitution is relevant to how exploitation of prostitution and sexual exploitation are understood in the context of trafficking.

Exploitative purpose – forced labour: Despite the existence of an international legal definition, the parameters of the international legal prohibition on forced labour are not firmly established in the context of trafficking at the national level. All States surveyed have included forced labour (either explicitly or effectively) within their understanding of exploitative purpose in relation to trafficking in persons. Some have left the term undefined; others have incorporated the international legal definition into national legislation. Two States have crafted their own detailed (and potentially more expansive) definition. The survey revealed particular sensitivities in some States around the issue of forced labour, including a reluctance to admit the existence of a problem. In other States practitioners noted considerable difficulties in identifying and prosecuting forced labour. In many States the parameters of forced labour are not well established in law and practice. For most practitioners

the principal difficulty lies in establishing the line that divides bad working conditions (that would be more appropriately addressed under other legislation such as labour law) from exploitation of workers that is of sufficient severity to be brought within the operation of criminal law generally, and within the definition of trafficking in particular. The national context appears to be relevant - where bad working conditions are widespread, only the most extreme cases of labour exploitation will warrant attention, as trafficking or indeed as a violation of any other law. All practitioners recognized the idea of a continuum of exploitation and were readily able to identify practices that might lie at either end. However, there was much less certainty and consistency in relation to conduct falling within these two extremes. Practitioners found it difficult to distinguish 'trafficking for forced labour' from the stand-alone concept or offence of 'forced labour'.

Exploitative purpose – slavery or practices similar to slavery and servitude: Slavery is defined in international law and there are agreed international legal understandings as to the practices that fall within 'practices similar to slavery' and 'servitude'. Most States surveyed have included these forms of exploitation within their list of stipulated purposes of trafficking. Some have attached definitions to these terms but most have not. Some States have Court practice concerning trafficking cases with slavery and practices similar to slavery and servitude as the exploitative element. But in most States these purposes of trafficking appear to be of limited importance, remain inadequately understood, and are rarely prosecuted. Irrespective of whether the law included a specific definition, practitioners in most States were able to point to slavery as being qualitatively different to other forms of exploitation in embodying the idea of de facto ownership of one person over another. No State surveyed has provided a legislative definition of 'practices similar to slavery' and there is some indication that States do not understand well the scope and substantive content of this international legal prohibition. Practitioners were generally unclear on the distinction between slavery, practices similar to slavery and other stipulated forms of exploitation, most particularly forced labour.

Exploitative purpose – removal of organs: International confusion and uncertainty around removal of organs as a form of trafficking-related exploitation is reflected at the national level. Most of the surveyed States have included this form of exploitation within their definitions of trafficking. However, trafficking in persons cases with the exploitative purpose of organ removal are rare in practice, as evidenced by the UNODC Global Report on Trafficking in Persons 2014 where they represented less than 1 per cent of all reported trafficking cases. Moreover, where illicit organ removal (or removal of other body parts) does occur, it is generally addressed under the legislative regime governing organ removal, or as a distinct criminal offence under the penal code or other legislation.

Other forms of exploitation: Most of the surveyed States have gone beyond the list of forms of exploitation set out in the Trafficking in Persons Protocol – either explicitly by adding additional forms in legislation, or implicitly, by interpreting certain stipulated forms as extending to other practices. While not included in the

Protocol, **forced begging** has been incorporated into other international legal instruments and, among States surveyed, there was general agreement that forced begging is indeed an appropriate form of trafficking-related exploitation. Of those States that have not explicitly included forced begging in their legislation, there appears to be very little difficulty in absorbing this practice into one or more stipulated forms. Only one of the surveyed States includes **illegal adoption** in its anti-trafficking law and most questioned the suitability of the trafficking framework in situations where the purpose of the adoption is not itself exploitative. Similar issues arise in relation to **commercial surrogacy**, which is not included as an exploitative purpose by any surveyed State. However, one has established trafficking in pregnant women for the purpose of selling their babies as an offence and another has prosecuted commercial surrogacy involving force and fraud as a form of trafficking-related sexual exploitation. While not included in the Trafficking in Persons Protocol, **exploitation in criminal activities** has been incorporated into other international legal instruments. It is explicitly captured in the legislation of only one State but several others have demonstrated a capacity to absorb this purpose under stipulated heads of exploitation such as forced labour. While the international legal understanding of ‘practices similar to slavery’ includes **servile marriage**, this is not understood well in most States. Legislation in several of the States surveyed makes explicit reference to this and other exploitative forms of marriage such as **forced marriage**. However, many practitioners surveyed expressed unease and uncertainty around the issue of marriage and trafficking in persons.

Key finding – exploitation is not well or uniformly understood: In most States surveyed, interviews with practitioners confirmed that exploitation is not always well and uniformly understood and this is contributing to less than optimal criminal justice responses. The absence of clear definitions in the law (both of exploitation and of stipulated forms of exploitation) is seen as part of the problem, providing individuals with a measure of interpretative discretion that can lead to inconsistency. Detailed and operationally focused definitions appear to reduce, but not eliminate, confusion. Many practitioners noted that even with the help of clear legal definitions, it is often difficult to distinguish trafficking from other crimes. The principle of the irrelevance of consent was cited by a number of practitioners as a source of confusion in relation to exploitation.

Key finding – certain forms of exploitation raise particular practical and evidentiary challenges: The survey confirmed that irrespective of the form of exploitation involved, trafficking cases are challenging to investigate and prosecute. However, forced labour presents particular difficulties, often being well hidden within an otherwise legitimate industry. There are also indications that political and social acceptance of exploitative working conditions, particularly among migrants, contributes to the lower profile of such conduct. Practitioners in many States experience great difficulty in separating bad working conditions from situations that could or should be pursued as trafficking offences. The lack of definitive guidance in this regard was frequently referred to, as was the absence of alternative offences.

Key finding – severity is relevant to establishing exploitation in practice: While not relevant considerations under the law, it appears that the *severity of the exploitation, severity of the means used* (force, deception, etc.) and the *degree of harm* caused or intended are important practical considerations at both the investigative and prosecutorial stages. It follows that borderline cases – where the exploitation and/or means used are not considered to be particularly severe, or where the exploitation does not appear to have caused substantial harm to the victim, then a case may not be pursued as trafficking. However, there was a general sense that even as borderline cases cause problems, attempts to precisely delineate a ‘threshold of seriousness’ would be risky and possibly counterproductive.

Key finding – culture and national context are relevant to determining exploitation: Cultural and other context-specific factors can play a role in shaping perceptions of what constitutes exploitative conduct for the purposes of establishing trafficking. Such considerations appear to be especially relevant in relation to forms of exploitation that particularly affect women and girls such as sexual exploitation and forced or servile marriage. Of course, cultural and other context specific factors may also be important in trafficking cases concerning men and boys. The exploitation of migrant workers was acknowledged by some to have been ‘normalized’ in the national culture to the point that it would not quickly be considered trafficking. Issues around religion and ethnicity can also play a role in determining whether a particular practice meets the threshold of exploitation required for trafficking. For example practitioners in one State noted that practices such as child marriage and child begging might be viewed differently depending on the ethnic background of those involved.

Key finding – there is a need for breadth and flexibility, but also clear parameters: With only a few exceptions, practitioners affirmed the need to retain a degree of flexibility in defining and understanding exploitation in the context of trafficking. Many pointed to the emergence of new or hidden forms of exploitation; changes in criminal methodology; and improvement in understanding of how exploitation happens as factors underlining the importance of such an approach. However, it was also noted (by noticeably fewer practitioners) that a vague law is not a good law: that basic principles of legality and justice require crimes to be delineated with certainty.

Views on guidance for practitioners: Practitioners generally agreed that guidance on the ‘exploitation’ element of the definition of trafficking in persons would be helpful to those involved in investigating, prosecuting and adjudicating such cases. Some considered the need to be most crucial at the national level: exploitation and forms of exploitation stipulated in the law need to be explained clearly and their parameters firmly established in a way that reflects national conditions and context. Others considered that international guidance is more important – both in its own right but also in terms of providing a framework within which more detailed and tailored national guidance could be developed. A number of practitioners expressed concern that guidance – whether national or international – could operate to

restrict the flexibility that is so important to ensuring that trafficking laws can accommodate new and changing situations. Practitioners were divided on the question of whether there could be a universal understanding of what constitutes exploitation for purposes of trafficking.

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 Crime² (Trafficking in Persons Protocol) is considered to be “the principal, legally binding global instrument to combat trafficking in persons.”³ 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 a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person); and (iii) a “purpose” (of the action / means): namely, exploitation, which is defined to 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”.⁴ All three elements must be present to constitute ‘trafficking in persons’ except in relation to trafficking of children for which the ‘means’ element is not required.⁵ The consent of a victim in trafficking is specified as irrelevant when any of the stipulated ‘means’ are used.⁶

Achieving international agreement on the definition of trafficking in persons was widely considered to be a major step forward in articulating a common understanding of the nature of the problem and establishing the foundation upon which the necessary cooperation between States could be developed. In the fourteen years that have elapsed since the adoption of the Trafficking in Persons Protocol, there has been considerable advancement towards its implementation, facilitated 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.

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2237 UNTS 319, done 15 November 2000, entered into force 5 December 2003 (Trafficking in Persons Protocol).

³ 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, 1 Dec. 2008.

⁴ Trafficking in Persons Protocol, Art. 3.

⁵ Ibid, Art. 3(c).

⁶ Ibid, Art. 3(b).

However, it has become evident that questions remain about certain aspects of the definition – most particularly those aspects that are not defined elsewhere 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 strengthen the international legal framework around this issue and also support national efforts to respond to trafficking. In this regard it is relevant to note that since the adoption of the Trafficking in Persons Protocol, the majority of States have revised or enacted legislation to respond to trafficking in persons. Many of these laws incorporate the Trafficking in Persons Protocol definition set out above. Some States have modified the definition to better suit their national context, their understanding of the problem and/or existing legal and policy frameworks. Generally, however, there is high correlation between the Trafficking in Persons Protocol and domestic law on trafficking, underscoring the value of offering guidance or highlighting unclear issues or aspects to practitioners that have been inherited through incorporation of the Protocol’s definition into national law.

It is important to reaffirm a point made in the context of earlier studies: questions around the definition of trafficking have a practical as well as legal dimension. Characterizing certain conduct as ‘trafficking’ has significant and wide-ranging consequences for the alleged perpetrators of that conduct, and for the alleged victims. Persons who are victims of that conduct become ‘victims of trafficking’, and thereby entitled to special measures of assistance and protection that will be unavailable to those who are not identified as having been trafficked. Criminals involved in a practice that is identified as ‘trafficking’ are likely to be subject to a different and typically harsher legal regime than would be applicable if that identification had not occurred. For the State, characterization of certain conduct as ‘trafficking’ will trigger a range of criminalization and cooperation obligations. It will also impact on national understanding of the nature and extent of the ‘trafficking problem’ and affect a State’s interaction with external compliance institutions and mechanisms.

The potential breadth and narrowness of the definition has raised different issues and States have taken quite different positions. There is a tension between those who support a conservative or even restrictive interpretation of the concept of trafficking, and those who advocate for its expansion: between understandable efforts to expand the concept of trafficking to encompass most, if not all forms of severe exploitation; and the practical challenge of setting priorities and establishing clear legal boundaries, particularly for criminal justice agencies involved in the investigation and prosecution of trafficking-related crimes. The complex and fluid definition contained in the Trafficking in Persons Protocol has contributed to ensuring that such tensions remain unresolved. ‘Exploitation’, the subject of the present study, provides a case in point (as do the subjects of previous studies, ‘abuse of a position of vulnerability and other means’ and ‘consent’). The way in which the purpose of trafficking is understood will inevitably operate to either expand or contract the range of practices identified as trafficking and, thereby, the categories of persons identified as having been trafficked or having perpetrated

trafficking crimes.

These tensions sit within a broader political and advocacy framework that is impatient with complexity and the need for legal nuance. Certainly, there have been strong and consistent efforts to simplify the definition and forms of trafficking in ways that will advance advocacy efforts. The increasingly common claims that ‘all trafficking is slavery’ and ‘all forced labour is trafficking’ (and thereby slavery) are just two manifestations of what one commentator has aptly termed ‘exploitation creep’.⁷

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 Parties to combat transnational organized crime and to promote and review the implementation of this Convention.”⁸ 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 carry out the functions assigned to it in article 32 of the Organized Crime Convention with respect to the Trafficking in Persons Protocol and the Smuggling of Migrants Protocol.⁹ The United Nations Office on Drugs and Crime (UNODC) acts as the Secretariat to the COP. UNODC is the guardian of the Organized Crime Convention and its supplementing Protocols, and is mandated to support Member States in their efforts to implement these instruments.

In 2008, the COP established an Open-ended Interim Working Group on Trafficking in Persons (Working Group) to advise and assist the COP in the implementation of its mandate with regard to the Trafficking in Persons Protocol. The Working Group is mandated to; (i) facilitate implementation of the Trafficking in Persons Protocol through the exchange of experience and practices between experts and practitioners in this area; (ii) make recommendations to the COP on how States Parties can better implement the provisions of the Protocol; (iii) assist the COP in providing guidance to UNODC on its implementation-related activities; and (iv) make recommendations to the COP on how it can better coordinate with the various international bodies combating trafficking in persons with respect to

⁷ Janie Chuang, “Exploitation Creep and the Unmaking of Human Trafficking Law”, 108 (4) *American Journal of International Law* (2014)

⁸ United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, done 15 November 2000, entered into force 29 September 2003 (Organized Crime Convention), Art. 32(1).

⁹ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, CTOC/COP/2004/6, 23 September 2004, 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” and Decision 1/6: “Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime”.

implementing, supporting and promoting the Protocol.¹⁰

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

[t]he Secretariat should prepare, in consultation with States parties, issue papers to assist criminal justice officers in penal proceedings, on subjects such as consent; harbouring, receipt and transport; abuse of a position of vulnerability; exploitation; and transnationality.¹¹

In October 2010, at its fifth session, the COP welcomed the recommendations of the Working Group on Trafficking in Persons¹² and requested the Secretariat to continue its work on the analysis of key concepts of the Trafficking in Persons Protocol.¹³ The first Issue Paper on “abuse of a position of vulnerability and other ‘means’ within the definition of trafficking in persons”, accompanied by a guidance note for practitioners, was issued in 2012 and presented to the COP at its sixth session from 15-19 October 2012. The COP welcomed the issue paper and requested the Secretariat to:

continue its work on the analysis of key concepts of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention on Transnational Organized Crime, by preparing similar technical papers.¹⁴

The second Issue Paper, on “the role of ‘consent’ in the Trafficking in Persons Protocol” has been finalised and was launched at the seventh session of the COP in October 2014. This third paper in the series examines the concept of ‘exploitation’ within the Protocol’s definition of trafficking in persons.

¹⁰ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, UN Doc. CTOC/COP/2008/19, 1 December 2008, Decision 4/4: “Trafficking in Human Beings”.

¹¹ “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).

¹² Conference of the Parties to the United Nations Convention against Transnational Organized Crime, UN Doc. CTOC/COP/2010/17, 2 December 2010, Resolution 5/2: “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”, op. 5.

¹³ Ibid, op. 10.

¹⁴ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, UN Doc. CTOC/COP/2012/15, 5 November 2012, Resolution 6/1: “Ensuring effective implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto”, op. 12.

1.3 Methodology

The methodology for preparation of this Issue Paper was similar to that adopted for the first and second studies, with some minor modifications on the basis of that previous experience. That methodology included the following steps:

Initial desk research: involving (i) a review and analysis of existing scholarly writings and technical materials;¹⁵ (ii) examination of international and regional treaty law including historical resources; and (iii) examination of national legislation and national case law using UNODC databases.

Country surveys: Preparation of a survey instrument aimed at capturing additional and in-depth information on laws, cases and practices related to the subject of the study as well as practitioner understanding of and views on the issues raised. The survey instrument (see Annex) was then used to guide in-depth interviews with practitioners and experts from twelve States representing different regions and legal traditions (Australia, Brazil, Bulgaria, Canada, Colombia, Egypt, Malaysia, Qatar, Sweden, Thailand, Uganda, United Arab Emirates).

The States that participated in the process were identified following consultations with States Parties and with a view to maintaining geographical balance and including experience from both civil, common and mixed law systems. States Parties were also invited to participate in the surveys at various points during the research. An effort has been made to include select States in more than one study in order to allow for a more detailed examination of law and practice. Among the group of States participating in this study, four (Australia, Canada, Egypt and Thailand) have participated in a previous study. Additionally, for the same purpose, practitioners from States surveyed for previous issue papers were included in the review process for the present paper (USA, Israel and Switzerland) although those States were not formally included in the survey.

Drafting a Survey Report and the Issue Paper: The results of the country surveys, together with a detailed analysis of those results, were compiled into a Survey Report that formed a major input into the present Issue Paper (most particularly Parts 3 and 4). Additional analytical material prepared by UNODC and documentation collected during the desk research was also utilized in the drafting process.

Review by expert group: UNODC convened an expert group meeting in Vienna on 13–14 October 2014, with the purpose of verifying the findings of the survey and enriching the substance of the present draft paper. The Issue Paper was revised and finalised in light of the expert group meeting's findings. Three of the 12 States surveyed (Australia, Malaysia and the United Arab Emirates) were unable to send

¹⁵ These included a background paper, prepared by the Secretariat for the fifth meeting of the Working Group on Trafficking in Persons: "*Forms of exploitation not specifically mentioned in the Protocol*", UN Doc. CTOC/COP/WG.4/2013/4, 23 August 2013.

representatives to participate. Australia provided detailed written comments that were taken into account by the Expert Group. As noted above, representatives of three States that were not formally surveyed for this study (USA, Israel and Switzerland) attended the meeting.

Finalisation of the draft issue paper: the draft issue paper was revised in light of the findings of the expert group meeting and the feedback received is reflected in this final version.

1.4 Structure of this paper

An Executive Summary sets out the major findings of the Study. The Issue Paper itself is divided into four parts with the present, initial part setting out necessary background information including the broader context, mandate and terms of reference.

Part 2 provides an overview and analysis of the international legal and policy framework around exploitation and related concepts. It commences with brief analysis of the various ways in which exploitation is explained and understood; highlighting the questions around exploitation that have long caused debate and that resonate with the subject of this study. The next section considers 'exploitation' within the specific context of trafficking: undertaking a detailed examination of the various concepts set out in the Trafficking in Persons Protocol and drawing on applicable rules of international law to elucidate their scope and substantive content. A brief survey of other sources of insight and authority is then made before drawing some initial conclusions on the applicable international legal and policy framework.

Part 3 summarises and analyses the results of the survey of national law and practice as it relates to the concept of exploitation with a view to establishing the foundation for a broader consideration of issues and trends in the following part. The twelve surveyed States are divided into four groups: (i) States that closely follow the Protocol's approach to exploitation; (ii) States that generally follow the Protocol's approach but include additional forms of exploitation; (iii) States that generally follow the Protocol's approach but include fewer forms of exploitation; and (iv) States that take a different approach to the purpose element of the definition of trafficking.

Part 4 draws together findings from legislation, case law and the views of practitioners around a series of findings relating to legislative approaches; different forms of exploitation; and practitioner views on key issues.

Part 5 presents guidance on policy and practice that emanated in the process of developing this paper, including through the surveys and in the Expert Group Meeting in October 2014. This guidance is presented for consideration and as a

source of learning, rather than for rigid application by States and criminal justice practitioners.

2 The concept of ‘exploitation’ in international law and policy

2.1 General insights into the concept of exploitation

The concept of exploitation as it appears in the Trafficking in Persons Protocol did not arise in a vacuum. A range of disciplines – from law to philosophy, from economics to politics – have long been occupied with examining and seeking to establish what exploitation means, or should mean. This has not resulted in agreement and the concept remains ambiguous. Certainly it has proved sufficiently fluid to support a range of positions and interpretations. This section describes, in necessarily brief and broad terms, the various ways in which exploitation is explained and understood. It also highlights the questions around exploitation that have long caused debate and that resonate with the subject of this study.

The common dictionary definitions of exploitation indicate two alternate meanings – one technical the other normative. In the first sense exploitation can refer, (neutrally), to making use of or deriving benefit from a thing or situation – for example a resource. In the second sense it focuses on relationships between *people*: referring, in a potentially pejorative way, to taking of advantage of a person (or their characteristics or their situation) for one’s own ends.¹⁶

In both politics and philosophy, ‘exploitation’, when attached to a person, is commonly understood as being linked to some weakness or vulnerability, which becomes the object of exploitation. “To exploit a *person* is to use a weakness in order to gain substantial control over the person’s life or labour.”¹⁷ This is not inevitably and universally seen as ‘wrong’. For example, many States accept that it is both just and right for people to buy and sell labouring capacities at whatever prices the free market will bear. The power differentials between employer and employee may mean that the resulting bargain will be ‘exploitative’ but not necessarily viewed as unjust or unethical.¹⁸ Efforts to redress inequalities of power through collective bargaining or minimum wages can lessen the *degree* of exploitation but not the fact of it.

To be ‘wrong’, therefore, exploitation must be linked in some way to injustice – not just taking advantage of a person, their situation or their vulnerability, but taking *unfair* advantage. This is a helpful distinction but of course it raises the question of

¹⁶ Judy Pearsall and Bill Trumble, eds., *Oxford English Reference Dictionary* (Oxford University Press, 2nd edn. 1996).

¹⁷ Ted Honderich, ed., *The Oxford Companion to Philosophy* (Oxford University Press, 2nd edn. 2005).

¹⁸ *Ibid.*

how unfairness should be defined or understood. The following extract from the Concise Oxford Dictionary of Politics neatly sets out the complications that arise when applying this more nuanced understanding in practice:

*The difficulties are in specifying the nature of the unfairness of the advantage, and the ways in which the opportunity to take advantage arises in the first place, and/or is seized on a particular occasion. For these reasons, the analysis of exploitation is linked inextricably to understandings of power and (in)justice. What is distinctive about exploitation as a particular form of injustice has been controversial; so, too, have been the ways in which (if any) exploitation is a form of power, rather than a possible consequence of it. A particular problem is the identification of exploitative transactions within consensual exchanges, which for some theorists disguise the presence of a power relation, but for others guarantee its absence.*¹⁹

This extract touches on complications that are central to the considerations of this paper. For example, is it wrong for one party to exploit another if the transaction is consensual? Is it wrong if the transaction is both consensual *and* mutually advantageous? Is it wrong to allow oneself or another person to be unfairly – or even harmfully – exploited? Can society justifiably prohibit people from entering into such transactions? At what point should exploitation become criminal? To what extent should we look to universal human rights – or the values they embody such as dignity and freedom – when addressing these questions?

Certainly the concept of exploitation has both temporal and cultural dimensions. Labour practices that today may be widely deemed exploitative (and prohibited under law) such as harmful child labour and bonded labour have not always been viewed in this way. In some cultures and societies, commercial sexual transactions are *ipso facto* exploitative and this is a principal justification for their criminalization. In others, that direct link is not present and additional features, such as coercion, would be required to establish exploitation for the purposes of legal sanction.

The literature review confirmed support for understanding exploitation – in the sense of taking unfair advantage – as a continuum, albeit one that is poorly defined and highly contested. At one end lie the situations in which it is both legally and socially acceptable for one person to derive an unequal, possibly even unfair advantage from another: the inequalities of power that enable the unfair advantage are themselves considered to be acceptable within that time and place – as is the disproportionate benefit accrued through the taking of unequal / unfair advantage. At the other extreme are situations where the unfair advantage is acute and the resulting harm very severe. Practices commonly associated with this end of the continuum, such as slavery and servitude, are more resistant to cultural and other

¹⁹ Iain McLean and Alistair McMillan, eds., *The Concise Oxford Dictionary of Politics* (Oxford University Press, 3rd edn. 2009).

influences; at least at the level of law and policy they are now universally condemned. All forms and manifestations of exploitation that do not belong at either end lie somewhere along this continuum. For example, somewhere not too far from the starting point will be exploitative conduct of a lesser kind that nevertheless reaches a point of unfairness or injustice to warrant it being subject to legal sanction. Failure to pay a mandated minimum wage may be one example. Forced labour would generally be located at the other extreme end, perhaps at a point before slavery-like conduct that involves assertions of ownership over a person. From a legal perspective, the idea of a continuum is particularly useful because points on that continuum can be set with reference to the legal regime they fall within (and vice-versa).

In international law use of the term exploitation mirrors the duality of meanings referred to above. In reference to a 'thing', such as an economic resource, exploitation has a neutral, potentially even a positive connotation.²⁰ In reference to a person, the connotation of exploitation is inevitably negative. For example, international human rights law prohibits "exploitation of prostitution"²¹ as well as all forms of exploitation that are prejudicial to children.²² Exploitation has also been used as an umbrella term to unify a stipulated group of harmful practices.²³ Despite accommodating such references, international law itself does not contain a general definition of exploitation. As discussed further below, certain practices commonly identified as 'exploitative' are indeed defined. However, other practices, such as the exploitation of the prostitution of others, and economic or sexual exploitation in relation to children, are not.

2.2 The concept of exploitation in the context of the Trafficking in Persons Protocol

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. The first component of the definition, the 'action' element, will typically be viewed as is one part (and in the case of trafficking in children, the only part) of the *actus reus* of trafficking. This element can be fulfilled by the undefined practices of recruitment,

²⁰ Allain cites the example of the United Nations Convention on the Law of the Sea, which establishes a regulatory regime for the economic exploitation of maritime natural resources. See Jean Allain, 'Introduction', in *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2012), p. 2.

²¹ Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, done 13 December 1979, entered into force 3 September 1981 (CEDAW), Art. 6.

²² Convention on the Rights of the Child, 1577 UNTS 3, done 20 November 1989, entered into force 2 September 1990 (CRC), Arts. 19, 32, 34–36.

²³ For example in Article 5 of the African Charter on Human and Peoples' Rights, 1520 UNTS 217, done 27 June 1981, entered into force 21 October 1986 (... *All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.*)

transportation, transfer, harbouring or receipt of persons. Such activities may well be neutral in and of themselves, but take on a different character when undertaken in a particular way (*means*) and with the intention to exploit (*purpose*). The final element, “for the purpose of” will typically provide the basis for identifying the *mens rea* aspect of the offence. 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. Trafficking is thereby a crime of specific or special intent.²⁴ There is no requirement for exploitation to have occurred: the crime of trafficking is made out under the Protocol once the relevant elements of act and purpose (or, in the case of children, act only) are made out along with an intention to exploit.²⁵

The Trafficking in Persons Protocol does not define ‘exploitation’, instead providing an open-ended list of examples 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”.²⁶ While none of these practices are subject to definition within the Protocol, some have been defined in other international instruments.²⁷ The words “at a minimum” confirm that forms of exploitation not explicitly mentioned in the definition could also be captured within the Protocol’s definition of trafficking in persons.²⁸

The Protocol makes several additional references to exploitation: in the preamble, noting (in the context of a statement of purpose) the existence of a range of international instruments “to combat the exploitation of persons”; in connection with its provision on the irrelevance of consent;²⁹ and in a provision requiring States Parties to address the demand that fosters “all forms of exploitation of persons”.³⁰

²⁴ UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (2009), Module 1, pp. 4–5. 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*, p. 6.

²⁵ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Sales No. E.05.V.2 (2004), p. 268–269, para 33.

²⁶ Article 3.

²⁷ See further section 2.3, below.

²⁸ The *Travaux Préparatoires* reproduce a note produced by the drafters during the negotiations explaining that “[t]he words “at a minimum” will allow States parties to go beyond the offences listed in this definition in criminalizing [and are] also intended to make it possible for the protocol to cover future forms of exploitation (i.e. forms of exploitation that [are] not yet known”): UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2006) (hereinafter *Travaux Préparatoires for the Organized Crime Convention and Protocols*), p. 343, note 22.

²⁹ Trafficking in Persons Protocol, Art. 3(b) (consent to the intended exploitation is irrelevant where any of the listed means are used).

³⁰ *Ibid*, Art. 9(5).

A review of the *Travaux Préparatoires* confirms that considerations of exploitation were a critical part of the negotiations – not just in terms of the definition but also more broadly in establishing the Protocol’s scope of application. In the context of this study, the *Travaux Préparatoires* provide important insight into how understanding of exploitation evolved during the drafting process and how this element of the definition, in its final formulation, was understood. Aspects of the drafting process that relate to specified forms of exploitation are considered in detail at section 2.3, below. More generally, findings include:

A concern to not unduly narrow the purpose of trafficking: This concern was raised regularly throughout the negotiation process as the rationale for a range of different suggested approaches: from excluding an exploitative purpose altogether (i.e. focusing solely on the act and means elements)³¹ to making broad reference to ‘any’ or ‘all’ forms of exploitation.³² The final text appears to be a compromise in ensuring maximum breadth of coverage while also providing sufficient indication of the nature of exploitation being addressed by the Protocol.

Differences of opinion on whether and how stipulated forms of exploitation should be defined: While there was no apparent appetite for ‘exploitation’ itself to be defined, a number of States suggested that forms of exploitation to be listed in the Protocol should be explicitly defined. In some cases the proposed definitions reproduced those already established in international law.³³ In other cases, additions or modifications were suggested to existing definitions.³⁴ New definitions were also suggested for proposed forms of exploitation that are not elsewhere defined.³⁵ Ultimately, it was agreed that the stipulated forms of exploitation to be included would not be separately defined.³⁶

Some forms of exploitation proposed for inclusion were not accepted: Throughout the drafting process a variety of exploitative purposes was proposed for inclusion. Some of these, such as domestic work, sex tourism and forced motherhood did not gain significant traction. Others, such as serfdom, the making or distribution of child pornography, purchase and sale of children, forced adoption, forced marriage, adoption and debt bondage were discussed more extensively but eventually dropped – generally with the implication that the proposed practice could be potentially subsumed under one or more of the stipulated forms and by the fact that the forms listed were “at a minimum”. The term “trafficking for labour

³¹ Travaux Préparatoires for the Organized Crime Convention and Protocols, pp. 334, 357.

³² Ibid, p. 337, note 19

³³ Ibid, p. 342, note 15.

³⁴ For example, modifications to the international legal definition of “forced labour”. See *ibid*, pp. 340, 342. Further on forced labour in the context of trafficking in persons see 2.3.2, below.

³⁵ For example, sexual exploitation. See *Travaux Préparatoires for the Organized Crime Convention and Protocols*, pp. 339–340.

³⁶ Ibid, p. 352, note 7.

exploitation” was proposed (in place of trafficking for forced labour) but this was not accepted.³⁷

A profit element to ‘exploitation’ was proposed but not accepted: During the early part of the negotiations some delegations suggested there was a need to refer to ‘profit’ in the context of exploitative purpose. This was discussed but the view that explicit reference to profit was unnecessarily restrictive prevailed.³⁸

The *Travaux Préparatoires* provide three Interpretative Notes relevant to the concept of exploitation: forms of sexual exploitation other than in the context of trafficking in persons are not covered by the Protocol;³⁹ the removal of a child’s organs for legitimate medical or therapeutic reasons cannot form an element of trafficking if a parent or guardian has validly consented;⁴⁰ and references to slavery and similar practices may include illegal adoption in some circumstances.⁴¹ These interpretative notes are considered further in the context of the discussion at 2.3 below related to the form of exploitation to which they apply.

The **Legislative Guide to the Organized Crime Convention and Protocols**, released in 2004, contains very little discussion on or analysis of the concept of exploitation. The 2009 **UNODC Model Law** is more expansive, particularly in relation to the various forms specified in the Protocol’s definition. The Model Law notes that while exploitation is not explicitly defined in the Protocol, this concept is generally associated with particularly harsh and abusive conditions of work, or “conditions of work inconsistent with human dignity”.⁴² It affirms the non-exhaustive nature of the forms of exploitation specified in the Protocol, noting that States may consider their own experiences and the existing legal framework in deciding whether to include other forms of exploitation. The Model Law does, however, warn against imprecision in stipulating additional forms, asserting that the principle of legality requires these to be well defined (“spelled out in the law”).⁴³ The Model Law may benefit from a review to reflect the growing understanding and interpretation of the Protocol as it has emerged since the Model Law’s publication in 2009.

³⁷ Ibid, p. 354 (*Notes by the Secretariat*, referring to a proposal by the International Labour Organization).

³⁸ Ibid, p. 340, note 6.

³⁹ Ibid, p. 347 (or Interpretative Notes A/55/383/Add.1, para. 64).

⁴⁰ Ibid (or Interpretative Notes A/55/383/Add.1, para. 65).

⁴¹ Ibid (or Interpretative Notes A/55/383/Add.1, para. 66).

⁴² UNODC, *Model Law against Trafficking in Persons*, UN Sales No. E.09.V.11 (2009) (hereinafter *UNODC Model Law*), p. 36, citing relevant provisions of Belgium, French and German law.

⁴³ Ibid, p. 35.

2.3 Forms of exploitation cited in the Trafficking in Persons Protocol

The forms of exploitation listed in the Trafficking in Persons Protocol are an integral part of its substantive content. Indeed, it is the substance and scope of these forms that, taken together, provide the minimum parameters of the third element of the definition set out in the Protocol. Critically the stipulated forms constitute a minimum list of exploitative purposes. States Parties are required to *at least* include these forms of exploitation but may also target other forms of exploitation.⁴⁴

This section considers each of the stipulated forms of exploitation individually: drawing on existing international laws and definitions, the *Travaux Préparatoires* and other guidance materials (international and regional) to ascertain both substance and scope; while also identifying aspects that remain unsettled, contested or otherwise unresolved.

2.3.1 Exploitation of the prostitution of others and other forms of sexual exploitation

The issues of prostitution and sexual exploitation were central to discussions around the definition of trafficking. This was unsurprising given the Protocol's origins in concern over the growing incidence of sexual exploitation of women and girls in the migration process and the involvement of criminal organizations in this phenomenon.⁴⁵ However, States disagreed, sometimes intensely, on how these issues were to be dealt with in the Protocol. Some sought specific reference to prostitution that would operate to confirm international legal opposition to all prostitution. Others argued that inclusion of 'prostitution' as a purpose of trafficking without further qualification would make the definition of trafficking overly broad and present particular difficulties for those who had chosen to respond to prostitution differently. The final compromise "exploitation of the prostitution of others and other forms of sexual exploitation" was accompanied by an Interpretative Note confirming that the Trafficking in Persons Protocol "addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons". The Interpretative Note further confirms that States deliberately decided not to define either term, ensuring the Protocol "is therefore without prejudice to how States parties address

⁴⁴ This may be inferred from the reference to "at a minimum" in the Protocol's provision on exploitation and is affirmed in the Council of Europe's Explanatory Report on the equivalent provision in the Council of Europe Convention on Action against Trafficking in Human Beings (ETS 197, 16.V.2005, done 16 May 2005, entered into force 1 February 2008). See Council of Europe, Explanatory Report on the Convention on Action against Trafficking in Human Beings, ETS 197, 16.V.2005 (hereinafter European Trafficking Convention Explanatory Report), para. 85.

⁴⁵ See further Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010), Chapter 1 (recounting the origins of the Trafficking in Persons Protocol).

prostitution in their respective domestic laws.”⁴⁶ A similar understanding is attached to the equivalent provision of the Council of Europe Convention on Action against Trafficking (hereafter the European Trafficking Convention).⁴⁷

“**Exploitation of the prostitution of others**” is generally understood as referring to profiting from the prostitution of another person. In that sense it operates to establish the locus of (usually criminal) conduct in a person other than the prostitute. The term first appeared in international law in the 1949 Convention for the Suppression of Traffic in Persons and Exploitation of the Prostitution of Others.⁴⁸ While the Convention does not provide a definition, States Parties to that instrument are required to punish, *inter alia*, “any person who, to gratify the passions of another ... exploits the prostitution of another person, even with the consent of the person.”⁴⁹ Further reference can be found in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which requires States Parties to suppress “all forms of traffic in women and exploitation of the prostitution of women”.⁵⁰ In the absence of an agreed definition of ‘exploitation of prostitution’ the CEDAW Committee has considered human rights issues associated with prostitution from a range of different (and sometimes, inconsistent) perspectives.⁵¹ It has avoided taking a position on the legal treatment of prostitution, but made clear its view that anti-prostitution laws should only penalize the actions of those who profit from exploitation, not the victims of that exploitation.⁵²

During the negotiations for the Trafficking in Persons Protocol, the Chairperson of the drafting group affirmed this accepted meaning of “exploitation of prostitution”, noting that “exploitation” as used in connection with prostitution distinguished individuals who might derive benefit from their own prostitution and those who derived some benefit from the prostitution of others.⁵³ The scant additional international guidance available appears to support this approach. For example, the UNODC Model Law on Trafficking, while noting that the term *exploitation of prostitution of others* could be defined in any number of ways, proposes that it refer

⁴⁶ Travaux Préparatoires *for the Organized Crime Convention and Protocols*, p. 347 (or Interpretative Notes A/55/383/Add.1, para. 64).

⁴⁷ European Trafficking Convention Explanatory Report, para. 88.

⁴⁸ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 UNTS 271, done 2 December 1949, entered into force 25 July 1951.

⁴⁹ *Ibid*, Art. 1.

⁵⁰ CEDAW, Art. 6.

⁵¹ See Janie Chuang, ‘Article 6’, in Marsha Freeman, Christine Chinkin and Beate Andrees, eds., *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012).

⁵² *Ibid*.

⁵³ Travaux Préparatoires for the Organized Crime Convention and Protocols, p. 344, note 27.

to “the unlawful obtaining of financial or other material benefit from the prostitution of another person.”⁵⁴

“**Sexual exploitation**”, also undefined in the Protocol, has no agreed definition in international law – although there have been various attempts to attach a particular understanding to the term in relation to specific settings.⁵⁵ It is not part of the language of international human rights law except in the context of children. The Convention on the Rights of the Child identifies the following practices as “**sexual exploitation of children**”: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.⁵⁶ Other international instruments embody a similar understanding of child sexual exploitation.⁵⁷

At one stage in the negotiation process, the rolling text contained a definition of “sexual exploitation” that, in the case of adults implied a means element such as force or clear lack of consent.⁵⁸ It was subsequently decided that there was no need to define the term.⁵⁹ Proposed alternatives such as forced prostitution or the subsuming of sexual exploitation under broader headings such as servitude, slavery and forced labour were discussed but not accepted. Proposals to include the production of pornography as a separate purpose were also not included, presumably because this purpose was seen to fall within the broader term ‘sexual exploitation’. The little additional international guidance available on the possible scope of ‘sexual exploitation’ includes a proposal in the UNODC Model Law that the term be defined in national law to mean: “the obtaining of financial or other

⁵⁴ *UNODC Model Law*, p. 14. The Model Law clarifies that “[t]he term ‘unlawful’ was added to indicate that this has to be unlawful in accordance with the national laws on prostitution”: *ibid.*

⁵⁵ For example, in connection with its policies around sexual exploitation and abuse by UN personnel, the United Nations has defined sexual exploitation as: “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.” Secretary-General’s Bulletin: Special Measures for protection from sexual exploitation and abuse, UN Doc. ST/SGB/2003/13, 9 Oct. 2003, Section 1. The UN’s Office of Internal Oversight Services, responsible for investigating misconduct, has stated that “engaging in sex with prostitutes” is an example of sexual exploitation: UN Office of Internal Oversight Services, “Frequently Asked Questions” (2008).

⁵⁶ CRC, Art. 34.

⁵⁷ For example, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, ETS 201, 25.X.2007, done 25 October 2007, entered into force 1 July 2010, Arts. 3(b) and 18–23.

⁵⁸ “‘Sexual exploitation’ shall mean: (i) of an adult [forced] prostitution, sexual servitude or participation in the production of pornographic materials, for which the person does not offer himself or herself with free and informed consent; (ii) Of a child, prostitution, sexual servitude or use of a child in pornography”: *Travaux Préparatoires for the Organized Crime Convention and Protocols*, p. 341 (or Sixth Draft of the Trafficking Protocol, UN Doc. A/AC.254/4/Add.3/Rev.6, 4 Apr. 2000, Art. 2(bis), Option 1).

⁵⁹ *Travaux Préparatoires for the Organized Crime Convention and Protocols*, p. 342, note 14.

benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials”.

2.3.2 Forced labour or services

The accepted international legal definition of forced labour is set out in ILO Convention No. 29: “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁶⁰ That definition is reproduced in the major human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), which also reiterates and extends the carefully circumscribed exceptions attached to the original definition.⁶¹ The prohibition contains a subjective element (*involuntariness*) as well as objective requirements that are met when the State or a private individual orders personal work or service and a punishment or sanction is threatened if the order is not obeyed.⁶² The ILO Convention definition of forced labour was reaffirmed, without amendment, in 2014 with the adoption of a Protocol to the Forced Labour Convention.⁶³

There is no international legal definition of forced labour as it relates to children. However, it is generally agreed that the definition set out above applies with modifications of the concepts of ‘voluntariness’ and ‘menace of penalty’ that take due account of the particular legal and social situation of children including their increased vulnerability to threat and intimidation.⁶⁴

The drafters of the Trafficking in Persons Protocol initially sought to provide a definition of forced labour, drawing variously on the 1930 ILO definition and the wording of the ICCPR with regard to exceptions to the general prohibition. One proposal before the drafters went significantly beyond the accepted international legal definition by including a means element (force, coercion, deception etc.) and incorporating the legally distinct practice of debt bondage. These various definitions were eventually dropped as part of the broader agreement to refrain from defining the specified forms of exploitation.

⁶⁰ Convention Concerning Forced and Compulsory Labour, 39 UNTS 55, ILO No. 29, done 28 June 1930, entered into force 1 May 1932, Art. 2(1).

⁶¹ International Covenant on Civil and Political Rights, 999 UNTS 171, done 16 December 1966, entered into force 3 March 1976 (ICCPR), Art. 8(3).

⁶² Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2005), p. 150 and sources cited therein.

⁶³ International Labour Conference, *Text of the Protocol to the Forced Labour Convention, 1930*, Provisional Record 9A, 103rd Session, Geneva, 2014, Art. 1(3).

⁶⁴ See further, International Labour Office, *Hard to See: Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children* (2011), pp. 16–18.

Initial drafts of the Protocol referred only to ‘forced labour’ and the *Travaux Préparatoires* do not explain why “services” was added although the addition can be readily defended with reference to the inclusion of “services” within the accepted international legal definition of ‘forced labour’. It is reasonable to speculate that this addition reflected general compromises made during the drafting process in relation to the issue of prostitution. States disagree on whether prostitution should be recognized as a form of work or labour. The addition of ‘services’ allowed for the possibility of sexual ‘labour’ exacted from “any person under the menace of any penalty, and for which the said person has not offered [him or herself] voluntarily” being included under the umbrella of forced labour in a manner that was acceptable to States holding different opinions on this issue. It is also reasonable to presume that the inclusion of ‘services’ enabled the prohibition to extend to other illegal or unregulated activities that States may not recognise as ‘labour’. The Explanatory Report to the European Trafficking Convention does not directly address this matter but notes no distinction between “forced labour” and “forced services”.⁶⁵

Important insight into the substantive content of the prohibition of forced labour is provided by ILO supervisory bodies which have emphasised that where work or services are imposed (for instance, by exploiting the worker’s vulnerability) under the menace of penalty, dismissal or payment of wages below the minimum level, such exploitation ceases to be merely a situation of poor employment conditions and triggers the protection of ILO Convention No. 29.

With respect to “voluntariness” the ILO has affirmed that this is to be understood as meaning that the person either became engaged in the activity against their free will or, once engaged, found that he or she could not leave the job with a reasonable period of notice, and without forgoing payment or other entitlements.⁶⁶ With respect to “menace of any penalty”, ILO supervisory bodies have recognized that psychological coercion might amount to the menace of a penalty, but have been less prepared to recognize that a situation of economic constraint keeping a worker in his or her condition meets this element of the definition.⁶⁷ Indirect coercion of that kind would only become relevant in conjunction with other factors for which the employer is responsible.⁶⁸ Work extracted through “menace of any penalty” is not voluntary and the ILO has further recognized that when deceit and

⁶⁵ European Trafficking Convention Explanatory Report, para. 92 (referring to case law under Article 4 of the European Convention on Human Rights).

⁶⁶ ILO, *ILO Global Estimate of Forced Labour: Results and Methodology* (2012), p. 19.

⁶⁷ ILO, *Forced Labour and Human Trafficking: Casebook of Court Decisions* (2009), pp. 12–13.

⁶⁸ As noted by the ILO in the *Forced Labour Survey Guidelines*: “... the obligation to stay in a job due to the absence of alternative employment opportunities, taken alone, does not equate to a forced labour situation; however, if it can be proven 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.” International Labour Office, *Hard to See, Harder to Count* (above n 64), p. 16.

fraud are involved in the original work offer, the worker's acceptance cannot be considered knowing and voluntary.⁶⁹ It identifies two separate questions: (i) whether the consent to work was in fact freely given; and (ii) whether the worker retains the ability to revoke his or her consent.

An important additional consideration concerns the ILO's shifting but ultimately unsettled position on the distinction between 'trafficking' and 'forced labour'. In a 2005 report the ILO affirmed its understanding that trafficking is distinguished from forced labour by the additional element of moving a person into a situation of forced labour. Under this interpretation, the maintenance of a person in a situation of forced labour without that initial movement (for example in relation to intergenerational bonded labourers) is "non-trafficked forced labor." In accordance with that understanding, only around 20% of persons in forced labour were estimated by the ILO to have been trafficked.⁷⁰ A subsequent publication, issued in draft form in 2011 took a different position, proposing a "narrow" version requiring movement and a "broad" definition to the effect that: "[i]rrespective of movement...any adult or child worker engaged in forced labour is classified also as a victim of human trafficking."⁷¹ Since 2012, however, the ILO has avoided pronouncing on such distinctions, confining its statistics to persons in situations of forced labour and noting that, with the exception of organ removal, 'trafficking' is covered by the Forced Labour Convention.⁷² It is relevant to note that one State (the United States of America) has been a strong advocate for an interpretation of the Protocol's definition that would support all forced labour being recognized as constituting trafficking in persons – and indeed all trafficking being recognized as 'slavery'.⁷³

2.3.3 Slavery or practices similar to slavery

While **slavery** and the slave trade were the subject of treaties throughout the nineteenth century, it was not until 1926, with the adoption of the League of

⁶⁹ See ILO, *The Cost of Coercion* (2009), p. 6.

⁷⁰ International Labour Office, *A Global Alliance Against Forced Labour: Global Report Under The Follow-Up To The ILO Declaration On The Fundamental Principles And Rights Of Work* (2005)

⁷¹ International Labour Office, *Hard to See, Harder to Count* (Draft version 2011)

⁷² See International Labour Office, *Global Estimate Of Forced Labour* 11-13 (2012); and International Labour Office, *Profits and Poverty: The Economics of Forced Labour*, at pp3-4 (2014).

⁷³ See generally Chuang, *Exploitation Creep*, above, note 7. In explaining the conflation of trafficking with both forced labour and slavery, Chuang cites the 2012 United States Government Trafficking in Persons Report which states at p.44: "On June 1, 2012, the International Labour Organization released its second global estimate of forced labour, which represents what the U.S. Government considers to be covered by the umbrella term "trafficking in persons." Relying on an improved methodology and greater sources of data, this report estimates that modern slavery around the world claims 20.9 million victims at any time".

Nations Slavery Convention,⁷⁴ that an international legal definition of slavery was formally articulated. Article 1 of that instrument defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁷⁵ The same instrument also called upon States to bring about “progressively and as soon as possible, the complete abolition of slavery *in all its forms*.”⁷⁶ The term “powers attaching to the right of ownership” and the “forms” of slavery that were to be progressively abolished were not specified and the resulting ambiguity has regularly given rise to expansionist interpretations. However, a careful review of the relevant *travaux préparatoires*⁷⁷ confirms that the phrase “slavery in all its forms” was not intended and does not operate to expand the definition beyond those practices involving the demonstrable exercise of powers attached to the right of ownership.⁷⁸

The question of what constitutes “powers attached to the right of ownership” is not settled although reference is generally made to acts such as purchasing, selling, lending or bartering a person or persons.⁷⁹ There is some evidence of an evolution of the definition of slavery in international law but its core content remains intact. For example, the International Criminal Tribunal for the Former Yugoslavia acknowledged that the traditional conception of slavery has evolved to encompass various contemporary forms of slavery in situations where these forms are: “based on the exercise of any or all of the powers attaching to the right of ownership.”⁸⁰

There was very little discussion of ‘slavery’ during negotiations for the Trafficking in Persons Protocol. A proposed definition – which did not survive – tracked the 1926 definition set out above.⁸¹

The inclusion of “**practices similar to slavery**” is not explained in the *Travaux Préparatoires* but is a clear reference to the 1956 Supplementary Slavery Convention.⁸² That instrument does not define contemporary forms of slavery but

⁷⁴ Convention to Suppress the Slave Trade and Slavery, 60 LNTS 253, done 25 September 1926, entered into force 9 March 1927 (Slavery Convention).

⁷⁵ Ibid, Art. 1.

⁷⁶ Ibid, Art. 2 (emphasis added).

⁷⁷ Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff, 2008).

⁷⁸ Ibid, esp. at 50–79. See also Gallagher, *The International Law of Human Trafficking* (above n 45), Chapter 3.

⁷⁹ See for example, Preparatory Commission for the International Criminal Court, “Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II: Finalized Draft Text of the Elements of Crimes”, UN Doc. PCNICC/2000/1/Add.2, 2 Nov. 2000.

⁸⁰ *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23-T and IT-96-23/1-T, ICTY Appeals Chamber, 12 June 2002, para. 117.

⁸¹ *Travaux Préparatoires for the Organized Crime Convention and Protocols*, p. 342.

⁸² Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, done 1 April 1957, entered into force 30 April 1957 (Supplementary Slavery Convention).

rather prohibits a set of practices. Accordingly, it operates to incorporate into the concept of “exploitation” the following:

Debt bondage: defined in the Supplementary Slavery Convention as: “the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined” (Article 1(a)). Unlike forced labour, the international legal definition makes no reference to the concept of voluntariness. It would appear, therefore, that international law does not envisage the possibility of an individual being able to consent to debt bondage. Debt bondage is said to be included within the prohibition on servitude contained in the ICCPR.⁸³

Serfdom: defined as “the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status” (Article 1(b)).

Servile forms of marriage: defined as any institution or practice whereby “(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person” (Article 1(c)). Note that this definition does not include forced marriage (understood as a union of two persons at least one of whom has not given their full and free consent to the marriage), and forced marriage is not separately identified as a practice similar to slavery.

Sale of children for exploitation: defined as “[a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour” (Article 1(d)). Subsequent developments call into question whether exploitative purpose or result are in fact required. For example, an optional protocol to the Convention on the Rights of the Child defines “sale of children” as: “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.⁸⁴ This broader definition could potentially operate to extend the concept of sale of children to include practices such as sale for adoption and even commercial surrogacy arrangements.⁸⁵ However,

⁸³ Nowak, *CCPR Commentary* (above n 62), p. 148.

⁸⁴ Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography, 2171 UNTS 227, done 25 May 2000, entered into force 18 January 2002, Art. 2(a).

⁸⁵ See further Anne T. Gallagher, ‘Article 35’, in Phillip Alston and John Tobin, *Commentary*

the requirement to additionally establish that the sale is for exploitation would remain intact.

2.3.4 *Servitude*

International law does not provide a definition of servitude although the 1956 Supplementary Convention identifies victims of “practices similar to slavery” (debt bondage, serfdom, servile forms of marriage and sale of children for exploitation) as “persons of servile status”.⁸⁶ The prohibition on holding a person in servitude is part of international human rights law.⁸⁷ A review of the relevant instruments appears to confirm servitude as both separate from⁸⁸ and broader than slavery, referring to “all conceivable forms of domination and degradation of human beings by human beings.”⁸⁹ Another interpretation separates the two concepts according to relative severity:

Slavery indicates that the person concerned is wholly in the legal ownership of another person, while servitude concerns less far-reaching forms of restraint and refers, for instance, to the total of the labour conditions and/or the obligations to work or to render services from which the person in question cannot escape and which he cannot change.⁹⁰

While the relationship between the two concepts is not fully settled, most agree that the distinction between slavery and servitude is both distinct and qualitative, that: “[s]ervitude should be understood as human exploitation falling short of slavery”⁹¹ However, it should be noted that the Explanatory Report to the European Trafficking Convention takes a slightly different position, stating that this “particularly serious form of denial of freedom” is to be regarded as “a particular form of slavery, differing from it less in character than in degree.”⁹² In *Siliadin v.*

to the Convention on the Rights of the Child (Oxford University Press, forthcoming, 2015).

See also discussion of forced / illegal adoption at 2.3, below.

⁸⁶ Supplementary Slavery Convention, Art. 7(b).

⁸⁷ See Universal Declaration of Human Rights, adopted by UNGA Res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc. A/810 at 71, 10 December 1948, Art. 4; and ICCPR, Art. 8(2).

⁸⁸ Drafters of the ICCPR changed the formulation of the Universal Declaration of Human Rights by separating “slavery” and “servitude” on the grounds that they were two different concepts and should therefore be dealt with in separate paragraphs: Marc J. Bossuyt, *Guide to the Travaux Préparatoires of the of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 1987).

⁸⁹ See *ibid*, p. 167; and Nowak, *CCPR Commentary* (above n 62), pp. 199–201.

⁹⁰ Pieter van Dijk and Godefridus J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer, 1990), p. 242 (discussing Article 4 of the European Convention on Human Rights).

⁹¹ Jean Allain, ‘On the Curious Disappearance of Human Servitude from General International Law’, *Journal of the History of International Law*, vol. 11, 2009, p. 304.

⁹² European Trafficking Convention Explanatory Report, para. 95.

France, the European Court of Human Rights generally affirmed these understandings, characterizing servitude as “an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of “slavery”.⁹³

During negotiations for the Trafficking in Persons Protocol some delegations objected to the inclusion of servitude in the list of exploitative purposes because of the lack of clarity as to the meaning of the term and the duplication with “slavery or practices similar to slavery”.⁹⁴ A draft definition, negotiated within the Ad Hoc Committee, proposed a definition that overlapped with both forced labour and debt bondage.⁹⁵ That definition survived up to the penultimate draft but was omitted without explanation from the final text. The UNODC Model Law provides an alternative, based on an interpretation of the prohibition of servitude set out in the Universal Declaration of Human Rights and the ICCPR.⁹⁶

2.3.5 Removal of organs

A proposal to include the removal of organs as an end purpose of trafficking was made very early in the drafting process but did not reappear until much later.⁹⁷ The proposal survived, despite not being universally supported⁹⁸ – or indeed well understood.⁹⁹ The official documentation provides no additional guidance on this aspect of the definition beyond an interpretative note to the effect that the removal of a child’s organs for legitimate medical or therapeutic reasons cannot form an element of trafficking if the parent or guardian has validly consented.¹⁰⁰ This raises

⁹³ *Siliadin v. France*, (2006) 43 EHRR 16 (ECHR, 26 July 2005, No. 73316/01), para. 124.

⁹⁴ Travaux Préparatoires for the Organized Crime Convention and Protocols, p. 344, note 29.

⁹⁵ “[T]he condition of a person who is unlawfully compelled or coerced by another to render any service to the same person or to others and who has no reasonable alternative but to perform the service, and shall include domestic service and debt bondage”. Ibid, pp. 344–345 (or Seventh Revised Draft of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,” UN Doc. A/AC.254/4/Add.3/Rev.7, 19 July 19 2000, Art. 2 bis(c)).

⁹⁶ The UNODC Model Law, at 20, proposes that servitude: “shall mean the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he or she cannot change”.

⁹⁷ Seventh Draft of the Trafficking Protocol, UN Doc. A/AC.254/4/Add.3/Rev.7, 19 July 2000, note 22.

⁹⁸ This is illustrated by the European Union’s deletion of organ removal from the definition of trafficking contained in its Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), OJ L 203, 1 Aug. 2002.

⁹⁹ Seventh Draft of the Trafficking Protocol, UN Doc. A/AC.254/4/Add.3/Rev.7, 19 July 2000, note 12. See also Travaux Préparatoires for the Organized Crime Convention and Protocols, p. 344, note 28.

¹⁰⁰ Travaux Préparatoires for the Organized Crime Convention and Protocols, p. 347. The Council of Europe and United Nations Organ Trafficking Study, at 80–81, notes that this also sets the limit for legitimate consent of parents or guardians: “if they consent to removal of organs other than for legitimate medical or therapeutic reasons, the offence of trafficking

several questions, not least of which is whether the same rule would apply to adults (subject of course to their valid consent) and if not, why not.

It is relevant to point out that of all the Protocol's listed examples of exploitative end purposes of trafficking, it is only "removal of organs" that does not necessarily constitute an inherent wrong – or indeed a crime in its own right in national law. In other words, unlike sexual exploitation, forced labour or services, slavery, practices similar to slavery and servitude, which are 'wrong' irrespective of whether or not they take place in the context of trafficking, the removal of organs may be lawful or unlawful depending on the purpose and circumstances of that removal. In most States organ removal will be lawful under certain specified circumstances.

In the years since the Protocol's adoption, while a lack of comprehensive, reliable data continues to persist, the nature of the organ trade, including its links with trafficking, have become more apparent and better understood.¹⁰¹ The distinction between trafficking in persons for purposes of organ removal and trafficking in organs, which has long been considered important,¹⁰² is not maintained in the most recent treaty on the subject, the 2014 Council of Europe Convention on Trafficking in Human Organs.¹⁰³ This instrument deviates from the Protocol's approach by addressing 'trafficking in human organs' rather than 'trafficking in persons for removal of organs'. It does not provide a definition of 'trafficking in human organs', rather requiring action against a range of practices including the illicit removal of organs; use of illicitly removed organs; and illicit solicitation, recruitment, offering and requesting of undue advantages in connection with organ transplantation. It is relevant to note that the UN Special Rapporteur on Trafficking in Persons has expressed concern about this instrument's failure to integrate the relevant practices within the broader conceptual and normative framework of the Trafficking in Persons Protocol and the possible lowering of victim protection and assistance standards as a consequence.¹⁰⁴ It is also important to note that 'organ removal' as

in human beings is committed. Regarding the question of what legitimate medical or therapeutic reasons are, reference must ... be made to recognised medical and ethical standards." Council of Europe and United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (2009).

¹⁰¹ See, for example, Report of the Special Rapporteur on Trafficking in Persons, especially women and children, UN Doc. A/68/256, 2 Aug. 2013; and Organization for Security and Co-operation in Europe (OSCE), *Trafficking in Human Beings for Purposes of Organ Removal in the OSCE Region: Analysis and Findings* (2013).

¹⁰² See Council of Europe and United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for Removal of Organs* (2009), p. 93. But note the view of the UN Special Rapporteur on Trafficking in Persons: "The Special Rapporteur considers that the difference is largely semantic, given that organs are not moved or traded independently of their source. Rather, the source is moved or positioned in such a way as to make transplantation possible. Accordingly, it is more accurate to characterize the practice described above as "trafficking in persons for the removal of organs". Ibid (UN Doc. A/68/256), para. 20.

¹⁰³ Council of Europe Convention against Trafficking in Human Organs, adopted by the Committee of Ministers on 9 July 2014 at the 1205th meeting of the Ministers' Deputies.

¹⁰⁴ UN Doc. A/68/256, 2 Aug. 2013, paras. 64, 65, 100.

an end purpose of trafficking can occur for reasons of culture and religious ritual, as well as for the commercial trade in organs for transplantation.

2.4 Additional accepted (and implied) forms of trafficking-related exploitation

Recent specialist anti-trafficking instruments have expanded the conception of trafficking to include several additional exploitative forms. Further forms of exploitation have been associated with trafficking through the Protocol's *Travaux Préparatoires* or other interpretative texts. These are briefly considered below.

Begging: EU Trafficking Directive 2011/36/EU¹⁰⁵ includes “begging” within its list of exploitative purposes, linking it to forced labour.¹⁰⁶ The accompanying explanatory note reiterates that “forced begging should be understood as a form of forced labour or services as defined in ILO Convention No 29: “[t]herefore, the exploitation of begging, including the use of a trafficked dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur.”¹⁰⁷

Exploitation of criminal activities: EU Trafficking Directive 2011 also includes “exploitation of criminal activities” within its list of exploitative purposes.¹⁰⁸ The accompanying note states that this expression “should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.”¹⁰⁹

Adoption: Drafters of the Trafficking in Persons Protocol considered proposals for inclusion of, variously, ‘forced adoption’, ‘illegal adoption’ and ‘purchase or sale of children’ within the list of exploitative purposes.¹¹⁰ While these suggestions were not taken up in the final text an Interpretative Note was included, stating that: “[w]here illegal adoption amounts to a practice similar to slavery ... it will also fall within the scope of the protocol.”¹¹¹ Under this provision it is only when the adoption is undertaken “with a view to the exploitation of the child or young person

¹⁰⁵ 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, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1, 15 Apr. 2011 (EU Trafficking Directive 2011/36/EU).

¹⁰⁶ Ibid, Art. 2(3).

¹⁰⁷ Ibid, chapeau para. 11.

¹⁰⁸ Ibid, Art. 2(3).

¹⁰⁹ Ibid, chapeau para. 11.

¹¹⁰ *Travaux Préparatoires for the Organized Crime Convention and Protocols*, pp. 342, note 13; 344, note 30; 350.

¹¹¹ Ibid, p. 347.

or of his labour”¹¹² that it will constitute trafficking. In short, illegal adoption, even when amounting to sale of children¹¹³ will not be characterized as trafficking under the Protocol unless exploitative intent can be shown. The chapeau to EU Directive 2011/36/EU appears to affirm this position in its somewhat ambiguous assertion that the definition set out in that instrument covers those illegal adoptions that “fulfil the constitutive elements of trafficking in human beings.”¹¹⁴

2.5 Conclusions on exploitation in international law and policy

Despite the absence of an international legal definition – including in the Protocol itself – the concept of exploitation as it relates to trafficking appears to be broadly consistent with its general meaning of one person taking unfair advantage of another person, their vulnerability or their situation. The core essence of trafficking-related exploitation is accepted to apply to both sexual exploitation and exploitation of another person’s labour. However, there is much less certainty at the edges, particularly in relation to the parameters of the concept; the scope and substance of individual practices deemed ‘exploitative’; and the criteria for determining other practices that could or should be included.

A careful review of relevant instruments, as well as of a range of interpretative and supporting materials, supports the following preliminary conclusions with respect to exploitation in international law and policy:

Considerations of exploitation were critical to establishing both the definition and the Protocol’s scope of application: States were concerned to not unduly narrow the purpose of trafficking, while also providing sufficient indication of the nature of exploitation being addressed by the Protocol. There was a high level of agreement around a core set of practices to be included as forms of exploitation. However, some forms of exploitation proposed for inclusion were not accepted – either because they were seen as being part of another form of exploitation to be explicitly listed, or because they were felt to fall outside the scope of the Protocol.

Existing international legal definitions of slavery and forced labour are relevant to understanding the Protocol: While both definitions date back to the early part of the twentieth century, their continuing validity has been affirmed through both treaty and case law. Recent developments around the two terms (for example, judicial consideration of the indicators of ownership associated with slavery and refinements of understanding with regard to the concepts of ‘involuntariness’ and ‘menace of any penalty’ in the definition of forced labour) are relevant to fleshing out their substantive content within the context of the Trafficking in Persons

¹¹² Supplementary Slavery Convention, Art. 1(d).

¹¹³ For the definition of “sale of children”, see note 84 above and accompanying text.

¹¹⁴ EU Trafficking Directive 2011/36/EU, chapeau para. 11. Note the same point is made about forced marriage. *Id.*

Protocol. While ‘servitude’, ‘practices similar to slavery’ and ‘exploitation of prostitution’ are not subject to clear international legal definition, there does exist a general understanding at law as to their substantive scope and content and the international legal definitions of practices that fall within the term ‘practices similar to slavery’ are directly relevant to the Trafficking in Persons Protocol.

The meaning of terms not subject to international legal definition or understanding may be reasonably inferred from the Protocol’s context and drafting history and from supplementary sources of insight: The term “*forced services*” is not defined in international law but may be inferred to extend the coverage of “forced labour” to practices and conditions that may not be universally regarded as ‘work’ but exacted from a person under the menace of any penalty, and for which the said person has not offered him or herself voluntarily. While the meaning of ‘*sexual exploitation*’ is not fixed, a contextual analysis reveals certain parameters. When used in the context of the Protocol, this term could not be applied to prostitution generally without any exploitative element, as States made clear that was not their intention. The ordinary meaning of ‘removal of organs’ is applicable – but the Protocol is unclear on certain points.

The list of exploitative purposes set out in the Protocol is not exhaustive and may be expanded provided the integrity of the Protocol is retained: The non-exhaustive character of the Protocol’s definition is manifested in two ways: (i) through the term ‘at a minimum’; and (ii) through the absence of definitions relating to concepts that are not otherwise defined in international law. In accordance with the Organized Crime Convention’s affirmation that criminalization obligations establish minimum standards, States are permitted to expand that list by either adding new concepts or by interpreting undefined concepts in a way that captures certain conduct relevant in a certain country or cultural context. They are similarly permitted to narrow the list by including only the stipulated forms of exploitation and attaching to those a narrow interpretation. In terms of expansion there are some limits. It may also be argued that there is a threshold of seriousness, which operates to prevent the inclusion of less serious forms of exploitation into the concept of trafficking in persons, such as labour law infractions that may be anyway subject to another legal regime. In addition, practices that do not possess an underlying element of exploitation (understood as one person taking unfair advantage over another) – such as buying or selling children for adoption that is not of itself exploitative – do not appear to fall within the Protocol’s understanding of exploitation and thereby its definition of trafficking.¹¹⁵

¹¹⁵ But note that this position does trigger questions around ‘removal of organs’ as a form of trafficking-related exploitation. See analysis above.

3 National Law and Practice: Overview

This Part provides an overview of national law, policy and practice around the issue of exploitation in the 12 States formally surveyed, summarising and analysing the more detailed information set out in the Survey Report.¹¹⁶ Its purpose is to lay the groundwork for further analysis of issues and trends in the following Part. For analytical purposes it has proven useful to divide surveyed States into four groups: (i) States that closely follow the Protocol's approach to exploitation; (ii) States that generally follow the Protocol's approach but stipulate additional forms of exploitation; and (iii) States that generally follow the Protocol's approach but stipulate fewer forms of exploitation than are provided in the Protocol; and (iv) States that take a different approach to exploitation.

The categorizations are imperfect and should be considered principally an organisational device. They reflect only the legislative definition and say nothing about practice. In terms of approach there is often more commonality between States in different categories than States within a single category. Within groups two, three and four are States that have reproduced the three-element structure of the definition set out in the Protocol and States that have omitted the 'means' element altogether. As means are often caught up within exploitative purposes, this can be highly relevant. Further, the amount and quality of information available on each country varied significantly. Some of those surveyed have substantial relevant case law while others were not able to provide any cases directly relevant to the subject of the study. Others referred to cases during the survey process, but were not able to provide judgments or other reports for further review. In some instances, the authors relied on (necessarily incomplete) case summaries drawn from the UNODC human trafficking case law database. Practitioners surveyed also had very different roles, capacities and experiences and these were reflected in the quality and depth of information secured through the interview process. Finally, while not all laws and cases were available in official translation, practitioners were asked to review and confirm findings based on unofficial translations.

3.1 States that closely follow the Protocol's approach to exploitation

Two of the 12 States surveyed (Malaysia and United Arab Emirates) are classified as closely following the Protocol's approach to exploitation: no definition of exploitation and inclusion of a minimum list that closely tracks that set out in the Protocol's definition.

¹¹⁶ Note that for ease of reading, formal references have been kept to a minimum in this part. Full citations to any legislation, case law or other material are contained in the survey report and available on request.

3.1.1 Malaysia

Summary: Persons consulted for this study included prosecutors and officials of the Ministry of Home Affairs and Ministry of Women, Family and Community Development. A number of cases were examined and external reports were also considered. Malaysian law generally follows the three-part definition set out in the Trafficking in Persons Protocol: including all stipulated forms of exploitation with the addition of “any illegal activity” (which has been used in practice to include sale of children and commercial adoption as exploitative purposes). Practitioners and officials interviewed provided very little information on most stipulated forms and discussion largely focused on “forced labour”; a concept that is not defined and not well understood. There is no clear line between trafficking for forced labour and illegal labour practices and case law is inconsistent. While there was little support for defining exploitation and/or its individual forms, practitioners and officials agreed that guidance would be valuable.

Legal framework: The *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670* as amended in 2010) defines trafficking in general accordance with the three part definition set out in the Trafficking in Persons Protocol. The definition affirms the irrelevance of consent and further notes the irrelevance of movement to establishing the crime of trafficking in persons. The third element of the definition, exploitation, is defined to mean “all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs”. There is no umbrella definition of exploitation and none of these stipulated forms of exploitation are defined in the trafficking law or elsewhere. The list of exploitative forms appears to be exhaustive but the reference to “any illegal activity” was likely intended to accommodate additional forms of exploitation.

Stipulated purpose – all forms of sexual exploitation: Sexual exploitation is considered by practitioners to be the primary form of exploitation in trafficking. However, of the 124 cases of trafficking charged in 2013, only 27 (approximately 22%) concerned trafficking for sexual exploitation. Practitioners generally indicated that this concept is well understood by investigators, prosecutors and the judiciary. No case law was made available to permit an analysis of the range of practices that are considered to fall within the term “all forms of sexual exploitation”.

Stipulated purpose – forced labour or services: Most cases of trafficking prosecuted in Malaysia in 2013 (90 of 127) involved trafficking for forced labour. The term is not defined in legislation but practitioners indicated that the general understanding is in accordance with the international legal definition and that prosecutors look to factors such as whether payment is made, conditions of living, whether basic needs are met, how a person is treated, whether there is evidence of injuries or abuse, and whether there is any debt bondage. In practice, however, there is some confusion as to its parameters. In some cases, courts have found that situations of even severe exploitation do not meet the required threshold of

seriousness but are rather labour disputes. Prosecutors are sometimes reluctant to pursue “forced labour” cases because of evidentiary and other difficulties that have caused previous prosecutions to fail. Alternative and lesser charges (such as unlawful or compulsory labour) may be invoked in some cases. It was noted that recourse to labour law may be helpful to some persons who are working under a contract but is not a possibility for those working in Malaysia without authorization.

Stipulated purpose – slavery or practices similar to slavery and servitude: According to practitioners, these forms of exploitation have not been encountered but would be addressed by Sections 370 and 371 of the Penal Code, respectively concerning “Buying or disposing of any person as a slave” and “Habitual dealing with a slave”. Practitioners did not evidence knowledge of the international legal definition of slavery or of international legal understanding of practices that would fall within the terms “servitude” and “practices similar to slavery”.

Stipulated purpose – any illegal activity: It was noted that the inclusion of the form “any illegal activity” was likely intended and would likely operate to accommodate additional forms of exploitation. Case law indicates that the term is to be given its natural and ordinary meaning and that it would operate to include under the concept of exploitation additional practices such as sale of children and illegal commercial adoption (see below). Practitioners surveyed were unsure as to whether the concept of ‘illegal activity’ would also capture trafficking for exploitation in criminal activities such as pickpocketing. They noted that such situations had not been encountered as yet, but would certainly not be considered ‘labour’ because of their irregular nature. Persons coerced or forced to carry drugs have not been treated as trafficked persons but have been prosecuted, and defended as being ‘innocent carriers’. No cases of exploitation in begging have yet been brought, but practitioners assert these would be addressed as an illegal activity or forced labour, depending on the circumstances of the case.

Other stipulated / discussed forms: There have been no cases of trafficking for “removal of organs” and no insight was offered into how this stipulated form of exploitation was understood. Practitioners expressed the view that **exploitation in domestic work** would fall under forced labour but noted the great difficulty in uncovering such cases. There has been an increase in cases of **sale of children / illegal commercial adoption** involving the exploitation of migrant women and girls. Such cases could be prosecuted under the Child Act as well as under trafficking for the purposes of an ‘illegal activity’.¹¹⁷ Officials noted that there is ongoing debate about whether such situations should be addressed as illegal adoption rather than trafficking, due to the need, in the latter case, to show exploitation beyond the actual sale. **Forced or servile marriages** were not considered to be a problem for

¹¹⁷ *Public Prosecutor v. Lian Kim Wan*. Note that in the earlier case of *Ng Yu Wah v. Public Prosecutor* the trafficking charge laid against the adoptive parent who purchased a baby was subsequently dropped on the basis that she lacked the *mens rea* of exploitation. However, subsequent cases suggest that purchasers of babies who intend to be parents can be penalized as traffickers alongside sellers.

Malaysia although cases of brides being brought from Vietnam to Malaysia were noted. Practitioners were generally unclear as to how a forced or servile marriage could occur and what it might entail.

Key issue for practitioners – problems associated with investigating and prosecuting trafficking for forced labour: Practitioners and officials expressed concern about the lack of clarity between trafficking for forced labour and other labour crimes and a resulting high level of conceptual confusion that obstructs effective action. It was felt that specific guidance is needed, particularly now that labour inspectors are empowered to identify and respond to possible situations of trafficking for forced labour. The evidentiary burdens associated with investigating and prosecuting trafficking for forced labour were identified as a significant obstacle: victims generally do not see themselves as victims and do not wish to participate in the prosecution of their ‘employers’. In relation to this form of exploitation, the apparent consent of the victim was flagged as a significant barrier to investigation and prosecution, despite legislative affirmation of the irrelevance of consent. In practice, the irrelevance of consent in trafficking cases was noted as making trafficking for sexual exploitation difficult to distinguish from cases of prostitution.

Key issue for practitioners – judicial uncertainty: Prosecutors noted that ‘the purpose of exploitation’ is approached by judges as an *actus reus* rather than a *mens rea*. They further noted that judges sometimes require that the type of exploitation be explicitly specified, but other times do not; and that in some instances even when the exploitative purpose is charged, and the precise wording of the relevant provision in the Penal Code is used (for instance, illegal activity), judges may not accept that an offence has been committed. Several of the provided cases appeared to confirm this.

Relevance of severity of exploitation / extent of harm to establishing exploitation: Practitioners noted that when labour exploitation is considered to be ‘mild’ it may be treated by courts as a mere complaint against an employer rather than a potential case of trafficking for forced labour. This is reinforced by internal prosecutorial guidelines that indicate cases involving non-payment of salary for less than three months will, in the absence of other factors, not be pursued as trafficking. No information was provided on how considerations of severity may weigh in sexual exploitation cases. While harm is not required to establish exploitation in trafficking, it is an important indicator and is also relevant in sentencing.

Views on guidance for practitioners: Overall it was felt that the current lack of conceptual clarity – especially around forced labour – is causing problems and additional guidance on the stipulated forms of exploitation would be very helpful. However, practitioners and officials cautioned that an overly rigid definition or understanding of exploitation and its forms would risk excluding some situations.

3.1.2 United Arab Emirates

Summary: Persons consulted for this study included judicial and prosecutorial practitioners. Those interviewed provided information on law and practice. However, no case law was made available. The legal framework around trafficking in the United Arab Emirates (UAE) generally follows the three-part definition set out in the Trafficking in Persons Protocol: including but not defining all stipulated forms of exploitation with only minor textual modifications. It was asserted that while there had been some cases of trafficking for sexual exploitation, trafficking for forced labour (or other forms of exploitation) has not emerged as a problem in the UAE. Practitioners did not raise any particular evidentiary issues or challenges in pursuing trafficking cases. Respondents noted that victims may be afraid and there may be a need to provide them with protection and other help. While there was little support for defining exploitation and/or its individual forms, some practitioners agreed that guidance could be useful.

Legal framework: UAE *Federal Law No. 51 of 2006 concerning Trafficking in Human Beings* defines trafficking in general accordance with the three-part definition set out in the Trafficking in Persons Protocol. However, the law makes no reference to the irrelevance of consent and the definition does not appear to distinguish between trafficking in adults and trafficking in children. The third element of the definition, exploitation, is stipulated to include “all forms of sexual exploitation, engaging others in prostitution, servitude, forced labour, enslavement, quasi-slavery practices, or detachment of organs.” None of these stipulated forms of exploitation are defined. The word ‘includes’ indicates that the list of exploitative forms is not exhaustive. The UAE Penal Code defines and prohibits forced prostitution. The labour law regulates conditions of work but does not provide for a minimum wage, nor does it apply to certain informal sectors such as agriculture and domestic work.

Stipulated purpose – all forms of sexual exploitation / engaging others in prostitution: Practitioners noted that sexual exploitation and exploitation of the prostitution of others are the most commonly prosecuted forms of exploitation. Where means are established, such cases will be pursued as trafficking (and the victim will not be prosecuted for prostitution offences). When considering the parameters of ‘sexual exploitation’, reference was made to Article 366 of the Criminal Code which refers to “the use of persons / children to fulfil certain sexual desires”. No cases were provided but practitioners provided an example of a case involving deceptive recruitment where victims were compelled by threats to engage in prostitution.

Stipulated purpose – forced labour: Several practitioners noted that cases of trafficking for forced labour have not been encountered, while others provided information on several cases that appeared to contradict this statement. Practitioners did not see any difficulty in differentiating between breaches of labour laws and trafficking for forced labour, noting that indicators of trafficking

(presumably means) would lead to a case being treated as one of trafficking. However, one practitioner noted that the way in which a complaint was lodged may be determinative: if a victim approaches the prosecution department the case will be examined there, if he or she approach a labour court, it will be examined as a labour offence. Practitioners referred to the need to take a case-by-case approach to situations of forced labour, considering payment of salaries, living conditions, working hours and whether there was freedom of movement, to show whether any means have been used.

Stipulated purpose – servitude: Servitude was differentiated from forced labour on the basis that a person in a situation of servitude may be consenting, whereas force and lack of consent was considered a critical element in cases of trafficking for forced labour. No case examples were provided

Stipulated purpose – enslavement or quasi-slavery practices: One practitioner noted that the parameters of enslavement or quasi-slavery practices are clear, and involve a person treating another as a slave or as merchandise to be bought or sold for the purpose of exploitation, whereas the transfer of a person to another (for the purpose of prostitution for example) would be considered a case of trafficking for sexual exploitation. No cases of enslavement were reported or provided. However, the UN Special Rapporteur on Trafficking who conducted a country visit to UAE in 2013 was informed of a 2011 case of trafficking for enslavement involving victims from Nepal and Indonesia that resulted in prosecution.¹¹⁸

Other stipulated / discussed forms: According to the information provided, there have been no cases of trafficking for “**removal of organs**”. No insight was offered into how this stipulated form of exploitation was understood, although practitioners referred to a law that prohibited the non-consensual removal of organs. A similar assessment was made in relation to **surrogacy**. Practitioners noted that while **exploitation of domestic workers** is not explicitly addressed in the law, such exploitation would fall under either sexual exploitation or forced labour. No information was provided on specific cases and the opinion was offered that domestic workers are always free to leave exploitative situations. **Forced marriage** is not considered a form of trafficking-related exploitation under the law. It was explained that several conditions regulate marriage under Sharia with conditions to ensure that women are not forced to marry against their will. Where a person is married forcefully against her will, she could therefore seek justice, though practitioners noted no such cases have been encountered. It was noted that safeguards are in place to guard against underage marriage. The concept of **servile marriage** is not recognized in law or practice. Exploitation for **criminal activities** is also not recognized in law. However, official reports indicate that several situations of trafficking in children for **forced begging** as well as trafficking for **sale of children** have arisen.¹¹⁹

¹¹⁸ Ibid, para. 24.

¹¹⁹ On forced begging see *ibid*, para. 22. On trafficking for sale of children see National

Key issues for practitioners: In the interviews conducted, practitioners did not highlight any particular issues or concerns related to the concept of trafficking or more generally related to the investigation, prosecution or adjudication of trafficking offences. All those interviewed considered sexual exploitation to be the principal exploitative purpose. The 2012-2013 report of the relevant government committee, noted the emergence of other cases including trafficking for forced labour and sale of children.¹²⁰ On the relationship between trafficking offences and stand-alone exploitation offences it was noted that the investigation process generally informs on the most suitable charge. Investigatory and prosecutorial challenges were considered to be case-dependent and not systemic. No particular evidentiary challenges were noted. Practitioners confirmed the existence of a list of indicators that is to be used to establish whether a situation is one of trafficking. Reference was made to withholding of passports, non-sanitary working and living conditions, and low or no wages as indicators of possible trafficking. In relation to victim testimony it was observed that victims are not often identified by law enforcement and the few that do emerge may be fearful. It was also noted that judges do not limit themselves to the testimony of the victim in reaching their decision but consider other sources of evidence as well.

Relevance of severity of exploitation / extent of harm to establishing exploitation: Practitioners were unanimous that in relation to all forms of exploitation, the degree of exploitation is irrelevant to establishing trafficking but may be relevant in sentencing. The existence and/or severity of harm is also not considered relevant to the extent that cases would be pursued even if the victim appeared to benefit from the exploitation as there are certain rights that cannot be given up. The threshold for 'exploitation' (distinguishing between trafficking related exploitation and lesser forms of exploitation) is decided with reference to national laws and standards. One practitioner noted the need for individualized assessment of exploitation that takes into account not just objective standards but also the personality, capacity and situation of the individual involved. For example, the nationality and situation of a victim may be considered in order to ascertain his or her vulnerability, relationship with the trafficker, etc.

No overlap between exploitative purpose and means element: Practitioners did not consider that there was any overlap between the 'means' element and the exploitative purpose element, with the parameters and limits of both being clearly

Committee to Combat Human Trafficking, *Combatting Human Trafficking in the UAE: Annual Report 2013-2014*, p. 27.

¹²⁰ National Committee to Combat Human Trafficking, *Combatting Human Trafficking in the UAE: Annual Report 2012-2013*, p. 26. The 2013-2014 report notes that "[w]hile all cases in the past pertained to sexual exploitation, there have been cases in the recent past that fall outside the scope of this form of abuse – labour exploitation, forced labour and, in even fewer instances, sale of children." National Committee to Combat Human Trafficking, *Combatting Human Trafficking in the UAE: Annual Report 2013-2014*, p. 27.

established in law. Practitioners differed on whether debt bondage is a means and/or exploitative purpose but no cases involving debt bondage were referred to.

Irrelevance of consent to exploitation: Despite the law not referring to consent, practitioners asserted that the victim's consent is irrelevant where means are used, regardless of the age of the victim. The example of organ trafficking was raised to explain that a person cannot trade in human organs even if the victim consented to it because physical integrity is a societal value and public good, and therefore a trafficking offence is considered to exist even where there is consent to it. When asked about the role of consent in other forms of exploitation, such as sexual exploitation, a judicial practitioner responded that this would not be a case of trafficking but rather an offence of adultery or prostitution because there is no exploitation, unless the exploitation results from abuse of a position of vulnerability or other means provided for in the law.

Issues related to victims: A comprehensive draft law to strengthen victim protection is reportedly being considered by the National Council. One practitioner highlighted the need to ensure victims are not treated as offenders. Another noted the need for training of law enforcement officials to raise awareness of the crime of trafficking and to ensure effective identification of trafficked persons among those engaging in prostitution who do not appear to be victims and/or do not consider themselves victims.

Views on guidance for practitioners: Some practitioners felt that there was no need for guidance on the concept of exploitation because it is well understood. However, others noted that the meaning of 'exploitation' itself can be unclear as are certain stipulated forms of exploitation. For example, forced labour, enslavement and quasi-slavery practices may benefit from further clarification. Other practitioners were of the view that no additional explanation of each form of exploitation is necessary, given each is clearly understood and that further definitions may serve to narrow and constrain the concept rather than expand it. It was noted that while some concepts are universally understood, others might differ from country to country depending on different religions and beliefs.

3.2 States that generally follow the Protocol's approach but stipulate additional forms of exploitation

Five of the 12 States surveyed (Bulgaria, Colombia, Qatar, Egypt and Thailand) are classified as generally following the Protocol's approach to exploitation but also stipulate additional forms of exploitation.

3.2.1 Bulgaria

Summary: Prosecutors, a judge and two senior experts from the National Commission for Combating Trafficking in Human Beings were consulted for this study. A number of cases were examined and external reports were also considered. Bulgarian law contains two similar but not identical definitions of trafficking – both of which require only an ‘act’ and a ‘purpose’. ‘Means’ such as force and coercion operate to aggravate the base two-element offence. There is no reference to exploitation but listed purposes of trafficking across the two definitions are: use for lecherous activities; forced labour or begging; removal of a body organ, tissue, cell or bodily fluid; and forced servitude. Some practitioners asserted that the purpose element of trafficking was well understood but there were indications of some confusion about the purposes of trafficking, most particularly the parameters of forced labour and the factors distinguishing trafficking from other crimes. Practitioners generally agreed that guidance on exploitation / purposes of trafficking would be highly beneficial as there is insufficient consistency in criminal justice practice.

Legal framework: The anti-trafficking legislative framework in Bulgaria consists of two instruments: the Criminal Code and a specialist law. Legislative amendments in 2013 harmonized the definitions set out in the two laws. The Criminal Code (as amended) criminalizes trafficking in human beings through a definition that omits the means element in the core definition, establishing means as an aggravating offence carrying a more severe penalty. The purpose element does not refer to exploitation but lists purposes of trafficking as use for lecherous activities, forced labour or begging, removal of a body organ, tissue, cell or bodily fluid and forced servitude. When any of these purposes involves use of a pregnant woman for the purpose of selling her child then this is considered an aggravated offence. None of these stipulated purposes of trafficking is defined. Trafficking is also defined in the *Law on Combating Trafficking in Human Beings Act (2003)*, which sets out responsibilities of designated authorities. Following recent amendment, that definition generally reflects the one set out in the Criminal Code, but establishes the purpose element as “exploitation” which is defined as meaning “the illegal use of persons for lechery, for the removal of organs, tissues, cells or body fluids from victims, for forced labour, begging or servitude, for placement in slavery or in a position similar to slavery”. None of these stipulated forms of exploitation are defined. In both instruments, the list of (exploitative) purposes appears to be exhaustive. Consent is stipulated as irrelevant in both laws and this aspect of the definition has been reaffirmed in case law.

Stipulated purpose – lechery, lecherous activities or debauchery: These concepts proved difficult to unravel as they are not defined and are used in different laws in different ways. Practitioners explained that they are concepts inherited from early criminal law that are generally equated to and were understood by practitioners as: “exploitation of the prostitution of others and other forms of sexual exploitation”. Debauchery is the subject of a distinct offence under Article 149 of the Criminal

Code, which also contains reference to the concept of 'lewdness'. Debauchery is also mentioned in Article 152 concerning rape, where sentences are aggravated if committed "in view of forceful involvement in further acts of debauchery or prostitution" indicating that debauchery may not entail prostitution but rather refer to a range of sexual offences involving children and the use of force or another consent-damaging means.¹²¹ Prostitution is not legal in Bulgaria, nor is it criminalized. In a 2009 Interpretative Decision,¹²² the Supreme Court of Cassation ruled that prostitution is in itself exploitative and is in itself debauchery. The Interpretative Decision further asserts that exploitation of prostitution includes at least "use in prostitution of another person or other forms of sexual exploitation" but also extends to a broader range of sexual conduct in which one person is in receipt of benefit through the use of another. The decision explains that human trafficking has a broader scope than the separate offence of persuading or inciting another to practice prostitution (captured by Article 155 of the Criminal Code), owing to the more permanent nature of the debauchery.

Stipulated purpose – forced labour: Trafficking for forced labour is generally not well understood. Practitioners and others have noted a lack of certainty as to the nature and the gravity of abuses that could qualify as forced labour and there are indications that the threshold for establishing this form of trafficking is low – that what may be considered labour exploitation elsewhere would constitute trafficking for forced labour in Bulgaria.¹²³ As one commentator noted, "[i]t seems that forced labour can be equated with low wages, poor working conditions and deception about working conditions".¹²⁴ Some practitioners expressed the view that the understanding of forced labour provided in the 1930 ILO Convention caused confusion in the context of the Trafficking in Persons Protocol, primarily because this understanding of forced labour entails non-voluntariness, whereas the Protocol makes consent irrelevant. One respondent expressed the view that forced labour should be differentiated from other exploitative forms on this basis, and that an understanding of forced labour should be arrived at that is specific to the context of trafficking, and can encompass broader notions of labour exploitation. There is little available case law on trafficking for forced labour.

Stipulated purpose – forced servitude, slavery and practices similar to slavery: These terms replaced a previous reference to "forced subjugation", which was generally understood to encompass practices that may constitute or be similar to slavery but to also extend to "... actions motivating victims to adopt a conduct

¹²¹ Section VIII, Bulgarian Penal Code.

¹²² No.2/16.07.2009 of the Bulgarian Supreme Court of Cassation.

¹²³ For example Decision No.30186/16 June 2010 by the Regional Court of Montana (involving a group of Bulgarians promised fruit picking jobs in Sweden. The victims were fed but their living conditions were harsh and they were not paid for the 20 days they remained in the situation before leaving. The defendant was found guilty of trafficking for forced labour).

¹²⁴ Vladislava Stoyanova, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law', *Amsterdam Law Forum*, vol. 5, no. 1, 2013, p. 74.

contrary to their will and in accordance with the will of somebody else, including by residing in an unwanted location”.¹²⁵ There was no official guidance available, however, and courts were left to decide which circumstances amounted to forced subjugation. Practitioners had little to say on the amended purpose of “forced servitude, slavery and practices similar to slavery” and it appears that these concepts have not yet been tested.

Stipulated purpose – trafficking in pregnant women for the purpose of sale of children: As noted above, this ‘purpose’ is set out in the Penal Code as an aggravated offence. While no case law was provided to explain how it operates in practice, there are indications that it is understood as an exploitative purpose in its own right – not requiring another purpose such as forced servitude to be separately established for the base offence of trafficking in persons. Practitioners did not see any particular difficulty and appeared to view trafficking for sale of children as a stand-alone form of exploitation captured under the general provision. It was noted that another provision of the Criminal Code separately prohibits the selling of babies and it is possible that women could be prosecuted under this article while also being considered a victim of trafficking. However, practitioners noted that women would generally not be prosecuted but rather encouraged to testify against their exploiters. The difficulty of establishing exploitative intent in cases of sale of babies by women who sell their babies as a means of providing materially for their other children was discussed.

Other stipulated / discussed forms: There is no case law available on **begging**, which was introduced as an exploitative purpose by the 2013 amendments to the Penal Code and specialist trafficking law. A judicial practitioner noted that there may be a fine line between trafficking for the purpose of begging and situations in which parents use their children as beggars; the difference may be that in the former situation the intent is exploitative whereas in the latter it is a question of survival of the family. Practitioners were not able to point to any case law on trafficking for **removal or a body organ, tissue, cell or bodily fluids**. It was noted that “cells” were included in the legislation recently following instances of women being trafficked to Greece and Israel for use as egg ‘donors’. **Forced or servile forms of marriage** are not included in the legislation but a judicial practitioner noted that forced marriage is anyway a stand-alone offence. While there have been instances of possible trafficking involving marriage arrangements no cases had reached the courts. With only a few exceptions practitioners considered this to be a rare form of exploitation. **Exploitation for criminal activities** is also not included in either of the domestic trafficking definitions, but practitioners referred to instances of trafficking for pickpocketing occurring in practice.¹²⁶ Such instances were reportedly treated as cases of trafficking, subsumed under the now-defunct concept of “forced subordination”. It was reported that victims of trafficking for pickpocketing are not

¹²⁵ Ibid, p. 75.

¹²⁶ See also National Commission for Combating Trafficking in Human Beings / Council of Europe, *Information about the rights of the victims of human trafficking* (2012), p. 5, noting ‘commission of criminal acts’ as a form of exploitation.

treated as victims but as perpetrators, a problem that is exacerbated by the absence of this form of exploitation in the legislated definition.

Practitioner understanding of exploitation / the purpose of trafficking:

Prosecutors were generally of the view that the purpose of trafficking / exploitation (these terms were used interchangeably given the lack of reference to ‘exploitation’ in the law) is clearly and widely understood. However, other experts noted that the lack of cases brought for forms of exploitation other than sexual exploitation may signify poor understanding and appreciation of other, equally prevalent forms of exploitation. It was noted that some instances of trafficking were dismissed on the basis that they were simply private matters between employers and employees.

Key issue for practitioners – distinguishing trafficking from other crimes:

Practitioners noted a lack of clarity and consistency with regard to charging decisions. The structure of the law means that some offences can be charged as ‘trafficking’ and/or under different provisions of the law. Prosecutors will sometimes apply several offences at once in an indictment. There was uncertainty with regard to the features that might distinguish one trafficking case from another – for example, a charge of debauchery from a charge of trafficking for purposes of debauchery. The final decision is often highly subjective. Some practitioners pointed to exploitative purpose (perhaps indicated through material gain) as a feature distinguishing trafficking from other offences. Others pointed to the nature and seriousness of the conduct and the level of organization it reveals as a way of distinguishing trafficking from other crimes.

Other issues for practitioners:

Practitioners noted a problem with **establishing intent** to commit one of the stipulated purposes of trafficking – which is necessary to sustain a charge. Others highlighted the **evidentiary burdens** created by heavy reliance on victim testimony and overly formalistic and complex criminal procedures that can hamper evidence collection including from abroad. It was noted that there is little incentive for persons to participate in the criminal justice process and that so far no victims have received compensation in Bulgaria.

Relevance of severity of exploitation / extent of harm to establishing exploitation:

Practitioners asserted that the extent or severity of exploitation is irrelevant to proving the charge, given that exploitation need not have taken place. The focus is on proving the ‘act’ element and inferring an exploitative intention from that act. Discussions indicated some confusion on this point, however, as it is evident that issues of relative severity are highly relevant to establishing whether exploitative working conditions are identified as constituting trafficking for forced labour.

Relevance of absence of means: As noted previously the crime of trafficking comprises only the ‘act’ and ‘purpose’ elements. Means are aggravated offences. A Group of Experts on Action against Trafficking in Human Beings (GRETA) report explains the effect of this formulation as follows:

“Bulgarian legislator[s] ha[ve] made it possible to bring under criminal liability more perpetrators because to prove that there was a *corpus delicti* it is sufficient to demonstrate that one of the actions took place with the purpose of exploitation, without having to prove the use of means ... This approach is seen as corresponding to the current economic and social climate in Bulgaria: because of their difficult material situation, some people enter into an “employment-like” relationship with traffickers who do not have to use coercion or fraud to achieve the goal of exploitation. According to senior prosecutors and judges met during GRETA’s country visit to Bulgaria, this approach has led to a higher number of prosecutions and convictions.”¹²⁷

The survey process confirmed this view among criminal justice practitioners; extreme economic hardship of many people is considered such that means are not necessary to exploit them. When asked about the risk of conflation of trafficking with other offences, it was explained that the exploitative purpose serves to adequately distinguish trafficking from other crimes.

Irrelevance of consent to exploitation: practitioners emphasized that culpability is found regardless of the consent of the victim and that the irrelevance of consent is an important aspect of Bulgarian legislation. Consent is explicitly irrelevant in both renderings of the trafficking offence, and confirmed by the key interpretative decision of the Supreme Court of Cassation, that states: “the consent or cooperation of the victim does not exclude the liability of the perpetrator in carrying out any of the forms of executive act of the crime of trafficking in human beings.”¹²⁸ There was some discussion around whether forms of exploitation that embody a lack of consent (‘forced labour’ and ‘being kept in forced subordination’ and ‘slavery’) should be distinguished from others where the irrelevance of consent may need to be explicitly affirmed. It was noted the principle of the irrelevance of consent is particularly important in view of the legislation’s inclusion of labour exploitation as a form of trafficking-related exploitation.

Cultural considerations relevant to exploitation: Practitioners noted that some types of exploitation are predominately perpetrated by and within specific ethnic groups. Notably, Roma victims are often trafficked by their families, for instance into begging and/or pickpocketing, forced sale of children and forced marriages of children. Practitioners also cited cases of trafficking of Roma women for the purpose of selling their babies. It was not accepted that cultural considerations are relevant in any way to establishing whether or not a particular practice or situation constitutes exploitation related to trafficking. However, some contradictory anecdotal information was made available – relating for example to instances of Roma men being charged with administrative offences and fined for marrying girls

¹²⁷ GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Bulgaria, GRETA(2011)19, p. 19, para. 62.

¹²⁸ See Interpretative Decision No.2/16.07.2009 of the Bulgarian Supreme Court of Cassation, available (in Bulgarian only) at: http://www.vks.bg/vks_p10_36.htm, paragraph 1.5 of its final decision.

of 12 or 13, rather than being charged with the serious criminal offences of statutory rape and child marriage.

Views on guidance for practitioners: Practitioners were of the view that more guidance should be offered on each type of exploitation, defining them broadly enough to capture the phenomenon, but not so broadly as to expand it unhelpfully. The view was expressed that there is a need to clarify exploitation as an element of trafficking – perhaps through an express definition that emphasizes the profit / benefit aspect. There was general agreement that guidance on trafficking for forced labour is urgently needed.

3.2.2 Colombia

Summary: A large number of persons were interviewed for this study, including officials from several involved ministries, a prosecutor, a representative of the Inter-institutional Committee against Human Trafficking, and UNODC officials. A number of cases were examined and external reports were also considered. The legal framework follows the definition set out in the Protocol but omits the means element. The concept of exploitation requires the obtaining of financial gain or other benefit for an open-ended list of purposes that include, in addition to those stipulated in the Protocol, exploitation of begging, servile marriage and sexual tourism. None of the listed concepts are defined. Practitioners confirmed that sexual exploitation is the most commonly pursued and the best understood form of trafficking and that apart from forced labour, there has been little action on other stipulated forms. The parameters of forced labour are not clearly established. Generally, practitioners face a range of legislative, procedural, evidentiary and other challenges in investigating and prosecuting trafficking offences and would welcome guidance on the element of exploitative purpose.

Legal framework: The centrepiece of the legal framework around trafficking in Colombia is provided through *Act 985 of 2005*, which establishes a two-element offence of trafficking constituting an act (capture, transfer, harbouring or receipt) for the purpose of exploitation. Means are not required to establish the offence. Exploitation means: *“to obtain financial gain or other benefit for himself or for another person, through the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, exploitation of others’ begging, servile marriage, the removal of organs, sexual tourism and other forms of exploitation”*. This introduces an additional aspect to the Protocol’s formulation of the purpose element, requiring that the obtaining of a financial or other benefit be established as well as the form of exploitation to which it relates. Consent of victims to exploitation is stipulated as not constituting grounds for exemption from criminal responsibility. The law establishes aggravated offences for trafficking involving *inter alia*, children, relations, and particularly vulnerable persons. Other relevant laws include Article 17 of the Constitution, which prohibits slavery, servitude and the slave trade in all its

forms.

The benefit element to the definition of ‘exploitation’: The reference to financial gain or other benefit appears to be well understood and widely supported, at least in broad terms. However, there are indications that the meaning of “other benefit” is not completely clear and there was a general sense that benefit related to exploitation is almost invariably financial. An external assessment concluded that: “it would be unrealistic to attempt to make an exhaustive list of the benefits, economic or otherwise, arising from the manipulation of victims”¹²⁹, and this view seems to be shared by practitioners. Challenges were seen to arise not with the broader concept of exploitation but recognizing it in its various forms.

Stipulated purpose – exploitation of the prostitution of others or other forms of sexual exploitation: Most prosecutions for trafficking are reportedly for sexual exploitation, notably of Colombian women exploited abroad, with other forms being considered less visible and relatively less prevalent. Exploitation of the prostitution of others or other forms of sexual exploitation are not defined in legislation but claimed to be generally and uniformly understood. Case law does not shed great light on the scope of these forms of exploitation although courts have found that the offence of trafficking for sexual exploitation includes the promotion of prostitution.¹³⁰ The existence of a range of other offences has helped to bolster prosecutions for sexual exploitation associated with trafficking. Practitioners noted that the approach to prostitution currently falls somewhere between abolition and regularization with a Bill currently before Parliament proposing to make prostitution a legitimate form of work. Discussions around approaches to prostitution often centre on which particular model provides the best protection against exploitation. The risk that trafficking for sexual exploitation could be conflated with prostitution has been raised.¹³¹ However, practitioners consulted were generally (but not uniformly) of the view that prostitution increases vulnerability to sexual exploitation including through trafficking but is not sexually exploitative in and of itself.

Stipulated purpose – forced labour or services: This exploitative purpose is not defined and not otherwise criminalized as a stand-alone offence. That means there is no back-up offence when prosecution of forced labour for trafficking encounters difficulties. Such prosecutions are in any event uncommon and practitioners cited the relative invisibility of this form of trafficking, which occurs in otherwise ‘normal’ contexts. They stressed the need for guidance to assist in determining the point at which bad or exploitative work conditions (which could or should be pursued through labour courts) morph into forced labour.¹³² There is little agreement or

¹²⁹ *Aportes desde el Derecho Internacional, Derecho Penal y las Organizaciones No Gubernamentales*, Covenio Interinstitucional 045-2009, (Libertad y Orden, Ministerio del Interior y de Justicia, Republica de Colombia; UNODC, Universidad del Rosario, Accreditation institucional de alta calidad, Ministeria de Educacion Nacional). (Unofficial translation, hereinafter 2009 Report).

¹³⁰ Criminal Case No 63-001-60-00-059-2007-00893.

¹³¹ See 2009 Report.

¹³² Note that UNODC is presently working with the Ministry of Labour to develop guidance

understanding on this point and the situation is complicated by the absence of clarity on what constitutes exploitation in the context of labour laws.

Stipulated purpose – servile marriage: Some cases of exploitation in what may be considered a situation of servile marriage have been reported but it is unclear whether they were pursued to prosecution. The lack of a definition causes problems for criminal justice practitioners seeking to respond to this often hidden form of exploitation. Practitioners also noted a general difficulty in establishing a standard for judging what conduct or circumstances may amount to servile marriage. For example, does there need to be some form of exploitation beyond the exploitative purpose of the marriage itself? Is it relevant that the ‘victim’ is apparently content with the arrangement? What are the implications for individual agency and autonomy?

Other stipulated / discussed forms: The exploitation of **begging** is considered to be a significant problem, particularly affecting disabled and indigenous persons. However, no cases of trafficking for exploitation of begging have been reported. Respondents noted that begging is not illegal, which can complicate identification and response. **Slavery or practices similar to slavery and servitude** are not defined in legislation and case law offers little guidance. Practitioners explained that discussions have recently focused on the possibility of subsuming these forms of exploitation under ‘forced labour’. Cases of exploitation related to **removal of organs** have arisen but been addressed by legislation outside the trafficking framework. Sexual exploitation and **sex tourism** were noted as being challenging to differentiate. The nature of tourism in Colombia with international tourism having sharply increased, as well as rising vulnerability of people through poverty, resulted in the introduction of this form of exploitation as a form of trafficking. Attempts are also reportedly being made to ascertain the extent to which tourism services themselves may be offering sexual exploitation of minors or adults. **Criminal exploitation**, particularly of children was noted as an issue of concern that is usually dealt with under alternative legislation. In relation to **commercial adoption**: it was noted that the involvement of money makes adoption illegal but it is not clear to practitioners where the practice would become exploitative and thereby constitute a purpose of trafficking. Here there are similarities with situations of forced marriage; need there be exploitation beyond the exploitative purpose of the illegal adoption itself? The issue of **trafficking into armed conflict**: Colombia experiences illicit recruitment of both adults and children into armed conflict. However, this not been considered a form of trafficking, in part because of the availability of alternative offences that in some instances may be easier to identify and prosecute than trafficking for exploitation in armed conflict. An example is illicit recruitment of children into armed conflict. However, it was noted such conduct would also constitute human trafficking where the exploitative purpose can be proven. Illicit

on the concepts of ‘labour exploitation’ and ‘forced labour’ in order to address the significant confusion that has been identified.

recruitment of vulnerable adults into military service has thus far not been addressed as potential trafficking.

Key issue for practitioners – disproportionate focus on transnational trafficking for sexual exploitation: While a range of forms of exploitation are known to occur in Colombia and to Colombians abroad, the criminal justice response is heavily focused on transnational sexual exploitation. This focus is explained by the relatively greater and longer-standing understanding of this form of exploitation, which has been a crime for many years. The lack of attention to internal trafficking was also cited as a concern. In relation to some forms of exploitation (for example, exploitation of children by armed groups) this may be explained by the availability of alternative legislation.

Key issue for practitioners – difficulties in investigating and prosecuting trafficking for forced labour: There are problems with mandate and jurisdiction that prevent the effective investigation of forced labour. For example, labour inspectors may identify possible situations of trafficking for forced labour but the relevant Ministry has no mandate to prosecute. Cases are therefore referred to the prosecutor's office, which may or may not pursue the case. It was also noted by government officials that victims in such cases are often unwilling to self-identify and authorities are often unwilling to commence a criminal investigation, even in the face of strong evidence.

Other issues for practitioners: The existence of **different legislative and regulatory frameworks** that potentially address similar offences causes considerable confusion. Police and prosecutors often have multiple charging and indictment choices and will usually apply the offence that is easiest to prove. Practitioners noted difficulties in **proving exploitative intent** prior to exploitation (for example in cases of transnational trafficking involving prosecution of local recruiters). The heavy (and apparently unavoidable) reliance on victim-witness testimony causes great difficulties when victims are not willing to self-identify as having been exploited. In cases where victims do not denounce their traffickers, the result may be no or lesser charges. The **indicators of exploitation** are not widely understood – or indeed agreed on. There has been some informal mention of factors such as existence of a power imbalance between victim and exploiter,¹³³ but it is unclear the extent to which these and other factors are accepted and used to determine the existence of trafficking-related exploitation.

Relevance of nature and severity of exploitation / extent of harm to establishing exploitation: Practitioners asserted that no particular threshold of exploitation is – or should be – required to make out the exploitative purpose of the trafficking offence. However, this assertion is at odds with the admitted difficulties in establishing the point at which exploitative purposes such as forced labour are made out. Practitioners stated that the form of exploitation is not relevant to

¹³³ See 2009 Report.

determining exploitation and further, that harm is not a required element of the offence. The central issue is rather the perpetrator's intent to exploit irrespective of the type or severity of exploitation or the harm that results. In principle even trafficking that results in 'mild' exploitation can be prosecuted, but this will not generally happen in practice. Severity of exploitation / harm may, however, be a factor in sentencing especially as there is a considerable range of penalties available and the law allows for aggravated offences in such cases.

Relevance of absence of means to exploitation: As noted previously the crime of trafficking comprises only the 'act' and 'purpose' elements. This was explained as being necessary to balance the otherwise very heavy burden of evidence that is required, particularly to prove abuse of a position of vulnerability. Those consulted generally considered the absence of the means element to be a virtue of the legislation, serving to shift focus from the victim to the intention of the trafficker to exploit. It was noted that certain forms of exploitation may embody 'means' (for example, forced marriage and forced labour) and proving such forms of exploitation necessarily also involves proof of means. One expert was of the view that all forms of exploitation entail means that are therefore essential to understanding the offence, though are not necessary to proving it.

The principle of irrelevance of consent is difficult to implement in practice: Legislation includes an explicit provision to the effect that a victim's consent does not absolve a perpetrator from criminal liability. A prosecutor emphasized the utility of this provision, particular when victims retract their statement in fear of retaliation. Others noted that while the law does not consider that a person can consent to his or her own exploitation, cases in which consent is asserted by the 'victim', (especially sexual exploitation cases), are difficult to prosecute. As noted previously, many apparent victims of labour exploitation also have no interest in participating in the prosecution of their exploiters and in fact sometimes seek to remain in exploitative situations.

Cultural considerations relevant to exploitation: Practitioners noted that while sexual exploitation is widely considered to be 'worse' than other forms of exploitation, some measure of social normalization that has occurred around sexual exploitation impacts on how this form of exploitation is understood and responded to. For example, criminal justice officials may be less willing to believe and act on cases that come to their attention due to underlying prejudices. Respect for indigenous autonomy may lead to certain exploitative practices being successfully defended as a cultural practice. Such practices include early marriage, servile marriage, domestic slavery and sale of virginity by a person's parents. Those interviewed expressed the view that cultural considerations should not absolve a person from responsibility for any abuses of rights and that establishing whether exploitation has taken place should be an objective exercise.

Views on guidance for practitioners: Practitioners had different views on whether each stipulated form of exploitation should be separately defined. Some were

concerned that this may operate to exclude certain practices. Others noted that broadly worded definitions could be helpful in providing the necessary degree of flexibility. All agreed on the need for greater clarity around forced labour including whether forms of sexual exploitation could be included under this heading and where the line was to be drawn between exploitative labour that does not meet the necessary threshold and forced labour that does. Practitioners highlighted the need for international understanding on the notion of exploitation, most particularly to facilitate the cross-border exchange of information, intelligence and evidence that is critical to the investigation and prosecution of transnational trafficking. One practitioner pointed to the great need for guidance on the Protocol's demand provisions which, despite their strong link to exploitation, are not well understood or applied.

3.2.3 Egypt

Summary: The survey involved three judges. A small number of cases were made available for analysis. Trafficking and related offences are dealt with in a number of laws but principally through a specialist law, which defines trafficking in general accordance with the Protocol. The main difference lies in the purpose element where the non-exhaustive list of "exploitation in all its forms" also includes sexual exploitation of children, begging and the removal of tissues as well as organs. Practitioners were unclear as to whether the concept of exploitation is clearly and uniformly understood, although it was asserted that practitioners who have prosecuted trafficking cases clearly understand the concept. Discussions revealed some confusion around certain forms of exploitation including sexual exploitation and forced labour. The relationship between trafficking offences and stand-alone offences set out in other legislation such as the Criminal Code is also unclear. However, one judicial expert subsequently consulted asserted that case law makes that distinction clear. There are indications that judges exercise considerable influence over the process of trafficking cases, often deciding how a case will be run according to available evidence and whether the exploitation alleged meets the threshold of trafficking. According to the judicial expert consulted subsequently, the rulings Court of Cassation, as the Court mandated to unify application of the law of all lower courts within Egypt, have strengthened and harmonized understanding and application of anti-trafficking legislation. While consent is irrelevant under the law it can sometimes be relevant in practice to establishing whether exploitation has occurred, in particular when prescribed methods of recruitment have been used. Cultural and religious considerations can also be relevant, for example in deciding whether a case involving a marriage could amount to trafficking.

Legal framework: Trafficking is defined in *Law No. 64 of 2010* in general accordance with the Protocol's three-element definition. The stipulated purpose is: "exploitation in any of its forms, including: exploitation of acts of prostitution and all forms of sexual exploitation, exploitation of children in such acts and in pornography, forced labour or services, slavery or practices similar to slavery or

servitude, or begging or removal of human organs, tissues or a part thereof.” The law affirms the irrelevance of consent where means are used and affirms the Protocol’s position that trafficking in children does not require the establishment of means. The law establishes aggravated offences in cases of trafficking involving, *inter alia*, familial relations, and abusing certain positions of authority, and the abuse of vulnerable persons (including children and persons with disabilities). Trafficking related offences are also set out in a number of other laws. For example, the Penal Code (Article 291) and the Child Law both prohibit and penalize trafficking and exploitation of children. Other laws criminalize incitement to or exploitation of prostitution and commercial trading in organs.

General understanding of the exploitation element: Several practitioners explained that the concept of exploitation, because it is extracted almost verbatim from the Protocol, and echoes a concept already in the Penal Code, is clear to practitioners and raised no particular issues with regard to understanding or application. Another practitioner expressed a different view, noting that the definition is complicated *because* it was adopted almost without modification from the Protocol, which itself does not define core aspects. All practitioners surveyed confirmed exploitation as a key component of the trafficking offence and agreed that the stipulated forms of exploitation are sufficiently broad to capture both existing and future forms of exploitation. However, a judicial expert asserted that certain emerging forms of exploitation, including the exploitation of children for political purposes, require more research and elaboration. One practitioner offered the view that the concept of sexual exploitation presents particular challenges because relevant stand-alone offences (including honour crimes, rape, sexual assault, and adultery) do not themselves include the concept of sexual exploitation. A suggestion made by one commentator that exploitation is inherently “transactional” did not resonate with any of the practitioners surveyed.¹³⁴

Stipulated purpose – prostitution and other forms of sexual exploitation: The term “other forms of sexual exploitation” is not defined and is consequently not uniformly understood. An idea of the possible scope of this form of exploitation can be gleaned from discussions with practitioners who noted, variously: the involvement of criminal groups in exploiting people in prostitution; child marriage; and forced and temporary forms of marriage. The latter are considered forms of sexual exploitation rather than stand-alone forms of exploitation. One practitioner noted that marriage is not valid without consent, so that the absence of consent could be an indicator of a trafficking case, at least in cases of minors. Furthermore, temporary marriages are not considered valid marriages and would also indicate potential trafficking. However, it would be much more difficult to find sexual exploitation in a validly established marriage even if prohibited means were used to bring that marriage about. (A case was mentioned in this respect, in which the alleged perpetrators married their victims after having exploited them sexually, so

¹³⁴ Mohamed Y. Mattar, ‘Human Rights Legislation in the Arab World: The Case of Human Trafficking’, *Michigan Journal of International Law*, Vol. 33:101, 2011., p. 113.

as to deflect accusations that the intention was exploitative by proving that their intention was marriage. External reports cite further examples of trafficking for sexual exploitation including forced prostitution.) It was noted that in current criminal courts decisions on trafficking cases, victims of trafficking have been exempted from prosecution for prostitution-related crimes.

Stipulated purpose – forced labour: Forced labour is not defined in legislation. One judicial expert noted that Article 131 of the Penal Code prohibits forced labour, if imposed by public officials and noted that case law sheds light on the crime of forced labour.¹³⁵ The Labour Code prohibits forced labour, regulates conditions of work and imposes penalties for breaches. However, some groups (notably domestic workers) that may be especially vulnerable to trafficking-related exploitation are not explicitly protected under this framework.¹³⁶ Practitioners did not discuss labour exploitation during interviews, except to note that there are few cases of forced labour in Egypt and that securing evidence can be difficult. It has elsewhere been noted that Egypt is a source country for victims of labour exploitation, usually deceived by false work opportunities abroad.

Stipulated purpose – sale of children: The Penal Code (Article 291) prohibits and penalizes trafficking and exploitation of children. Further, the Child Law prohibits adoption, thereby preventing adoption being claimed as a cover for sale of children. According to practitioners, the sale or purchase of a child under any circumstances would be treated as a trafficking case. In one case the Court used Interpretative Guidance on the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, to conclude that the case was not one of trafficking given the absence of exploitative intent. However, a judicial practitioner explained that this case would be one of trafficking under Article 291 of the Penal Code (which, as noted above, deals with trafficking and exploitation of children) as trafficking under that provision can be established without exploitative intent as it criminalizes any type of transaction involving a child.¹³⁷

Other stipulated / discussed forms: The removal of organs, tissues or part thereof is considered to be widespread in Egypt, with many cases of illegal transplants every year, despite laws criminalizing all aspects of commercial transplantation.

¹³⁵ Specifically, the expert referred to Case No. 1481-2011, Criminal Court of the First District of October City, and the Judgement of the Court of Cassation in Appeal No. 14934, Judicial Year 83, Session 4/2/2014. In that case, the defendants took advantage of their positions as high-ranking police officers, to recruit a number of recruits and police members for labour exploitation in the agriculture and construction sectors, for private gains, between September 2007 and January 2011.

¹³⁶ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, UN Doc. A/HRC/17/35/Add.2, 15 Apr. 2011, para. 19.

¹³⁷ The expert referred Case No. 5383/2010, Criminal Court of Alexandria, El-Attarin District, Session 13/4/2010; Case No. 414/2009 Criminal Court of Cairo, Kasr El-Nile District on the selling of children for the purpose of adoption, appealed to Court of Cassation (Appeal No. 11268, Judicial Year 79, Session 1/7/2010) in which the Court decided that exploitative intent is not required in transactions involving children.

Practitioners interviewed made brief mention of this exploitative purpose of trafficking, but offered no further detail. One practitioner explained the lack of trafficking cases for the purpose of organ removal on the basis that most of those types of offences are prosecuted under Law No. 5/2010 on Regulating the Transplant of Human Organs. Practitioners did not discuss **slavery or practices similar to slavery**, which are not defined in law. There was extensive discussion by one practitioner of **exploitation of children for political purposes** as being a possible purpose of trafficking that has arisen during clashes for political purposes in 2013. It has been claimed children were recruited (sometimes from care homes or charity institutions) to wear political slogans in public places, attack protestors and public institutions. Additional forms and manifestations of trafficking related exploitation have been identified by external sources as widespread in Egypt but were not discussed by practitioners. These include severe exploitation of refugees including through **criminal extortion**; sexual exploitation and **forced begging** among street children; and **domestic servitude** involving children.

Issue for practitioners – distinction between stand-alone offences and trafficking offences: As noted above, the Egyptian legal framework contains references to trafficking outside the core trafficking provision of the Penal Code and also includes many stand-alone provisions directly relevant to the exploitative purposes set out in the definition of trafficking. Practitioners were not able to shed light on how these various laws and provisions relate to each other and how decisions are arrived at as to which charge to pursue. (The fact that no prosecutors were available to participate in the survey may have contributed to the lack of a satisfactory response on this point). However, one judicial expert noted that prosecutors will generally include trafficking offences and stand-alone offences in the same indictment and leave the court to consider the elements of each crime and, upon conviction, apply the severest penalty in accordance with article 32 of the Penal Code. One practitioner noted a difficulty in distinguishing between prostitution offences and trafficking offences, particularly when the victim is a prostitute. When asked which offences most commonly succeed in the event that the trafficking conviction fails, offences of corruption, sexual assault, child abuse, labour offences, making use of public officials, blackmailing and bribery were offered as examples. One practitioner noted that cases of trafficking in children would not be pursued under the core trafficking provisions but rather under those provisions of the Penal Code that deal directly with exploitation of and trafficking in children which do not require ‘means’ or exploitative intent to be proven and which provide for relatively harsher penalties.

Issues for practitioners – evidentiary challenges: Practitioners cited challenges in securing victim cooperation and frequent lack of corroborative evidence. Generally, prosecution of sexual exploitation was considered to be easier to prosecute than forced labour cases because of the availability of forensic, physical evidence. In contrast, trafficking for forced labour can really only be proven through victim

testimony.¹³⁸ With regard to proving exploitative intent one judge asserted that without exploitation there is no crime; exploitation must have occurred. He was of the view that if a situation of potential trafficking were to be intercepted before exploitation had occurred, an alternative offence would likely be sought. However, another judge expressed the view that mere intent to exploit fulfils the crime; the discovery of girls in a place of prostitution before sexual exploitation had occurred would constitute a complete crime rather than an attempt. The issue of distinguishing between attempts and complete crimes falls under prosecutorial and judicial discretion according to the facts provided and evidence available.

Relevance of nature and severity of exploitation / extent of harm to establishing exploitation: Practitioners did not pronounce directly on whether the nature or severity of the exploitation was relevant, although one noted that even ‘mild’ exploitation is adequate to establish the offence while ‘severe’ exploitation will aggravate sentences, through Article 6 of Law No.64/2010 and through the application of judicial discretion. It was noted that the law requires that a ‘victim’ has suffered material or moral harm but it is unclear whether the absence of harm would prevent a trafficking charge from proceeding or whether it would merely affect the legal status of the ‘victim’. Material harm was explained as being principally financial. An example of ‘moral harm’ could be abuse at the hands of family members. One judge explained that even where there is benefit to the victim as a result of his or her situation, a person can still be deemed to have been exploited: a person who benefits financially from organ removal for instance, may not have given effective consent to this if his or her poverty was abused. Another judge offered a different view. Though he noted that ‘mild’ harm is enough to fulfil the exploitation element, the court would likely use its discretion to apply alternative offences and not consider a case to be one of trafficking if the victim benefited from and is ‘happy’ with his or her situation.

Relationship between exploitation and ‘consent’: While the trafficking law is explicit on the irrelevance of the victim’s consent where means are used, there is some indication that consent (and its absence) may be relevant to establishing whether exploitation has occurred. One practitioner explained that exploitation “amounts to overcoming the willingness of the victim through coercive means” though he added that the trafficking offence would be established regardless of the consent of the victim. Another judge noted that in cases of trafficking “the victim has not consented and has no ‘free will’ and that the absence of consent implies that force has been used on him or her.” The same judge also distinguished coercive marriages from those that may fall within the trafficking definition on the basis that in the latter, the element of consent is not present; “If a person loses his will he would be a trafficking victim. Free will is a must; consent must be founded to say there is a real marriage relationship.” Similarly, cases of prostitution and cases of

¹³⁸ But one expert referred to Case No. 1481-2011 Criminal Court of the First District of October City, in which the prosecution referred the case to trial with an indictment including the testimonies of 137 persons – witnesses as well as victims.

sexual exploitation related to trafficking would be differentiated on the basis that in the latter situation the person has not consented and is therefore a victim (who would be exempted from punishment). The same point was repeated in respect of forced labour or services; the person is a victim of exploitation if he or she has lost his or her will. However, another judge emphasized that in Egyptian law consent should not be considered if it is found that a victim has been exploited. In this respect it was acknowledged that while consent is irrelevant in theory, in practice this might depend on the severity and type of exploitation.

Cultural and other considerations relevant to exploitation: Practitioners consulted (who were all judges) observed that views of judges are important in determining how a case is approached and indeed whether conduct is considered to be exploitative. Islamic Sharia was also noted as being highly relevant in understanding exploitation and in entrenching that understanding: the strict prohibition of sexual exploitation for instance makes its wrongfulness readily understood. However, there are different views on what is acceptable or not. Marriage is governed under Sharia, but 'temporary' marriage (where a man who is away from his wife for an extended period of time takes another and then divorces her – a practice that could potentially imply trafficking for sexual exploitation) is considered religiously acceptable to some and religiously unacceptable to others.¹³⁹ Cultural and religious perceptions around adoption were also noted as being relevant to one's understanding of exploitation. As adoption is widely (but not universally) considered *haram* (forbidden) in Islam, its occurrence is more likely to raise suspicion of criminal intention. Forced marriage was discussed against the background of Islamic understandings of marriage with several judges expressing the view that it would be extremely difficult to locate trafficking-related exploitation in a continuous marriage that did not involve a minor. One relevant case mentioned involved the organization of marriages of Egyptian girls to foreign nationals for financial gain. The victims were then 're-married' repeatedly for sexual purposes. The Court viewed this as trafficking but on appeal the appellant 'customers' were acquitted on the basis of a lack of evidence of exploitative intent as the alleged exploiters had proven that their intention had been marriage. The appeal was also accepted due to the lower court's reasoning in failing to convict the parents of the girls as well as their exploiters.

¹³⁹ In this respect one practitioner noted that the Grand Mufti of Egypt and subsequently, criminal courts, pronounced such marriages to be null and void. In particular, in case No. 1685 - 2010, the Grand Mufti of Egypt provided the following Fatwa (i.e. religious ruling):

"There is Ijmaa (consensus) among Islamic scholars that righteousness is a requirement for guardianship, such that guardianship cannot be established for an immoral (corrupt) parent, and that forcing his daughter to marry an incompatible person is a sign of a guardian's immorality, and that such a kind of marriage disregards compatibility, and even lacks the minimal respect for humanity, is a sign of the guardian's immorality, which consequently renders his guardianship void and annuls this type of marriage contract, for lack of the requirements and real foundations of marriage ."

Views on guidance for practitioners: One practitioner was of the view that the overarching concept of exploitation should not be defined given the need to retain judicial discretion and take account of different environments and cultures. Another affirmed that there could be no universal understanding of exploitation: the human trafficking definition is universal but the evaluation of exploitation will differ from country to country and between cultures. He was of the view that understanding would be strengthened with definitions offered for each form of exploitation so as to limit the discretion of judges, but be framed flexibly enough to allow practitioners to apply those definitions differently in different contexts.

3.2.4 Qatar

Summary: This analysis of Qatar is based on interviews with several officials. No cases were made available for analysis. The legal framework defines trafficking in accordance with the three elements of the international definition but extends the open-ended list of exploitative purposes to include exploitation of children in pornography, extraction of human tissues and begging. In addition to trafficking in persons, a range of related offences is criminalized which in some cases may lead to confusion, which charge is applicable in a specific case. Those interviewed generally considered the legal framework and Qatar's response to be adequate and, in view of existing guidance on forms of exploitation and their assessment of the low level of trafficking in that country, felt that additional guidance was unnecessary.

Legal framework: *Law No. 15 of 2011* prohibits trafficking in persons, which is defined in accordance with the three-part definition set out in the Protocol. The purpose element refers to exploitation in whatever form, including: exploitation in acts of prostitution and all forms of sexual exploitation, exploitation of children in such acts and in pornography, begging, forced labour or the forced rendering of services, slavery or practices similar to slavery, servitude or the removal of human organs, tissues or body parts. The consent of the victim to exploitation is specified to be irrelevant if means are used and the means element is omitted in the case of trafficking in children. The law further prevents victims from being prosecuted for offences committed as a result of their trafficking. Other relevant laws establish offences related to sexual exploitation and exploitation of prostitution, forced work with or without payment, begging, use of children in camel races, exploitation of children in pornography, slavery and dealing in slaves, and commercial transactions involving organs. The labour law sets minimum standards for employment but does not extend to domestic or casual workers and working members of the employers family. Furthermore, the constitution guarantees certain rights and freedoms to Qatari citizens and legal residents.

General understanding of the exploitation element: Those interviewed asserted that practitioners understand trafficking and its exploitation element. They expressed their view that foreign workers are well aware of where to seek help and can easily access police and services, which minimize the risk of exploitation taking,

place. Furthermore, it was acknowledged that the list of exploitative purposes is derived directly from the Protocol and some of these may be ambiguous.

Stipulated purpose – exploitation in prostitution and all forms of sexual exploitation: Selling sex is illegal in Qatar, and it is unclear whether victims of trafficking are exempt from prosecution for prostitution-related crimes.¹⁴⁰ A range of other offences relate to “incitement to debauchery, immorality and prostitution” including what would be considered “exploitation of prostitution”. The following is drawn from an unofficial translation of a publication of the Qatar Foundation to Combat Trafficking, which is to aid practitioners in victim identification:

Sexual exploitation	
Sexual exploitation:	The use of a person, whether male or female, to satisfy the desires of others in any form or manner, or the commission of rape, sexual molestation or immoral acts, or the exploitation of that person in the production of photos, pictures, scenes or videos or in the performance of acts or shows or any other practice of pornography against a given benefit (financial or non financial).
Exploitation of the prostitution of others:	To benefit, financially or non-financially, from the prostitution of another person.
Exploitation of children in prostitution or pornography:	The use of children in sexual acts against a “reward” or any other form of compensation, or the filming of a child, using whatever means, while actually practising or simulating the practice of explicit sexual acts, or any filming of the sexual organs of a child to satisfy sexual desires.
Sexual servitude:	The detention of women and children against their will and their ownership by a person or entity in order to exploit them sexually.

Stipulated purpose – forced labour and forced rendering of services: The concept of forced labour was explained as reflecting the international legal definition. No insight was offered into “forced rendering of services”. The interviews conducted for this paper did not discuss cases of trafficking for forced labour. The working definitions relevant to forced labour offered by the Qatar foundation to Combat Trafficking are as follows:

Labour exploitation	
Forced labour:	To entrust someone with work without pay and forcefully (definition of the anti-trafficking model law).
Exploitation of children in labour:	The use of children in acts that cause them physical or moral harm or seriously endanger their lives or which might hinder their normal growth or prevent their education.
Exploitation of children in begging:	The use of children either by a family member or any other person, by sending them or transporting them internally, accompanied or

¹⁴⁰ *Overview of Trafficking and Prostitution Laws in the Middle East and Africa* (Thomas Reuters Foundation for the Trust Women Conference, November 2012), p. 5. Note that practitioners interviewed did assert that victims would not be prosecuted for status related offences

	not by an adult, in order to exploit them in begging.
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Stipulated purpose – slavery and practices similar to slavery: These concepts were noted as problematic despite the existence of international legal definitions, partly because of their overlap with other concepts and also because the definitions themselves were not considered adequate. The concept of forced marriage was raised as an example and it was noted that the alleged marriage of a child in Qatar would not be considered ‘marriage’ because it is legally impossible for such a marriage to take place. The working definitions relevant to these forms of exploitation offered by the Qatar Foundation for Combating Human Trafficking are as follows:

Slavery or practices similar to slavery	
Slavery:	The situation of any person upon whom some or all the authorities derived from the right of ownership are exercised.
Practices similar to slavery:	The exploitation of a person economically on the basis of an actual relationship of force or dependence, accompanied by a serious and long-term deprivation of basic civil rights.
Servitude:	The situation of any person who surrenders to conditions of labour or who is committed to working or delivering services or both and which such person cannot escape from or change.
Selling of children:	Any act or deal in which a child is transported or transferred by a person or group of persons to another person against a given benefit or any form of compensation.

Stipulated purpose – removal of human organs, tissues or body parts: Practitioners explained that no cases of this form of exploitation in trafficking have been encountered in Qatar as yet and that this area is anyway subject to a strong alternative legal, regulatory and institutional framework that regulates donation, prohibits commercial transactions and oversees activity in this area. The relevant working definition offered by the Qatar Foundation for Combating Human Trafficking is as follows:

Removal of organs	
The removal of organs or human tissues for the purposes of trafficking:	Any operation of forced removal of human organs or tissues from a person against their will for the purposes of trade.

Other stipulated / discussed forms: In discussing other forms of exploitation, interviewed officials noted that for some of these forms stand-alone offences existed in the law (e.g. for exploitation of children in camel racing and removal of organs), while other forms may be considered *haram* and therefore against Islamic law (commercial surrogacy, adoption and forced marriage). **Commercial adoption** was also explained in this way. Furthermore, discussions appear to confirm an understanding that, provided consent of the biological parents is obtained and the

child is not exploited, this would not be considered trafficking.¹⁴¹ In relation to **exploitation of domestic workers**, it was noted that legislation is currently being discussed to deal with the problem of domestic workers being excluded from protection of the labour law. Exploitation of domestic workers was confirmed as falling within the definition of trafficking, but no examples were offered of any investigations or prosecutions. Concerning the possibility of exploitation of domestic workers, the Chief Prosecutor for Juvenile Justice explained that the media raises awareness of migrants such that they are aware of their rights and can assert them. Salaries of domestic workers were explained as being set by private recruitment offices according to the nationality of the worker, with no negotiation possible. The **exploitation of children in camel racing** has previously been raised as an issue of concern but the practice was outlawed in 2005 and Qatari authorities report that it has consequently been eliminated.

Issue for practitioners – distinction between stand-alone offences and trafficking offences: Practitioners explained that sexual exploitation and labour exploitation are the most commonly prosecuted forms of exploitation in trafficking investigations; though in practice it is problematic to know which laws to apply as several offences in the Criminal Code potentially overlap with the offence of trafficking. It was noted that the distinction between stand-alone offences (in relation to sexual exploitation) and the trafficking offence is that the latter requires the **intention to exploit**. When asked about the role of the provision of the Criminal Code, which relates to intent,¹⁴² one expert responded that it is applicable and that intent is easily established. Where exploitation has not yet occurred, the crime will be treated as one of ‘attempt’ under Article 17, and be punishable by lesser penalties.

Relevance of nature and severity of exploitation / extent of harm to establishing exploitation: Interviewees stated that a simple / less severe form of exploitation

¹⁴¹ Note that a recent case (involving an American couple who were convicted of trafficking offences following the death of their adopted daughter (which has not been officially reported and was not discussed during interviews)) indicates some confusion in understanding and practice around the link between adoption and trafficking, as well as trafficking for removal of organs. Rick Gladstone, ‘Americans Jailed for Months in Qatar after Daughter’s Death’, *New York Times*, 4 November 2013, available at: www.nytimes.com/2013/11/05/world/middleeast/americans-accused-in-daughters-death-are-jailed-for-months-in-qatar.html?_r=0

¹⁴² Article 32 of the Qatari Criminal Code specifies that:

The mental element of the crime is composed of the intention (*mens rea*) or the mistake. The intention is present when the will of the perpetrator is directed to commit or omit an act, in order to produce a result punishable by law and which the perpetrator expected. The mistake occurs whenever the criminal result is achieved as a result of a mistake on the part of the perpetrator, whether such mistake is due to negligence, carelessness, non-precaution, recklessness, imprudence or non-observance of the laws or regulations. Unless the Law explicitly provides for premeditation, the perpetrator shall be liable for the offence whether it was committed deliberately or by mistake.

would result in a standard sentence, while a more severe form of exploitation would result in an aggravated sentence. The issue of ‘harm’ was not discussed.

Cultural considerations relevant to exploitation: With regard to questions about the relevance of cultural or traditional practices and ideas in understanding and approaching different forms of exploitation in trafficking, practitioners noted that in understanding some concepts, Islamic law is often referred to, as are the model laws of the Arab League and GCC (Cooperation Council for the Arab States of the Gulf). The UNODC Model Law was also mentioned. On the other hand, Sharia is the source of legislation in Qatar, with sexual exploitation defined in Sharia and linked to prostitution. Practitioners were adamant that the cultural or traditional background of criminal justice officials including judges is irrelevant as to how cases are approached.

Views on guidance for practitioners: The single practitioner and two officials interviewed generally felt that existing guidance (including detailed guidance on the different forms of exploitation set out in the trafficking law) were sufficient and that additional guidance may not be required. However, the value of training practitioners on the practical implementation of the law was acknowledged.

3.2.5 Thailand

Summary: The survey involved senior police and prosecutor practitioners as well as government officials with extensive experience in anti-trafficking law and policy. A substantial number of cases were made available for analysis. The definition of trafficking in Thai law closely follows the Protocol’s definition but modifies the purpose element to exclude some of the Protocol’s stipulated forms of exploitation and include some additional ones. Practitioners were frank that exploitation is not well and uniformly understood within the Thai criminal justice system and this is obstructing effective investigations and prosecutions. There are particular problems around trafficking for forced labour, even with a clear definition of that form of exploitation. The lack of definitions around other forms is seen as a problem that will hopefully be remedied soon through reform to the legal framework. Practitioners expressed a common view that there is a need to reserve the crime of trafficking for the most serious forms and manifestations of exploitation.

Legal framework: Thailand’s law on trafficking was adopted in 2008, amending previous legislation on the subject. The definition of trafficking set out in the *Anti-Trafficking in Persons Act* closely follows the Protocol’s three-element definition with significant differences only in the purpose element. Exploitation is defined as: “seeking benefits from the prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, causing another person to be a beggar, forced labour or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person’s consent.” The principal differences with the Protocol in this regard are:

inclusion of additional forms of exploitation (pornography, causing a person to be a beggar, practices resulting in forced extortion); omission of some forms (practices similar to slavery, servitude); express inclusion of the means element in some forms (removal of organs, practices resulting in forced extortion); and inclusion of the provision on consent (“regardless of consent”) within the element of exploitation rather than in connection with the ‘act’ element. In addition, the umbrella phrase “or any other similar practices resulting in forced extortion”, is used instead of ‘includes’. One practitioner expressed the view that, rather than having a limiting effect, this phrase could expand the potential scope of the law, giving practitioners discretion in interpreting the phrase to capture emerging forms of serious exploitation. None of the forms of exploitation listed in the legislation are defined except for forced labour and services (see below).

General understanding of the exploitation element: Practitioners and experts were very open about the fact that the concept of exploitation is not always understood well and uniformly in practice. There are particular difficulties in separating trafficking for forced labour from poor and even exploitative working conditions, which are not covered by the law. Practitioners find the absence of clear definitions frustrating and informed the interviewer that detailed proposals have been made to revise the law, which is now almost a decade old, in order to take account of experiences and lessons learned. It is proposed that the new law attach definitions to each of the exploitative purposes.

Stipulated purpose – seeking benefits from prostitution, production or distribution of pornographic materials and other forms of sexual exploitation: Practitioner understanding of seeking benefits from prostitution generally correlates with international understanding of “exploitation of the prostitution of others”. Benefits are typically financial although it was noted that non-financial benefits would not be excluded. “Other forms of sexual exploitation” is a commonly cited purpose in trafficking prosecutions. It is easy to establish in cases of children (no means required) but can be more difficult to establish in cases of adults. The use of ‘means’ is critical in differentiating prostitution and pimping from trafficking. The absence of a definition of sexual exploitation was not considered to be an obstacle for the investigation and prosecution of such cases. The open-ended nature of the term “other forms of sexual exploitation” was considered to be important in ensuring that additional practices could be captured under the law (cases of commercial surrogacy discussed below were cited in this context).

Stipulated purpose – forced labour or services: “Forced labour or services” is the only form of exploitation stipulated in the definition that is subject to its own definition as follows: “*compelling the other person to work or provide service by putting such person in fear of injury to life, body, liberty, reputation or property, of such person or another person, by means of intimidation, use of force, or any other means causing such person to be in a state of being unable to resist*”. Practitioners consider this definition important and useful. However, it was noted that certain concepts within that definition (for example, fear of injury to liberty, reputation,

property) are themselves not clear. It was agreed that criminal justice practitioners generally – but not always – understand what conduct falls within “forced labour”. There is still a problem distinguishing between conduct that amounts to forced labour for purposes of trafficking and bad labour conditions that may even be illegal under labour laws, but do not reach the high severity threshold required of trafficking. Generally, however, practitioners felt that a line could be drawn, perhaps most easily with reference to the means and the overarching question of whether someone is free to leave. However, complications can arise, particularly in the context of debt-financed labour migration. Practitioners find it difficult to establish when such arrangements tip over into trafficking-related exploitation. Questions to be asked in this context include: Is the debt reasonable? Is it known to the debtor and fixed? How does the debt reduce? It is also important to look at the victim – is he or she able to walk away from the debt without harm? Are there particular vulnerability factors that should be taken into account (but note that abuse of a position of vulnerability is not a means under the law)? When the debt in question is held by a person other than the victim’s employer, for example by a recruitment agency or broker, then additional complications arise for investigators.

Stipulated purpose – slavery: Practitioners noted the absence of a definition of slavery but there was a difference of opinion between them as to whether this is problematic. Some stated that while the concept is well understood in Thai law due to its historical antecedents, there is still a need to have a clear conception of what slavery is – particularly how it differs from forced labour. Practitioners cited a particularly egregious case of exploitation involving a Korean girl to illustrate the general view in Thai jurisprudence that slavery implies complete *de facto* ownership of another person, almost always through the use of severe violence and intimidation.

Stipulated purpose – causing another person to be a beggar: Exploitative begging is considered to be a significant problem in Thailand. Practitioners noted that investigations and prosecutions in cases involving begging could become complicated around the question of exploitation. In one case the court was required to consider whether the exploitation element had been satisfied when the mother of the ‘victim’ had indeed caused that person to be a beggar but that this had happened in a setting where the family was begging and the money was used to sustain the family. The prosecution argued that the child had been ‘pushed’ into begging and therefore that this was indeed a case of trafficking. However, the trial judge acquitted the mother on the grounds that she had not, in fact, *intended to exploit* the child.

Other stipulated / discussed forms: The list of exploitative purposes set out in the law is supplemented by “**any other similar practices resulting in forced extortion**”. This ‘form’ of exploitation is not defined in the legislation. Practitioners noted confusion around the concept and the need to clarify it. One asserted that the phrase “any other similar practices resulting in forced extortion” incorporates “practices similar to slavery, servitude”, and can be interpreted to further

incorporate new and emerging forms of exploitation. Thailand has experienced trafficking associated with **commercial surrogacy**. In a recent case (which has just been added to the UNODC case law database) the court found that the three elements of the definition were satisfied (victims were brought / sent / detained / confined through use of force and deception for purposes of being exploited through commercial surrogacy). The form of exploitation cited in this case was “sexual exploitation”. Practitioners saw no need to amend the law to refer specifically to commercial surrogacy as they consider that this is indeed a form of sexual exploitation.¹⁴³ Practitioners stated that **trafficking for commercial adoption** is not a problem in Thailand and that such cases would anyway fall outside the trafficking law.

Issue for practitioners – the definition of trafficking, including its element of exploitation, is not clear and this lack of clarity is obstructing prosecutions:

Practitioners interviewed were unanimous in their view that the trafficking law, most particularly its definition, is not sufficiently clear to provide a strong tool for investigators and prosecutors and to guide consistent practice. It was noted that vague, undefined concepts, inherited from the Trafficking in Persons Protocol, meant that the question of what constituted “trafficking” is still open to interpretation. This is obstructing investigations and prosecutions. There are arguments within and between the judiciary and prosecutors on many aspects of the definition including the concept of exploitation. Even within victim support agencies (where the threshold for establishing ‘trafficking’ is generally lower), there is a lack of clarity around this central issue, which complicates victim identification. In the words of one practitioner, there are “just too many variables to support good interpretation of the law”. It was unanimously agreed that one of the most important elements of the proposed legislative reform will relate to securing greater clarity around the definition including through defining the various forms of exploitation, adding more types of exploitation (for instance, surrogacy), and considering abuse of a position of vulnerability. The importance of training and guidance to assist in the interpretation of concepts was emphasised, as was the need to ensure that the definition and interpretations allows for flexibility in adapting to new forms of exploitation.

Issue for practitioners – need for stand-alone offences: The interviewer queried whether it would be useful to establish certain forms of trafficking-related exploitation as stand-alone offences (noting, for example, that forced labour is not a separate offence in Thailand). Practitioners generally felt that this was unnecessary and would not contribute to more and better prosecutions.

Relevance of nature and severity of exploitation / extent of harm to establishing exploitation: Practitioners observed that the more severe the exploitation and the

¹⁴³ Note that a number of recent cases in Thailand involving Israeli and Australian commissioning parents and Thai surrogates have received considerable media attention. In the view of practitioners interviewed for the survey these cases do not fall within the trafficking law as there is no evidence of means.

greater the evidence of harm, the more easily a situation is established as trafficking. They affirmed previous statements that sexual exploitation may be easier to establish than forced labour. As a general point, practitioners noted the need to reserve the crime of trafficking for the most serious forms and manifestations of exploitation. In Thailand, the penalties for trafficking are very severe and it would be unfair to have these applied to less serious offences. In addition it was acknowledged that exploitative labour, of various forms and levels of severity, is prevalent in Thailand. It was felt that widening the concept of exploitation too much would overwhelm the criminal justice system and divert resources and attention away from where they are most needed.

Views on guidance for practitioners: Practitioners agreed that additional guidance at both the international and national levels was needed. However, they did not agree on how detailed and closed the definitions associated with trafficking-related exploitation should be. Some noted that terms such as “any other similar practices” are overly broad and vague. Others pointed to the need to ensure that the law is sufficiently flexible to take account of newer or emerging forms of trafficking-related exploitation.

3.2.6 Uganda

Summary: The survey involved only two respondents (both interviewed by telephone): the Coordinator of the Counter Human Trafficking National Task Force and an official of the Ministry of Justice. Poor telephone connections, inadequate time for interviews and the limited number of respondents meant that the survey process was not adequately robust. A number of relevant cases and additional external material were used to supplement the primary sources. The trafficking law sets out a definition of trafficking that generally corresponds to the Protocol’s structure and content. However, the purpose element extends well beyond the Protocol’s to include a greater number of forms of exploitation. Most of these forms of exploitation are defined and where international legal definitions are available, these have been used. Practitioners noted that the detail in the law was helpful in ensuring a common understanding of exploitation but pointed to significant practical difficulties in investigating and prosecuting trafficking cases. Some of these relate to capacities, others relate to cultural and social factors that influence how exploitation is understood. It was agreed that international guidance would be useful but practitioners also emphasized that more practical forms of assistance and support are perhaps even more urgently required.

Legal framework: The *Prevention of Trafficking in Persons Act 2009* (Trafficking Act), creates a number of offences relating to human trafficking with sentences ranging from 15 years imprisonment to the death penalty. The two core trafficking in persons offences closely follow the three-element definition set out in the Trafficking in Persons Protocol – which Uganda has signed but not yet acceded to. Exploitation is defined for the purposes of the first core offence (Article 3(1)(a)) as

including, at a minimum: “sexual exploitation, forced marriage, child marriage, forced labour, harmful child labour, use of a child in armed conflict, use of a person in illegal activities, debt bondage, slavery or practices similar to slavery or servitude, human sacrifice, the removal of organs or body parts for sale or for purposes of witchcraft, harmful rituals or practices” (Article 2(d)). The second core offence (Article 3(1)(a)) does not refer to exploitation but to the following purposes: “engaging [the victim] in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, debt bondage, forced or arranged marriage”. Most of the stipulated forms of exploitation are defined in the law.

A number of aggravated trafficking in persons offences are also set out in the law, several of which (such as adoption, guardianship, fostering and other orders in relation to children undertaken for the purpose of exploitation) either constitute or stipulate additional forms of exploitation. The law sets out a definition of child trafficking that does not require means and affirms the irrelevance of consent for both adults and children.

Practitioner understanding of exploitation: The concept of exploitation was considered to be clear because it is well defined but those interviewed noted that practitioners who have not received specialist training are not familiar with the crime of trafficking. In the course of their work, police will carry out an arrest if a complaint is made and refer to the Penal Code in laying basic charges, rather than conducting further investigation to uncover potential exploitation that may indicate trafficking. In short, because trafficking does not exist as an offence in the Penal Code, law enforcers may not be aware of its existence. They will instead revert to Penal Code offences they are familiar with, rather than the relatively newer and less familiar trafficking legislation.

Stipulated purpose – sexual exploitation: This form of trafficking is defined as “the use of a person in prostitution, sex tourism, pornography, the production of pornographic materials or the use of a person for sexual intercourse or other lascivious conduct.” The internal concepts of prostitution, sex tourism and pornography are also subject to specific definition in the act as shown below.

Sexual exploitation	
Prostitution	The activities of a ‘prostitute’ as defined in the Penal Code Act—a person who, in public or elsewhere, regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain.
Pornography	Any representation, through publication, exhibition cinematography, indecent show, information technology, or by whatever means, of a person engaged in real or simulated explicit sexual activities, or any representation of the sexual parts of a person for primarily sexual excitement.
Sex tourism	A program organized by travel and tourism-related establishments or individuals, which consists of tourism packages or activities, utilizing, and offering escort and sexual services and practices

offered for any persons as part of work recreation.

The parameters of sexual exploitation were not discussed, but examples offered of the phenomenon imply it is broadly understood. Both practitioners noted the prevalence of sexual exploitation and its many manifestations and this is strongly confirmed by external reports.

Stipulated purpose – forced marriage and child marriage: It is unclear how trafficking for marriage purposes is addressed, particularly given that only forced marriage is identified as a form of exploitation in the first core offence but both forced and arranged marriage are stipulated as purposes of trafficking in the second core offence. During the survey process, forced marriage was not discussed beyond the situation of child marriage. Also termed ‘early marriage’, the practice of children (girls) marrying adults (men) reportedly happens on a large scale, owing to the cultural acceptability of the practice. Parents generally receive a dowry for giving their daughter away in marriage. Where such cases are addressed as criminal offences, rather than being addressed as situations of trafficking they are instead treated as crimes of ‘defilement’ of a minor under the Penal Code, which is an easier offence to establish.

Stipulated purpose – forced labour: The trafficking law defines forced labour in substantive accordance with the international legal definition: “service which is exacted from any person under the threat of any penalty and for which the said person has not offered himself or herself voluntarily.” This form of exploitation was not extensively discussed during the survey process. Practitioners acknowledged that trafficking for forced labour is a problem but there appear to have been very few cases investigated and prosecuted.

Stipulated purpose – harmful child labour: Harmful child labour is defined in the Children’s Act as labour that results in physical, psychological or social harm, although the lines between this form of exploitation and forced labour (or indeed acceptable labour) remain unclear. Laws around employment prohibit the employment of children under 12 and restrict the employment of older children. It could be presumed that child work in violation of these provisions is *ipso facto* harmful to the child and therefore exploitative for purposes of the trafficking framework. The Government has acknowledged the extent of child involvement in economic activity and the probability that some working children are subject to exploitation and abuse. External sources have reported the exploitation and forced labour of children in fishing, agriculture, domestic service, cattle herding, mining, stone quarrying, brick making, car washing, scrap metal collection, bars, restaurants, the domestic service sector and prostitution, both internally in Uganda and in other East African countries. Children from neighbouring countries have reportedly been found in conditions of forced labour and commercial sexual exploitation in Uganda.

Stipulated purpose – use of a child in armed conflict: Kidnapping of children for use as child soldiers by internal armed groups has been a long-standing problem in Uganda and many children are reported to remain in captivity. Practitioners did not raise this form of exploitation.

Stipulated purposes – use of a person in illegal activities / use of a child for criminal act: Neither of these purposes is defined in law and it is unclear whether either has been applied in practice. One practitioner noted reports that children and adults are deceived into traveling to other countries for work in mines or in the timber industry but subsequently exploited in armed conflict or as drug couriers. Children may be exploited in theft, burglary and petty smuggling across borders. On the basis of this response, it is to be presumed that such exploitation is conceived of as exploitation in ‘illegal activities’ rather than in ‘armed conflict’ (at least where the victim is an adult), though this is not clear given that neither concept is defined.

Stipulated purpose – debt bondage: This exploitative purpose is defined in substantive accordance with the international legal definition (“the status or condition arising from a pledge by the debtor of his or her personal services or labour or those of a person under his or her control as security or payment for a debt, when the length and nature of services is not clearly defined or when the value of the services as reasonably assessed is not applied towards the liquidation of the debt”). Debt bondage was not discussed during the interview process and no examples of it were raised. No cases were provided or referred to that could shed light on whether this exploitative purpose would also satisfy the means element.

Stipulated purposes – slavery or practices similar to slavery or servitude: These exploitative purposes were not discussed. Slavery is defined in the Trafficking Act in accordance with the international legal definition (“the status or condition of a person over whom any or all of the powers attaching to the rights of owners are exercised”). The ‘slave trade’ is also defined – despite not being explicitly included as an exploitative purpose – in accordance with the international legal definition (“all acts involved in the capture, acquisition or disposal of a person with the view to selling or exchanging him or her and with the intention of reducing him or her to slavery”).

Stipulated purposes – human sacrifice and removal of organs or body parts for sale or for the purpose of witchcraft, harmful rituals or practices: The concept of ‘human sacrifice’ is defined in the Trafficking Act as: “the killing, mutilation, removal of organs or body parts of a person for sale or for the purposes of witchcraft, rituals or any harmful practices.” There is accordingly a measure of overlap with the exploitative purpose of removal of organs or body parts for sale or purpose of witchcraft, harmful rituals or practices. This latter practice is a source of some confusion: it is not included in the second core trafficking offence but rather stipulated as an aggravated form of trafficking and child trafficking. It is, however, included in the first core trafficking offence through the attached definition of exploitation as well as the definition of human sacrifice. The question of whether

exploitative intent is relevant in distinguishing trafficking for the purpose of human sacrifice that results in death from other crimes (for instance, murder) was not raised.

Issue for practitioners – capacity challenges in investigation and prosecution: Both interviewees explained that low capacity obstructs effective investigation. Capacity in this sense refers to financial and human resources as well as skills and organizational competencies. The Special Investigations Division (led by one of the respondents to the survey) has limited operational capacity beyond Kampala. In addition to resource constraints (including transport) few skilled investigators are available.¹⁴⁴ These limitations mean that many cases that should be prosecuted are never commenced or successfully concluded.

Issue for practitioners – evidentiary challenges: Practitioners acknowledged the heavy evidentiary burden of trafficking prosecutions. In this country as in others it is difficult to secure prosecutions without the involvement of victims who are often reluctant to participate in the criminal justice process. Exploitative intent was noted as being particularly difficult to establish without evidence of actual exploitation. For instance, recruitment companies are active in channelling Ugandans overseas – sometimes into exploitation. However, the companies assert that they are operating legitimately and deny exploitative intent. While acknowledging difficulties, one practitioner asserted that it is still possible to advance a prosecution in some cases even when the type of exploitation is not known. For example, a person could be confined, have his or her passport confiscated, or be treated in another way that implies there is an exploitative intent.

Is nature and severity of exploitation / extent of harm relevant to establishing exploitation? One practitioner was clear on the point that “exploitation is exploitation” and the severity of exploitation should not be considered – other than for the purpose of determining the type of assistance a victim requires. He also noted that severity is difficult to determine, for instance, where the impact of a situation is psychological rather than physical. The other practitioner shared the view that exploitation at all levels should be taken seriously, but noted that in practice mild exploitation would not be pursued to prosecution, as police are understandably reluctant to allocate scarce resources to the investigation of situations that are not considered very serious. That practitioner explained that in the national context, a person with only a minor complaint, for instance, against an employer, would be considered “a cry baby” and his or her grievances would be dismissed. The presence or apparent absence of harm could also be a factor in deciding whether exploitation had taken place. For example, if a child has not

¹⁴⁴ The Special Investigations Division is allocated resources for referral rather than for operations, and is accordingly only able to investigate those cases referred to it by higher authorities. One practitioner emphasised the need to establish a Specialised Investigations Unit specifically mandated to address trafficking crime, and to ensure they have capacity to investigate financial and material gains derived from trafficking

suffered apparent harm in her marriage, the situation would generally not be considered trafficking but would more likely be addressed as a case of “defilement”.

Relationship between exploitation and ‘means’ and exploitation and ‘consent’: Certain practices (for example, witchcraft) are both a means of trafficking (as a form of control over the victim or a way of securing his or her acquiescence), as well as an exploitative purpose (for instance, removal of their body parts for use in witchcraft rituals). There are insufficient cases in Uganda to ascertain how these issues are approached in practice. One practitioner noted that efforts are currently underway to reconceive child marriage as a form of trafficking. The ingredients of the crime can be made out where the act is done for the purpose of sexual exploitation. He explained that while the ‘means’ element is not required in cases of child trafficking, the use of means would often serve to differentiate a crime of trafficking for the purpose of child marriage from another offence. For instance, if a child is forced into a marriage it becomes a case of trafficking, whereas if she runs away and enters into a relationship with an adult herself, the situation would be rather considered a case of defilement. The law affirms the irrelevance of consent but it is difficult to gauge how this operates in practice and whether it influences understandings of consent. One practitioner noted that police may be reluctant to investigate a situation where there is consent and cases have in fact been dismissed where signed contracts have been involved, even when there is indeed evidence of exploitation.

Relevance of cultural / social factors to understanding of exploitation: This issue was discussed at length and practitioners agreed that understandings of exploitation are informed by cultural and social factors. Early marriage, child labour and witchcraft were cited as examples of practices that may not be considered exploitative in all situations by those involved due to cultural factors. It was further noted that criminal justice officials often share the same cultural beliefs that can result in exploitative practices, which will impact on their willingness to pursue certain forms, and manifestations of exploitation associated with trafficking, or even serve to legitimize them.

Guidance for practitioners: Practitioners were of the view that the legislative framework is broad and robust enough to capture the various forms of exploitation encountered but noted significant implementation challenges that could indeed be addressed through additional guidance. They saw a need to raise awareness of laws and their correct application among concerned officials. One practitioner noted the challenge of explaining that the law is meant to punish the psychological as well as physical and other harms that victims of exploitation endure. He pointed to conceptual confusion around the issue of consent, and the misconception that trafficking refers to the movement of a victim from one place to another. He also noted that there remains a perception, even among educated people, that the trafficking law is an imported European concept with little relevance for the Ugandan context. In his view, these challenges speak to the need to support victims to share their experiences so the public and practitioners understand the nature

and scale of trafficking-related exploitation in the country. It was noted that while a global understanding of exploitation and its different forms is certainly possible, it is also important that there be room within global understandings to reflect country-specific experiences and contexts. The same practitioner emphasised the need for States of destination / exploitation to recognise and respect forms of exploitation that are included in legislation elsewhere (for instance, ‘child marriage’ and ‘illicit adoption’ in the case of Uganda) as indicators of trafficking and to protect victims accordingly.

3.3 States that stipulate fewer forms of exploitation than are provided in the Protocol

Two of the 12 States surveyed (Brazil and Sweden) are classified as providing fewer forms of exploitation than are provided for in the Trafficking in Persons Protocol.

3.3.1 *Brazil*

Summary: The survey involved two government officials (focal points for the Tripartite Coordination of the National Policy to Combat Trafficking in Persons) and a judge. A large number of cases were available for analysis but these did not shed great light on the subject of the study. Brazil’s current legal framework around trafficking criminalizes only trafficking for sexual exploitation. However, a range of other exploitative purposes are caught in other provisions of the Penal Code including, most particularly, labour exploitation / practices similar to slavery. A Bill to bring the law in closer conformity with the Trafficking in Persons Protocol – including its definition of trafficking – is currently before Parliament. If passed/enacted it will extend exploitative purposes to include the undefined practices of removal of organs, tissue and body parts; work similar to slavery, any kind of bondage, illegal adoption and sexual exploitation. Practitioners confirmed that the current legislative framework obstructs investigation and prosecution of trafficking, which is anyway challenged by a range of evidentiary difficulties. Sexual exploitation is particularly problematic, not least because it is sometimes collapsed into prostitution offences. However, there is considered to be a solid understanding among practitioners of labour exploitation. Practitioners consider that international guidance on exploitation would be important and that such guidance should be based on human rights principles and be sufficiently robust and flexible to support implementation in different national contexts.

Legal framework: Brazil’s Penal Code currently only criminalizes internal and international trafficking for purposes of sexual exploitation. Labour exploitation is addressed separately through a series of standalone provisions of the Penal Code and offences under these provisions are dealt with through the Federal Court. A decree promulgated in 2006 affirms the Protocol’s definition of trafficking in persons to be the country’s official definition. While this decree does not have

direct legal effect it enables courts to turn to the Trafficking in Persons Protocol and other relevant instruments for guidance. The extent to which this can and has operated to expand the list of exploitative purposes beyond sexual exploitation is unclear. Brazil's National Policy on Trafficking further affirms the Protocol's definition and establishes principles and guidelines to guide actions of public and private institutions in addressing trafficking and implementing the Protocol although, once again, the impact of this is unclear. The Penal Code also separately criminalizes a range of offences that may constitute or be connected to trafficking including "reducing someone to a condition analogous to slavery, or subjecting him to forced labour" (Section 149); illegal constraint (Article 146); deprivation of freedom (Article 148); facilitating prostitution or other forms of sexual exploitation of children (Article 218); facilitating prostitution, exploiting the prostitution of others, and other forms of sexual exploitation (Article 227-230). In addition, Brazil's *Integrated Methodology of Data Collection and Information on Trafficking in Persons* (Integrated Methodology) refers to additional categories of crime related to human trafficking including fraudulent recruitment of workers to a foreign territory (Article 206); recruitment of workers from one location to another national territory (Article 207); crimes against transplant law (Articles 14 to 17 of Law No. 9434/97); crimes against children and adolescents (Articles 238 and 239 of Law No. 8069/90).¹⁴⁵

Draft legislation seeking to amend the Penal Code to bring it into line with the Trafficking in Persons Protocol has recently been approved in the Senate and is currently before Congress. A Commission of Enquiry of the House of Representatives is completing a report on the draft bill. The Bill includes a definition of trafficking that is in general accordance with the Protocol's three-part definition. Forms of exploitation stipulated in the draft are removal of organs, tissue and body parts; work similar to slavery, any kind of bondage, illegal adoption and sexual exploitation. The list is exhaustive as a proposal to include reference to 'other forms of exploitation' was rejected. There do not appear to be any definitions attached to these forms of exploitation.

Practitioner understanding of exploitation: Despite the lack of definitions, practitioners noted that there is rich experience and expertise in addressing labour exploitation which under the Penal Code is addressed as a situation akin to slavery-like conditions, rather than as trafficking. The relevant provisions are seen to be helpful in identifying victims and perpetrators by clearly setting out the prohibited forms and conditions of exploitation. However, there is considerable confusion around trafficking for sexual exploitation. These offences overlap with general prostitution and sexual exploitation offences of the Penal Code. It appears that the provisions on trafficking for sexual exploitation may operate to criminalize prostitution (which is not otherwise regulated or criminalized under the law) rather

¹⁴⁵ See *Metodologia Integrada de Coleta e Análise de dados e Informações sobre Tráfico de pessoas*, (UNODC, Secretaria Nacional de Justiça, Ministério de Justiça, Governo Federal Brazil, 2013), p.78.

than trafficking. Sensitivities around this issue are apparently inhibiting the development of tools that would objectively measure conditions of exploitation in sexual contexts. Despite the absence of any apparent legislative mandate, practitioners reported that situations of labour exploitation involving migrants are sometimes informally categorized as “trafficking” in order to allow migrants to access rights and services reserved for victims of trafficking. Brazilians exploited in labour contexts have access to benefits on account of their nationality and so would not be classified as victims of trafficking. Similar flexibility is extended to victims exploited in prostitution (which does not fall within the legal framework for indemnification) will be identified as dancers or waitresses so they can access benefits. The new law proposes to bring the protection framework currently attached to the labour regime, to all victims of trafficking regardless of the type of exploitation.

Stipulated purpose – sexual exploitation: The concept of sexual exploitation is not defined but the reference in the law to “prostitution” instead of “exploitation of prostitution” appears to have expanded the concept beyond that set out in the Protocol. This, combined with movement as a required element of the offence, means that any movement for purposes of prostitution is prohibited as trafficking. One case cited as an example of the overreach of the law involved a group of prostitutes moved abroad into conditions that were not considered to be exploitation. This case was nevertheless prosecuted as trafficking. External reports suggest that many internal sex trafficking cases are investigated as other crimes (for example, sexual exploitation of children).

Stipulated purpose – labour exploitation and slavery like conditions: While also undefined, labour exploitation is said to be well understood as a form of slavery associated with violations of dignity and liberty. Practitioners reported little difficulty in determining the point at which unfavourable working conditions cross the line into criminal labour exploitation. The core offence is itself explicative: “reducing someone to a condition analogous to slavery, or subjecting him to forced labour or exhaustive journey, either subjecting them to degrading working conditions, or restricting by any means, their movement due to debt to the employer or agent”. Practitioners confirmed that it is for the courts to determine what conduct reaches the threshold of ‘exhausting’ and/or ‘degrading’ and it is likely that not all such situations would meet the international legal understandings of slavery, slavery-like practices and forced labour. However, it was noted that these concept are construed more broadly in Brazil than in the relevant international conventions.

Forms of exploitation to be addressed in the new legislation: It is presumed that “**work similar to slavery**” and “**any kind of bondage**” will extend to include situations currently characterized as labour exploitation / slavery like conditions. However, the absence of a precise definition makes it impossible to establish the likely parameters of these forms of exploitation. Currently, legislation around transplantation addresses only situations of improper **organ removal**. It has,

however, been used at least once to prosecute persons for organ removal in situations that would meet the international legal definition of trafficking in persons. Practitioners did not express a view on the proposed inclusion in the new legislation, of removal of organs, tissues and other body parts as an exploitative purpose of trafficking. Situations of **illegal adoption** are currently prosecuted under general rules around adoption, which classify all adoptions taking place outside the official framework as 'illegal' although not necessarily criminal. It is not clear what conduct will be captured through the inclusion of illegal adoption as a form of exploitation in the new law. There was disagreement among practitioners as to the wisdom of this inclusion. Among those that were supportive there was disagreement regarding whether the adoptive, as well as the biological parents, should be considered as perpetrators of trafficking.

Forms of exploitation not addressed in the new legislation: Despite reference to **servile marriage** in the National Policy to Counter Trafficking in Persons, the proposed legislation does not include either forced or servile marriage as an exploitative purpose of trafficking. One practitioner explained that drafters considered that the phrase "all forms of slavery" captures servile marriage. **Exploitation in criminal activities** is also not included in the bill but is reported to be a significant problem. While one practitioner expressed the view that the new law would capture such exploitation, others noted that proposals to include exploitation in criminal activities as a form of trafficking related exploitation were explicitly rejected.

Issue for practitioners – weak data: Those interviewed were not able to pronounce definitively on whether certain forms of exploitation are pursued more often than others. One obstacle is the legislative framework within which relevant offences overlap and are categorized differently. Jurisdictional issues between the federal and state systems also complicate the collection and collation of case data. The Integrated Methodology referred to above seeks to bring together public safety, criminal justice and victim care institutions to collect information on victims and traffickers, trafficking trends as well as responses including investigation and prosecution to both strengthen response and monitor policies.¹⁴⁶

Issue for practitioners – focus on sexual exploitation rather than trafficking for the purpose of sexual exploitation: External observers have noted that cases of trafficking for sexual exploitation not involving movement are prosecuted under pimping statutes instead of the trafficking statute. Practitioners generally affirmed this, noting that despite a framework in place to address trafficking for sexual exploitation, and several campaigns to raise awareness of human trafficking, there remains reticence on the part of investigators and prosecutors to identify cases of

¹⁴⁶ According to the guidelines attached to the Integrated Methodology, two cycles of data collection should be implemented and monitoring meetings should be scheduled annually. Since the methodology was adopted, two reports have been published; one encompassing 2005 to 2011, the other capturing data from 2012. Data from 2013 is currently being collected for analysis. Ibid.

sexual exploitation as being cases of *trafficking* for the purpose of sexual exploitation. The reasons for this are unclear although it appears that the distinction between these two crimes is not clearly understood. One practitioner surveyed for this report disagreed that there is conceptual confusion, noting that the concepts are clear to practitioners, yet when asked could not clearly delineate between sexual exploitation and trafficking for the purpose of sexual exploitation.

Issue for practitioners – securing victim-witness testimony: The heavy reliance on victim-witness testimony was noted as a key barrier to achieving convictions. Some victims are reportedly deterred by the risk that they will become culpable for their participation in crimes that have taken place, and others may not wish to testify because they fear being unable to support themselves or their children as a consequence. As a result, many cases of exploitation do not become criminal cases. Ultimately the victim determines whether a case will progress or not; if he or she does not want a case to proceed it generally will not. Efforts have been made to redress this heavy reliance on victims – for example through large-scale campaigns promoting societal involvement in identifying and denouncing exploitation.

Relevance of nature and severity of exploitation / extent of harm to establishing exploitation: Practitioners generally agreed that even “mild exploitation” is enough to establish the exploitative purpose element of the trafficking offence, regardless of the type of exploitation (though in practice this can only apply to trafficking for sexual exploitation). However, severity of exploitation / harm will be relevant to sentencing as judges have discretion to impose penalties between firmly prescribed minimum and maximum sentences. The Judge interviewed for the survey noted that the low sentences prescribed for trafficking offences (three to eight years) are a significant problem – not least because persons sentenced to less than eight years imprisonment are free to leave their place of detention during the day and are only required to return at night.

Relationship between exploitation and ‘means’, and exploitation and ‘consent’: Currently, the means used to traffic a person are not a separate element of the offence but understood to be subsumed within the acts of trafficking. Means are also addressed as aggravating circumstances (use of violence, serious threat or fraud aggravates the sentence, as to vulnerability factors including young age, mental disease or defect or close relationship with the victim). The Bill currently under consideration proposes inclusion of an element of means into the definition (“serious threat, violence, duress, fraud or abuse”) and there are indications that practitioners are being trained with reference to this three-element definition. The current law contains no reference to the irrelevance of consent in relation to both trafficking for sexual exploitation and the various proscribed forms of labour exploitation. The National Policy (which can be referred to by judges) does affirm the irrelevance of consent. Practitioners were divided on the value of this reference. One suggested it should be qualified to make consent relevant unless it is ‘vitiating’ in order to preserve individual agency and autonomy. Another stressed the critical importance of the irrelevance of consent, in light of the fact that the vast majority

of victims are thought to be aware of the exploitation they will experience (although presumably not the extent or severity of that exploitation).

Relevance of cultural / social factors to understanding of exploitation: The survey uncovered a range of cultural and social factors that may impact on how exploitation related to trafficking is understood in both theory and practice. For example, Brazil's history of chattel slavery has apparently resulted in a strong and fairly uniform understanding of labour exploitation. However, historical factors have also rendered certain groups within society especially vulnerable to exploitation and their exploitation relatively less visible. Indigenous traditions and practices were not considered to be of any particular relevance to how exploitation occurs or is understood. However, the cultural practice of urban families informally adopting children from poor rural families was noted as being conducive to exploitation through child labour. It was noted that cultural sensitivities and controversies around prostitution have hampered productive discussion around the parameters of sexual exploitation. Gendered attitudes within the criminal justice system can sometimes affect how exploitation is understood. For example, judges may determine that a person subjected to sexual exploitation was somehow responsible for her own exploitation. Sexual exploitation, particularly of minors, is reportedly so widespread that it is normalized to the point where there is some tacit acceptance, within society, of such exploitation, making children susceptible to further abuse and exploitation, potentially in the context of trafficking.

Guidance for practitioners: One practitioner expressed the (apparently widely held) view that exploitation should be understood as a human rights violation of dignity and liberty, and that this understanding should guide how exploitation is understood in the context of the Trafficking Protocol.¹⁴⁷ All those interviewed acknowledged that each country has its own perspective on what dignity and liberty mean. However, the core questions that should be asked in making this determination are the same, and all States can unite around a baseline of human rights obligations they have voluntarily adhered to. It should therefore be possible to come up with universally applicable objective standards that can be tailored to local conditions. Critically, practitioners were of the view that in determining whether a particular situation constitutes trafficking for purposes of national criminal law, it is the standards of the country in which the exploitation takes place that is to be the point of reference. The victim's country and context was considered an irrelevant measure in this respect.

¹⁴⁷ A recent book, published by the Ministry of Justice, explores the critical links between trafficking and human rights from a range of different perspectives. See *Tráfico de pessoas: uma abordagem para os direitos humanos*, Secretaria Nacional de Justiça, Departamento de Justiça, Classificação, Títulos e Qualificação; organização de Fernanda Alves dos Anjos ... [et al.]. – 1.ed. Brasília: Ministério da Justiça, 2013. Available in Portuguese only.

3.3.2 Sweden

Summary: The survey involved a prosecutor, law enforcement official and the National Coordinator against Prostitution and Trafficking. The law criminalizes trafficking in general accordance with the Protocol for *“sexual purposes, the removal of organs, military service, forced labour or other activity in a situation that places that person in distress”*. None of these terms is defined. Strong alternative offences exist in cases where one of the elements of the trafficking for sexual purposes offence (typically the means element) cannot be established. Much of the criminal justice focus is on trafficking for sexual purposes although the extent of the problem of trafficking for exploitation of labour is acknowledged to be considerable. Practitioners noted the relatively greater difficulties in prosecuting something (labour) that is not of itself considered inherently exploitative – such as prostitution. There is some evidence of uneven application of the legal framework leading to inconsistent results and it appears that cultural considerations associated with particular ethnic groups are sometimes at work. While practitioners acknowledged inconsistencies and sometimes even unwelcome judgments, they were of the view that the absence of strict definitions of exploitations contributed to a flexible and responsive framework within which exploitation associated with trafficking could be addressed.

Legal framework: The definition of trafficking in the Penal Code generally follows the three-element definition set out in the Trafficking in Persons Protocol with some minor textual alterations to the ‘act’ and ‘means’ element. The ‘purpose’ element requires that the act was undertaken: *“with the intent that [the victim] shall be exploited for sexual purposes, the removal of organs, military service, forced labour or other activity in a situation that places that person in distress”*. The definition affirms that means are not required to establish trafficking in children. An additional offence of “gross procuring” is reportedly utilised as an alternative to trafficking offences in some instances. The offence refers to “anyone who encourages or improperly economically exploits a person having casual sexual relations in return for payment”. Factors to be considered in establishing an aggravated offence of gross procurement are: *“whether the activity was conducted on a large scale, entailed significant financial gain or involved the ruthless exploitation of another person.”* [Emphasis added].

The Swedish Penal Code also criminalizes the buying of sexual services in circumstances other than those that constitute “gross procuring”, specifically, “obtain[ing] casual sexual intercourse in return for payment”. The use of exploitative services outside of sexual context is not explicitly prohibited in the trafficking context but may constitute or be implicated in a crime of usury which, in the Penal Code, refers to “tak[ing] advantage of someone's distress, innocence or thoughtlessness or dependent relationship ... in order to obtain a benefit which is clearly disproportionate to the consideration afforded or for which no consideration [is or] will be provided”. Other provisions of the Penal Code address potentially related offences such as those concerning poor or dangerous working conditions.

The Penal Code and specialist legislation also criminalizes the taking of organs without consent and the commercial dealing in organs.

Practitioner views on the absence of definitions associated with exploitation:

Practitioners consulted do not consider the absence of definitions around exploitation to present a problem and some regarded this as a strength of the legislative approach, allowing it to adapt to changing circumstances. One example provided was the capacity of sexual and labour exploitation to absorb the practice of forced marriage. Another example relates to the situation of young men who are recruited into armed religious fundamentalist groups abroad, which could be subsumed under the exploitative forms of both 'military service' and 'distress'.

Practitioner understanding of exploitation as a social as well as legal construct:

The National Coordinator stressed a distinction between the legal concept of exploitation and the broader social understanding. For example, he was of the view that it is possible for exploitation to exist – at least in the non-legal sense – even in the absence of an exploiter. Addressing exploitation in this broader sense is a great challenge. It was noted that sometimes the 'legal' and the 'social' perspectives of exploitation collide. While from a social point of view a situation may be considered one of trafficking, to police there may be inadequate evidence to commence or successfully conclude an investigation. Many cases fall down because the means or the act cannot be proven. This, according to the National Coordinator, speaks to the need to find a way of addressing the situation of European Union citizens living in subhuman conditions and who are highly vulnerable to exploitation, without needing to establish trafficking in persons in order to be able to mount a response.

Practitioner understanding of exploitation as being linked to benefit or gain:

The prosecutor participating in the survey anchored exploitation to the notion of 'gain' on the part of the exploiter which is made possible through: (i) putting a person in a situation that requires service to be provided; and (ii) failing to remunerate that person sufficiently. In his view, a failure to fulfil one of these elements would mean that the exploitation element has not been established. Reference was made to a series of cases involving foreign berry pickers some of whom were determined to have been subject to criminal exploitation while others were not. It was further noted that the appropriate standard for determining remuneration (and presumably living conditions and other criteria that may be applicable in determining whether criminal exploitation has occurred) is the standard in Sweden, not the standard in the victim's country of origin.

Stipulated purpose – sexual purposes:

This term is not defined and its parameters are unclear. As purchasing sexual services is criminalized in Sweden, prostitution is considered to be a situation in which a person may be a victim of various degrees of exploitation. A case of trafficking for sexual purposes will require the establishment of the act and means element with no more than the fact of prostitution being sufficient to establish the purpose element. Where the act and or means element cannot be established then the case is likely to be prosecuted as an offence of

“gross procuring”. Practitioners did not identify any major problems with the absence of an explicit definition of ‘sexual purposes’, noting the flexibility that this provision provides to take account of a broad range of conduct.

Stipulated purpose – removal of organs: The existence of additional legislative provisions (outside the trafficking framework) on organ removal and commercial dealings in organs is helpful in establishing the parameters of this exploitative purpose. There have been no cases of organ removal in a trafficking context. However, practitioners reported that there are some indications of Swedish nationals traveling abroad to receive organs in situations that could fall within the definition of trafficking in persons for removal of organs. These cases have not been approached as trafficking and it appears they have not, in fact, been investigated as possible criminal offences.

Stipulated purpose – military service: Little information is available on the origin of this particular form of exploitative service, which may well be unique to Sweden. Practitioners noted that there have recently been cases of young people radicalized as jihadists and recruited as fighters or suicide bombers abroad. It was considered that there is no effective way of preventing such persons from travelling abroad unless, as minors, they are treated as victims of trafficking recruited for the exploitative purpose of military service, or as having been placed in “situations of distress” (see further below). Where recruitment into armed conflicts or similar cannot be considered trafficking, other stand-alone crimes such as war crimes and terrorism offences may be applied (presumably to the ‘victim’ as well as to his or her recruiter). Thus far the application of trafficking offences with this purpose has been limited to minors – for whom no ‘means’ must be shown. It was suggested that application could be extended to adults through establishment of means such as coercion, abuse of power or abuse of a position of vulnerability.

Stipulated purpose – forced labour: Forced labour is not defined in legislation. Practitioners identified the difficulty in establishing the parameters of forced labour as a major practical challenge. The example of foreign berry pickers was again offered. Unions report that labourers are paid approximately \$1USD per kilo of berries picked. Often such persons consider themselves to be well paid and may even leave after some time with saved earnings. There is rarely evidence of means beyond abuse of vulnerability. However, they may also be left in debt, having paid exorbitant rates for their flight tickets and accommodation. As mentioned above, Courts have sometimes found such situations to constitute trafficking for forced labour and sometimes not.

Stipulated purpose – other activity in a situation that places a person in distress: There is no accepted definition or even a uniform understanding of this term and the parameters of its operation are accordingly unclear. Practitioners commented that this is a ‘catch-all’ provision allowing all types of exploitation not expressly stipulated in the legislation to be captured. Examples given were exploitative forms of marriage and criminal exploitation. In relation to the latter they pointed to

several cases of exploitation for criminal purposes including welfare fraud and stealing. However, these have not always been prosecuted successfully as trafficking cases.¹⁴⁸ It was explained by practitioners that the term does not require that the victim actually *be* in any sort of ‘distress’: the word ‘distress’ refers to the victim being prevented from freely making decisions about his or her own actions, or finds him or herself in a serious predicament that is not coincidental or transient.¹⁴⁹ A decision of the Gothenburg District Court states that: “situations that entail distress ... are when a person is induced to work under particularly difficult conditions at a very low wage. Another example is when a person is induced to beg or steal.”¹⁵⁰ This explanation of the court suggests that there may be an overlap between the means used (or at least the effect of those means) and the exploitative purpose. The Court’s statement also raises questions about whether or not a person can be considered a victim of exploitation if the working conditions are particularly difficult but the wage he or she receives is not considered ‘low’. (Note that Sweden does not have a statutory minimum wage). It is further notable that inducement to begging or stealing are envisaged as exploitative purposes irrespective of the conditions or consideration that may be attached.

Not stipulated – commercial adoption: Practitioners were uncertain as to whether and when an illegal adoption may become a situation of trafficking. They speculated that in order to make an illegal adoption fulfil the exploitative purpose element of trafficking, the situation of the child following the illegal adoption would have to be exploitative (in accordance with one of the stipulated purposes) above and beyond the fact of the illegal commercial adoption itself. However, practitioners emphasized the more generally applicable point that the fact that a victim may end up in a situation they consider to be an improvement (for instance in prostitution, labour or marriage) should not detract from a finding that they have been trafficked into that situation. There have been no cases brought as yet in relation to commercial adoption as a form of trafficking.

Not stipulated – forced or servile marriage: Practitioners noted that a forthcoming law will criminalize forced marriage, child marriage, and other types of marriage in which a person is misled. The current situation is similar to that of commercial adoption in that some additional exploitation would need to be shown above and beyond the fact of the forced marriage. A forced marriage that does not result in any sexual, domestic or labour exploitation would not be considered a case of trafficking. This assertion appears to challenge the notion expressed by practitioners in other contexts that that the victim’s view of their situation is irrelevant. It could be argued that a person’s subsequent apparent satisfaction with a situation (the marriage) should be irrelevant to establishing whether it was forced. Cultural considerations can be relevant: an official report has referred to cases of

¹⁴⁸ *Trafficking in human beings for sexual and other purposes, Situation Report 13*, RPS Rapport 2012, p. 23, referring to Västmanland District Court 25.08.2011, Case no B 406-11.

¹⁴⁹ See *ibid*, p. 8, referring to Swedish Government Bill 2009/10:152.

¹⁵⁰ *Ibid* at p. 22, referring to Gothenburg District Court Dept. 4, 30.01.2012, Case no. 15416-11, p.23.

minors being forced to “enter into marriage in accordance with the traditions of the Roma people”.¹⁵¹

Not stipulated – commercial surrogacy: Commercial surrogacy is not criminalized in Sweden, but is not allowed. There have been no cases of trafficking for the purpose of commercial surrogacy. Practitioners referred to the belief (reflected in both law and culture) that a person who carries a child and gives birth to a child is its natural mother. Where this practice happens elsewhere (for example, India) it is not approved of – but not criminalized.

Not stipulated – begging: Begging is reported to be a growing form of exploitation in Sweden, notably among Roma minorities, mainly from Bulgaria and Romania. Practitioners interviewed noted their opposition to criminalization of public begging which they felt would not target the organizers behind the exploitation. It has proven difficult to determine the conditions under which begging would be considered exploitative. Practitioners cited a problematic court decision that found a Roma minor in begging to *not* be in an exploitative situation because her situation was the same of that of her parents, under whose instruction she was begging.¹⁵² They speculated that a different conclusion would be reached if ethnically Swedish children were exploited in begging, as such situations would not be dismissed as being part of a traditional ‘lifestyle’.

Issue for practitioners - criminal activities including exploitation of others for financial fraud and defrauding the welfare system: In recent years there has been a rise in welfare fraud through the use of third persons. Perpetrators register their victims for the purpose of obtaining credit cards, bank accounts, mobile phone subscriptions, social security and other benefits in their name. The victims are left with liabilities for these goods and services but receive no benefits, which are instead obtained by traffickers generally without the knowledge of their victims. There is current discussion as to whether such situations can be subsumed within the concept of ‘situations of distress’ as an exploitative purpose of trafficking.

Issue for practitioners – risks of expansionist approach: Practitioners noted that there might be inadequate resources to respond to the many people identified as ‘exploited’ if trafficking is too broadly construed. The implication therefore is that trafficking may serve to limit the focus to those forms of exploitation in which there are criminal organizers (the ‘illegal’ exploitation). Meanwhile, in order to address ‘social’ exploitation (and with it, vulnerability to ‘illegal’ exploitation), the National Coordinator stressed the urgent need to create a means of fighting exploitation without necessarily anchoring it to the crime of trafficking. While exploitation is necessarily a criterion of the trafficking offence, he was of the firm view that it should also be addressed even where the other elements of the trafficking crime cannot be established. According to him, the notion of exploitation in the context of

¹⁵¹ Ibid, p. 31, referring to Bergen District Court 05.07.2012, Case no 11-194827MEDBBYR/01.

¹⁵² See the report on Thailand for a similar example.

trafficking is clear, but the bigger challenge is those situations where exploitation occurs outside the context of trafficking.

Issue for practitioners – attention to sexual exploitation at the expense of labour exploitation: Practitioners noted that there are more convictions for exploitation in sexual contexts than in labour contexts. In their view sexual exploitation is simply more evident and more easily investigated and prosecuted, not more prevalent. Trafficking for labour exploitation is often hidden and investigation and prosecutions are considered to be relatively more challenging. Proving criminal intent in sexual exploitation is considered easier than for other types of exploitation that may involve conduct (such as labour), which is not considered inherently exploitative. The National Situation Report offers examples of people being offered construction, cleaning, hotel and restaurant jobs, or work in snow-clearing, car-washing and catering in Sweden, to discover shortly before or soon after they commence work that the conditions have changed. Such cases are noted as difficult to investigate given it is not clear whether they are situations of human trafficking for forced labour, or fraud or breach of contract.¹⁵³ The lack of fall back stand-alone offences for non-sexual forms of exploitation provides a further challenge. While the offence of gross procuring is used to prosecute cases of sexual exploitation that cannot be established as trafficking, other forms of exploitation do not enjoy such flexibility. Specifically in relation to forced labour it was noted that if the offence of trafficking for forced labour is not able to be established then there may be no available alternative within the criminal law. The challenges of proving intention to exploit are also different in relation to trafficking for sexual purposes and for forced labour. Authorities have noted that: “[i]n some cases of [non-sexual] human trafficking, the proceedings are dismissed because of a lack of evidence showing that the suspects, as early as at the time of recruitment, intended to mislead the victims or that no exploitation could be proven.”¹⁵⁴

Issue for practitioners – heavy reliance on victim testimony: The relationship between the type of exploitation and the legislative framework around it has bearing on the role of witness testimony. Alternative evidence may be difficult to obtain in cases of sexual exploitation, because people may not wish to admit to buying sex given that this is a criminal act. However, the laws prohibiting purchase of sex and procurement allow evidence gathering through proactive investigation. Meanwhile, investigations for other forms (such as exploitation in agriculture or exploitation for criminal purposes such as theft) are invariably reactive. The evidentiary burden in the latter cases will fall on witness testimonies, which are of course fraught with challenges of victims who are willingly in their situations, reliant on their exploiters and do not stand to gain by cooperating in criminal justice processes. One result is that individuals exploited in crime or kept in situations that compel them to commit crime (such as berry pickers who steal food), may prefer to

¹⁵³ Ibid, p. 23.

¹⁵⁴ Ibid, p. 22.

accept the minor charge attached to that offence rather than give away their traffickers and face retaliation.

Relevance of nature and severity of exploitation / extent of harm to establishing exploitation: One practitioner asserted that there is indeed a threshold of severity required to establish the exploitation element, but that it cannot and should not be defined. The fact that practitioners ‘know it when they see it’ was not deemed to be problematic but rather a strength of the national approach that allows flexibility in navigating grey zones. The impact of severity of exploitation primarily manifests in the sentence imposed: the higher the degree of exploitation, the graver the sentence that may be expected. Practitioners affirmed that the type of exploitation might have a bearing on the threshold required for exploitation. Some activities are unacceptable; for instance brothel keeping is not acceptable and will always be considered to have reached the required threshold. A higher degree of exploitation would be needed in those contexts (such as labour) that are not unacceptable in their own right. A recent official report notes: “...it can be difficult to determine the extent to which a person may have been exploited and whether the exploitation is serious enough to be considered criminal under the trafficking legislation. In addition, victims are usually able to move about freely but are deprived of their liberty in more subtle ways, for example by threats of reprisals or by being deprived of their passports or being indebted to the perpetrators. This makes it difficult to prove the power relationship that should exist between the perpetrator and the victim.”¹⁵⁵ This statement confirms that exploitation must be of a serious enough ‘extent’ to warrant treatment as a crime, but also speaks to the role of the means element in establishing that extent. As already noted, practitioners were unanimous in asserting that regardless of the type of exploitation, the standard by which exploitation should be measured should be the standard that is prevalent in the country where the exploitation takes place, not the standard in the country of origin or the context of the victim.

Relationship between exploitation and ‘means’ and exploitation and ‘consent’: A survey of all trafficking cases between 2009 and 2012 revealed some 20 cases in which prosecutors decided it was appropriate to file an indictment for trafficking. Of those cases that were dismissed the exploitative purpose was not at issue; the more significant issue was the court considering that the prosecution had failed to prove means. It was noted that in the absence of means, a case of trafficking for sexual exploitation might instead become one of gross procuring. The prosecutor suggested that across different forms of exploitation the use of means may be relevant to proving exploitative intent, but that ultimately exploitation consists of two aspects irrespective of the means used, being putting a person in a position and gaining from it. Interestingly, the thirteenth Situation Report of the National Rapporteur, implies that the means infer criminal liability, regardless of criminal intent: “Common to the circumstances mentioned in the provision is that they, in various ways, intend to control the victim’s free and true will, regardless of the

¹⁵⁵ Id.

intended exploitation.”¹⁵⁶ External observers have suggested that acquittals in cases where the alleged victims apparently consented points to a discordance in understanding at the judicial level of the irrelevance of consent. These concerns were echoed by practitioners, who pointed to the particular challenge of explaining the irrelevance of consent in connection with abuse of a position of vulnerability.

Relevance of cultural / social factors to understanding of exploitation: This issue was discussed at length and practitioners agreed that understandings of exploitation are indeed informed by cultural and social factors. The clearest example of this is the understanding of prostitution as inherently exploitative and of the purchasing of sexual services as inherently wrong. The survey process touched on the particular challenges that arise when members of the Roma community are exploited by other members of that same community. In that regard practitioners noted the reticence of courts to find what they consider to be practices or activities they assume to be part of a ‘culture’ or ‘traditional lifestyle’ to be criminal activities. All three practitioners were of the view that these considerations may influence the view of courts on whether exploitative situations are deemed to be trafficking or not. Servile and forced marriages were also flagged as being subject to cultural judgments that influence how exploitation is understood in respect of particular ethnic groups, and indeed how its victims can be empowered against such exploitation.

Guidance for practitioners: One practitioner suggested that guidance should acknowledge the social dimension of exploitation and the forms of exploitation that may not fit the model that has been subject to legal regulation. Another emphasized the need for guidance to focus on the element of gain: where there is no gain to the trafficker, there is no exploitation. The investigator recommended that guidance should emphasize the importance of investigators treating potential trafficking as trafficking – reflecting the reality that trafficking situations are often mistaken for other offences such as theft, procurement or begging. It is important that the professed political will to address trafficking is matched with appropriate resources for criminal justice agencies to do their part.

3.4 States that take a different approach to exploitation

Two of the 12 States surveyed (Australia and Canada) are classified as taking a different approach to exploitation altogether.

3.4.1 *Australia*

Summary: The survey involved senior police and prosecutors as well as government officials with extensive relevant legislative experience. A reasonable number of cases were available for analysis. Australia’s legislative framework around

¹⁵⁶ Ibid, p. 6.

trafficking, extensively revised in 2013, is complex, comprising base offences of trafficking – that do not always require an exploitation element – and a comprehensive list of stand-alone offences of exploitation that are typically added to base trafficking offences, several of which go well beyond the corresponding international legal definition. An unusual feature of the legislation is the attachment of detailed definitions of all stipulated forms of exploitation. These changes have ensured that the concept of exploitation is well understood. However, there are some challenges in ‘borderline’ cases that may not meet the required threshold of seriousness and the new offence of forced marriage is yet to be tested. Practitioners are strongly supportive of a broad and flexible approach to exploitation that nevertheless establishes clear parameters affirming trafficking as a very serious crime and human rights violation.

Legal framework: Australia’s legislative framework around trafficking in persons and related offences is set in Divisions 270 and 271 of the Commonwealth Criminal Code. The relevant provisions do not replicate the three-element definition set out in the Trafficking in Persons Protocol but generally capture those elements. The law was substantially revised in 2013 with the purpose of making sure “the broadest range of exploitative conduct is criminalized.”¹⁵⁷ Division 270 establishes the offences of slavery, servitude, forced labour, deceptive recruitment and forced marriage as well as related aggravated offences. Division 271 sets out specific trafficking in persons / trafficking in children offences – organizing or facilitating the *transportation* of a victim into, out of or within Australia using coercion, threat or deception or by being reckless as to the exploitation of the victim. It also establishes offences of trafficking for purposes of organ removal; debt bondage; and harbouring, receiving and concealing a victim as well as related aggravated offences. Aggravated offences include conduct involving minors; cruel, inhuman or degrading treatment; or conduct that gives rise to a danger of death or serious harm to the victim or another person.

Exploitation is not an element of the base Division 271 offences of trafficking in persons and trafficking in children. There is accordingly no requirement to establish ‘exploitation’ in proving these offences or in proving the related aggravated offences except in relation to the offence of “trafficking persons reckless as to exploitation”. However, the legislative approach is a ‘tiered’ one, which means that, in practice, the base offence of trafficking is added to in a way that ensures the elements of the Protocol’s definition – including exploitation – are always captured. Exploitation is defined for the purposes of the Division 271 offences as causing a person to enter into a number of stipulated exploitative situations. These forms of trafficking-related exploitation (which are each defined in the legislation) generally correspond to those set out in the Protocol with the exception of there being no

¹⁵⁷ The Parliament of the Commonwealth of Australia House Of Representatives, Crimes Legislation Amendment (Slavery, Slavery-Like Conditions And People Trafficking) Bill 2012, *Explanatory Memorandum*, p. 2, available at: www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r4840

specific reference to trafficking for “exploitation of prostitution or other forms of sexual exploitation”.¹⁵⁸ However, the range of exploitative practices potentially captured under the Australian legislative framework is considerably broader than envisaged under the Protocol. That breadth is gained by: explicit inclusion of forms of exploitation such as forced marriage and debt bondage that are only implicitly included in the Protocol’s reference to “practices similar to slavery”; defining certain forms of exploitation (including servitude, forced labour and debt bondage) differently and typically more broadly than the equivalent international law definitions; establishing all stipulated forms of exploitation as stand-alone offences without requiring a link to an element of movement; and establishing facilitative conduct as stand-alone offences.

General view on the concept of exploitation – need for breadth and flexibility to accommodate different forms: Practitioners considered the legislative framework as amended in 2013 to be broad enough to accommodate a wide range of exploitative purposes associated with trafficking and flexible enough to provide criminal justice agencies with much needed options when pursuing prosecutions. Critically, the fact that offences relate to *conduct* and not *industry*, is seen as making them more robust and better able to withstand changes in criminal methodology. It was further noted that the framing of certain offences would permit the inclusion of forms of exploitation that are not specifically mentioned. For example while the legislation contains no reference to **trafficking for involvement in criminal activities**, this could potentially be prosecuted as forced labour. The definition of servitude would likewise permit prosecution for **domestic servitude**. Depending on the degree of seriousness, ‘domestic servitude’ may also be prosecuted as slavery or forced labour.

General view on the concept of exploitation – need for parameters: All those interviewed affirmed strong support for a broad and flexible approach to exploitation that provides sufficient space to accommodate a range of exploitative purposes of differing levels of seriousness. However, this must be balanced with a level of specificity sufficient to ensure consistency and predictability in the application of the law and further, to ensure that not every bad employment relationship becomes “trafficking”. While noting that the list of exploitative purposes is broad, practitioners do not consider it to be open-ended. They observed that certain forms of exploitation associated with trafficking in other jurisdictions would not be pursued as trafficking or slavery cases in Australia. An example is **foreign adoption programs** that are not aimed at securing the economic or sexual exploitation of the adopted child. The question of whether **recruitment for armed conflict** could ever fall within the framework was discussed but not resolved

¹⁵⁸ Conduct that may be prosecuted elsewhere as “trafficking for sexual exploitation” was, previous to 2013 amendments, prosecuted as slavery or “sexual servitude”. The sexual servitude provision has been removed and replaced with a set of generic servitude offences. Trafficking for sexual servitude would now likely be prosecuted as slavery, servitude or forced labour.

definitively, with practitioners noting that alternative legislation is available and would likely be more appropriate in such cases.

Forms of exploitation that have been – and are being – prosecuted: In practice, most trafficking related exploitation identified and pursued in Australia has concerned women working in prostitution. However, there has been a marked increase in identifications of exploitation in other sectors including hospitality, domestic service and agriculture and referrals for sexual and non-sexual exploitation are now comparable. Most trafficking related exploitation to date has been prosecuted as slavery, sexual servitude and trafficking in persons reckless as to exploitation. All four matters currently before the courts include base charges of trafficking. One matter also includes sexual servitude charges, and another includes debt bondage charges. No one has yet been charged under the new stand-alone forced labour or forced marriage offences.

Slavery offences include possessing a slave or exercising over a slave any of the powers attaching to the right of ownership; engaging in slave trading; entering into a commercial transaction involving a slave; exercising control or direction over, or providing finance for, a commercial transaction involving a slave or any act of slave trading; and reducing a person to slavery. **Slavery** is defined as: “the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.” **Slave trading** is defined as including: “(a) the capture, transport or disposal of a person with the intention of reducing the person to slavery; or (b) the purchase or sale of a slave.” As noted above, slavery offences have been central to the legal framework around trafficking. They continue to be so under the new law in a way that makes clearer their place at the extreme end of the exploitation continuum. Practitioners assert a general understanding of slavery, which has been helped by judicial determinations as to its applications in situations of trafficking.

Servitude offences include causing a person to enter into or remain in servitude; and conducting a business involving servitude. Servitude is defined as “*the condition of a person (the victim) who provides labour or services, if, because of the use of coercion, threat or deception: (a) a reasonable person in the position of the victim would not consider himself or herself to be free: (i) to cease providing the labour or services; or (ii) to leave the place or area where the victim provides the labour or services; and (b) the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.*” The provision affirms that the coercion, threat or deception can be used against the victim or another person. It also affirms that a condition of servitude may exist whether or not: (a) escape from the condition is practically possible for the victim; or (b) the victim has attempted to escape from the condition. The concept of servitude as defined above was introduced in 2013 to replace the previous offence of “sexual servitude”. Practitioners explained that this comprehensive and detailed definition addressed challenges that had been encountered in seeking to prosecute trafficking offences – for example in situations where victims were not physically

restrained but were otherwise not free to remove themselves from harm. The amendments also aimed to ensure that the servitude offence captures conduct irrespective of the industry in which it takes place.¹⁵⁹

Forced labour offences, introduced in 2013, include causing a person to enter into or remain in forced labour and conducting a business involving forced labour. As with servitude, forced labour is defined carefully, exceeding the parameters of the international legal definition in terms of detail but, according to practitioners, generally following the scope of that prohibition. Forced labour is defined as “*the condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim¹⁶⁰ would not consider himself or herself to be free: (a) to cease providing the labour or services; or (b) to leave the place or area where the victim provides the labour or services.*” The provision affirms that the coercion, threat or deception can be used against the victim or another person. It also affirms that a condition of forced labour may exist whether or not: (a) escape from the condition is practically possible for the victim; or (b) the victim has attempted to escape from the condition. In certain circumstances, a person may be found guilty of forced labour where servitude cannot be established. Where it has not been proven that the victim was significantly deprived of his or her personal freedom (as required to establish servitude), but the remaining elements of servitude have been proven, the elements of the forced labour offence are in effect proven. Accordingly, a person who has been found not guilty of servitude can be found guilty of forced labour, where the court is satisfied beyond reasonable doubt, and where the defendant has been afforded procedural fairness in relation to this finding.

Trafficking in persons for removal of organs offences relate to organizing or facilitating the entry or proposed entry, receipt, exit or proposed entry into a country, being “reckless as to whether the conduct will result in the [illicit] removal of an organ of the victim ... by the offender or another person”, after or in the course of that entry, receipt or exit. The Criminal Code criminalizes trafficking of persons for removal of an organ into and from Australia, as well as within Australia in certain circumstances. Removal of an organ constitutes a trafficking in persons offence where organ removal is contrary to law (trade and sale of organs has been criminalised in all States and Territories), and / or there is a lack of consent and no medical need. Consent cannot be obtained by coercion, threat or deception.

¹⁵⁹ Prior to the 2013 amendments, only servitude within prostitution was addressed, owing to the definition of ‘sexual services’ in the Criminal Code. The amendments accordingly sought to also capture conduct amounting to servitude that occurs outside prostitution, including sexual servitude that takes place in a non-commercial setting (e.g. domestic servitude). The 2013 amendments further distinguished between slavery and servitude offences, by adding a second tier to the definition of servitude; while slavery is proven by the exercise of ownership over the victim, servitude falls short of ownership by involves significant deprivation of the victim’s personal freedom.

¹⁶⁰ The ‘reasonable person test’ requires the court to consider whether a reasonable person of the same background and in the same circumstances would have been free to withdraw his or her labour or services, or to leave the workplace.

Forced marriage offences are causing a person to enter into a forced marriage and being a non-victim party to a forced marriage. Forced marriage is defined as a marriage involving “the use of coercion, threat or deception”, causing “one party to the marriage (*the victim*) [to enter] into the marriage without freely and fully consenting”. Practitioners expressed the view that forced marriage is an odd fit because unlike other forms of exploitation targeted in the legislation it does not appear to be associated with organized crime or indeed with profit making. Also, as a practical matter, this particular form of trafficking related exploitation is relatively less amendable to a criminal justice response, requiring interventions that are focused strongly on prevention and victim support. However, it was agreed that the association of forced marriage with trafficking / slavery is consistent with international law (and the idea of women as property). It also has significant symbolic effect that is likely to reap more practical criminal justice benefits further down the track.

Debt bondage is defined as occurring when a person pledges his or her services, or the services of another person, as security for a debt if the debt is “manifestly excessive”, or the “reasonable value” of the services is not taken out of the debt, or “the length and nature of those services are not respectively limited and defined”.

Issue for practitioners – borderline cases raise practical problems and severity of exploitation is relevant: Decisions about which cases to investigate / refer / prosecute are multi-factorial – involving considerations of resources, public interest, seriousness and evaluations of the whether available evidence is sufficient to support a strong prosecution. Practitioners acknowledged the practical difficulties associated with drawing the line in some cases and cited the value of the new legal framework in establishing a continuum of severity from debt bondage and deceptive recruiting, through to forced labour, servitude and, at the most grave end of the spectrum, slavery. They further noted the importance of a complementary civil framework that can deal effectively with bad working conditions – and strong referral mechanisms in each direction. It was agreed that the *severity of the exploitation* as well as the *severity of the means used* (force, deception, etc.) are important considerations at both the investigative and prosecutorial stages, as is the related – and subjective – question of whether the alleged victim was free to leave.¹⁶¹ Here it important to note that the test of whether a person was ‘free’ to leave is an objective test requiring the court to consider whether a reasonable

¹⁶¹ However practitioners noted limitations to the informal “free to leave” test, particularly as exploiters become more adept at imposing less direct means of compulsion on their victims. A recent case example involved a group of Malaysian tomato pickers being paid around half the minimum wage, housed in a remote area in extremely poor conditions and with little freedom of movement. The individuals appeared to consent to the working and living arrangements and to be technically “free to leave”. They did not wish to pursue a complaint. Police assessed the group as being potential victims of trafficking but the case was assessed as not suitable for a trafficking charge due to lack of victim cooperation. The syndicate involved was subsequently charged with money laundering offences.

person of the same background and in the same circumstances would have been free to withdraw his or her labour or services, or to leave the workplace.

Issue for practitioners – evidentiary obstacles and dealing with victim-witnesses:

Practitioners confirmed that the heavy reliance on victims as witnesses makes it difficult to pursue prosecutions to successful conclusions. In this country as in all others, victims often have little incentive to cooperate, despite the existence of protection and support services as well as opportunities to regularize legal status. In 2013 the *Vulnerable Witness Act* was passed, providing protections for vulnerable witnesses giving evidence in Commonwealth criminal proceedings, including victims of human trafficking and slavery. Victims of trafficking can now give evidence by closed-circuit television, video-link or video-recording, have their contact with the defendant or members of the public limited, and have a support person with them while they give evidence. The Act also makes it an offence to publish material identifying a trafficked person, and allows trafficked people to make victim impact statements to the court outlining the harm they have experienced.

Link between exploitation and the ‘act’ and ‘means’ elements: Practitioners acknowledged a close relationship between trafficking related exploitation and ‘means’ as these are understood in the context of the Trafficking in Persons Protocol. For example, ‘means’ form an essential part of the definition of most stand-alone offences. In other words, the existence of means is essential to establishing the exploitation offence. In relation to the link between exploitation and the ‘act’ element it was noted that legislation actually criminalizes, as stand-alone offences, certain acts including harbouring, receiving and concealing.

Guidance for practitioners: All those interviewed felt that States should take advantage of the mandate they have been provided to add to the Protocol’s “at a minimum” list of exploitative purposes of trafficking. They urged, however, that the list should be added to sensibly and not ambiguously. It is essential to remain mindful of the purpose of the Protocol (and of national anti-trafficking frameworks) to address the most serious of human rights abuses. It is also important to structure legislation and the criminal justice response with the victim firmly in mind: what approach best protects victims? What approach most directly targets the exploitation they are experiencing? It was agreed that general international guidance on such points could be useful.

3.4.2 Canada

Summary: The survey involved three practitioners – all interviewed by telephone. Several relevant cases were available for analysis and additional documentation, including practitioner guidance, was also reviewed. Further substantive inputs were provided by participants to the expert group meeting. Canadian law takes a unique approach to criminalizing human trafficking: including the ‘act’ and ‘purpose’ elements of the international definition. Canadian law also defines exploitation, for the purpose of the human trafficking offences, that incorporates ‘means’. That

definition refers to causing a person to provide a labour or 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.” Means are relevant but not decisive to establishing exploitation. However, in order to prove exploitation occurred it must be established that the trafficker caused the victim to provide the labour or service *by instilling fear* (in the reasonable victim). “Labour or service” is not defined but has been shown to include a range of conduct. Exploitation in the context of trafficking for removal of organs and tissues is included and defined separately. Practitioner understanding of exploitation was generally considered to be high although evidentiary difficulties were flagged in relation to what some considered a need to show a reasonable ‘fear for safety. It was further noted by some practitioners that this requirement might operate to exclude certain forms and situations of exploitation. Practitioners were generally of the view that additional guidance on the element of exploitation would be useful.

Legal framework: Trafficking offences are set out in the Criminal Code. The ‘act’ and ‘purpose’ element generally correspond to those elements under the Protocol. (Section 279.01 provides that “Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, *for the purpose of exploiting them or facilitating their exploitation* is guilty of an indictable offence” – emphasis added). Section 279.01 provides that a person exploits another person if “they cause them to provide, or offer to provide, **labour or a service** by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.” The ‘means’ element is relevant to determining exploitation. To that end, the court *may* consider the use of threat of force or another form of coercion; deception; and abuse of a position of trust, power or authority. But the court *must* be satisfied that the accused’s conduct caused fear in the mind of the (reasonable) victim and that this fear is what caused the victim to provide the labour or service.¹⁶² The term ‘labour or a service’ is not defined.

¹⁶² To establish exploitation, it must be shown that the accused caused another person to provide, or offer to provide, their labour or services, or to have done an act for the purpose of facilitating such conduct by another person. It must then be shown that the labour or service was offered or provided (or intended that it would be offered or provided) as a result of conduct that, in all the circumstances, could reasonably be expected to cause the victim to fear for their safety or for the safety of someone known to them if they failed to offer provide their labour or service. This is an objective test; in other words, it is not necessary to prove that the victim was fearful for their safety – only that the circumstances were such that a reasonable person in the victim’s position would have had such a fear. Safety is not defined in the human trafficking provisions but has been interpreted in the context of other Canadian criminal offences to include mental, psychological and emotional safety. It is relevant to note that courts have rejected claims that the trafficking definition including the concept of exploitation is overly vague and difficult to apply. *R v. Stone and*

There are additional trafficking offences including an offence that prohibits the receipt of financial or other material benefit from the commission of a trafficking offence and withholding or destroying documents for the purpose of committing or facilitating human trafficking.

Trafficking is also criminalized in the *Immigration and Refugee Protection Act*, which provides for an offence of trafficking in persons, understood as “knowingly organiz[ing] the coming into Canada of one or more persons by means of abduction, fraud, deception or threat of force or coercion”. An exploitative purpose is not required to establish this offence.

Stipulated forms of exploitation: The Canadian approach does not define exploitation by reference to examples of exploitation but rather through a global assessment of the tactics used by traffickers to obtain labour or services and the effects that those tactic would have on a reasonable person standing in the shoes of the actual victim. As noted above, the term “**labour or services**” is not defined in the legislation. Practitioners affirmed that it is broadly construed. A handbook for criminal justice practitioners asserts that the term covers: “... all forms of sexual and domestic services, and any kind of labour, such as work in the agriculture, restaurant, construction or any other industry. Labour or services provided toward criminal ends, such as participation in grow operations or transporting drugs, is also included. In short, trafficking may occur within any industry, whether regulated by the state or not.”¹⁶³ Statistics from the period 2007–2010 indicate that the overwhelming majority of trafficking cases involve sexual exploitation, followed by forced or exploitative labour. The **removal of organs or tissues** in a situation that amounts to exploitation for the purpose of the trafficking offence is addressed in section 279.04(1)(3) of the Criminal Code, which provides that “a person exploits another person if they cause them, by means of deception or the use or threat of force or any other form of coercion, to have an organ or tissue removed.” Practitioners did not provide further information on this form of exploitation and no relevant case law was provided.

Forms of exploitation that may not be captured within “labour or services”: Practitioners have noted that as yet there has not been sufficient case law to determine the parameters of “labour and services” but acknowledged that some forms of exploitation associated with trafficking may well not be covered. Borderline cases cited by practitioners include persons being duped into defrauding social welfare systems (and potentially other manifestations of exploitation for criminal activities), and work in agricultural settings where a person is paid less than what they were promised. The buying and selling of a person, and exploitation in commercial surrogacy or commercial adoptions may also not be captured by

Beckford [2013] O.J. No. 371, 2013 ONSC 653.

¹⁶³ *A Handbook for Criminal Justice Practitioners on Trafficking in Persons* (Federal/Provincial/Territorial Working Group on Trafficking in Persons, November 2013), p. 22.

trafficking legislation. Forced marriage is also considered unlikely to be included under “labour or service” unless other types of exploitation are also involved. Practitioners had different views on the implications and impact of certain forms of exploitation being outside the umbrella concept “labour or services”. Two were of the view that all forms of exploitation (particularly sexual) should be captured by the trafficking legislation, while one suggested that not all exploitation should be considered trafficking and that sentences of equal severity could be achieved by applying alternative offences (e.g. living on the avails of prostitution) that would sufficiently punish the wrongdoing.

Issue for practitioners – the “fear for safety” element in the definition of exploitation: Practitioner opinions of the definition of exploitation attached to the Criminal Code’s offences of trafficking varied considerably as did understanding of what must be established to show exploitation. One view expressed was that the test required evidence that the victim was in fact fearful for their safety, or the safety of someone known to the victim and that that fear be reasonable, having regard to all of the circumstances. However, guidance offered in the Handbook for Criminal Justice Practitioners as well as a review of the Canadian Parliamentary record indicates that the safety test does not require the victim to have actually been afraid but rather a determination that it would be reasonable to conclude that a person like the victim would have been afraid, having regard to all of the circumstances. To date, no court in Canada has directly pronounced on the applicable standard to be applied, although appellate level decisions on this issue are expected in the near future.

Certain practitioners felt that the “fear for safety” requirement is unnecessarily restrictive: that it may operate to exclude wrongful / exploitative conduct that should be captured as trafficking and that could be captured as trafficking under the Protocol. It was explained that fear is not always a feature of relationships between victims and traffickers: that the most effective exploiters may use incentives (such as romantic attachment, drugs, a home) that operate to remove, rather than create fear and this may, have the temporary effect of improving some aspects of the victim’s life. The situation of a person with an intellectual disability who is happy with his situation and considers himself cared for by his traffickers was provided as an example of one that would not be captured within the definition because fear could not be demonstrated. Exploitation of prostitution is another example in which fear may not be present (as illustrated in one case in which two individuals were considered victims of trafficking because of their fear, while nine others in similar or worse situations were not because the fear element was not proven to the requisite standard)¹⁶⁴. One practitioner expressed the view that an apparent absence of fear on the part of the alleged victim may pose evidentiary challenges, but would not be fatal to a charge of trafficking because the Court can consider whether it would have been *reasonable* to conclude that a person in the circumstances of the victim would have been afraid, irrespective of whether any evidence was led to suggest

¹⁶⁴ R. v. Moazami 2014 BCSC 1727

that the victim in fact felt fearful. As noted above, there has yet to be a Canadian decision examining these issues in a detailed way. However, it does appear that prosecutions may well be difficult in cases where an alleged victim does *not* express fear – or cannot articulate his or her situation of fear for safety well enough to the court.

Issue for practitioners – victim-witness testimony critical to proving the *fear for safety* element: Practitioners asserted that the greatest challenge in investigating and prosecuting trafficking in persons is securing the cooperation of victims. Demonstrating the effect of the accused’s conduct on a victim can be powerful evidence in helping to determine whether exploitation has been made out, as is illustrated by the Moazami case described above. This can often make the role of the victim vital, particularly in cases where other evidence is not available.¹⁶⁵ Available case law to date demonstrates that evidence, which establishes that a victim was in fact afraid, is often critical for securing convictions.

The test of reasonableness may be difficult to apply in practice – some practitioners noted that it may be difficult to convince a jury that it would be reasonable to conclude that a person in the same circumstances of the victim would be afraid when a specific ‘victim’ clearly asserts that he or she is not. This emphasis on the victim and his or her state of mind was noted by two practitioners as inappropriately detracting from the rightful focus, which should be on the criminal activity of the accused person.

Relevance of the nature and severity of exploitation / extent of harm to establishing exploitation: Practitioners noted that there is no threshold for exploitation in legislation. However, in practice, situations that are less exploitative will most likely be addressed by another offence, even if trafficking is charged. Also, charges may simply not be brought in cases of mild exploitation; victims would only be put through a trial process where there is a high chance of conviction which can often depend on evidence of severity of exploitation / harm. Practitioners acknowledged the concept of a continuum of exploitation and expressed the view that a case-by-case approach is necessary to determine whether exploitation reaches the severity of criminality and, if so, which criminal law provision is the most appropriate to charge. In that regard they pointed to the very heavy penalties that could be imposed for trafficking and the consequent need to ensure that conduct is sufficiently severe to warrant such penalties. While the question of whether a victim benefited from the exploitative conduct was agreed to be irrelevant, practitioners observed that such considerations could potentially affect whether exploitative purpose is established. In relation to sentencing, the degree of exploitation and harm were both considered to be of great relevance. One

¹⁶⁵ In that regard it was noted that rules on admissibility of evidence can pose significant barriers to the collection of corroborative and other evidence that could be used to supplement (or potentially even replace) victim testimony. Examples are provided in the survey report.

practitioner noted that the type of exploitation may also be relevant and there is a perception that sexual exploitation is worse than other forms.

Relationship between exploitation and ‘means’ and exploitation and ‘consent’: As noted previously, the means element is not explicitly included in the relevant trafficking offences. Rather, means (use or threat of force, other coercion, deception and abuse of a position of power or authority) are relevant – but not decisive – to establishing whether exploitation has occurred. One practitioner explained the reasoning behind this approach related to the fact that means are inherent in some forms of exploitation but not all. Drafters did not want cases to fail because means could not be established. However, another practitioner expressed the view that the resulting formulation operates to impose a higher standard than is actually required by the Protocol. The irrelevance of the victim’s consent is affirmed in law. However, as in many other States, issues of consent are often considered in practice. Two practitioners expressed the view that the irrelevance of consent is in conflict with the requirement that the victim be fearful for his or her safety. In that regard another noted that it would be hard to imagine how a person could consent to an activity, as that term is understood at law, yet also be performing that activity out of fear.

Relevance of cultural / social factors to understanding of exploitation: One practitioner noted that perceptions of sexual exploitation being the worst form of exploitation could have a cultural aspect: within Canadian culture there is little understanding of forced labour and other forms of extreme labour exploitation and of how individuals enter and remain in such situations. Though exploitation of indigenous Canadians was not discussed in any significant depth in the survey process, indigenous girls and women have been identified as being particularly vulnerable to sexual exploitation. Stigmatization and stereotyping, particularly of indigenous women as ‘prostitutes’ or ‘criminals’, combined with preconceived notions of what a ‘victim’ should look like have been noted as hindering law enforcers in their identification of potential victims of trafficking.¹⁶⁶

Guidance for practitioners: One practitioner expressed the view that a common understanding of exploitation in the context of human trafficking may not be achievable at the international or even national level – and perhaps is not desirable. The absence of a uniform understanding is not damaging provided that laws address the full range of exploitation that affects or may affect a particular country or community. Several of those interviewed affirmed the need for standards that are objectively verifiable and provide guidance that is tailored to each legal tradition on what is and what is not exploitation. Another interviewee asserted that the greatest need is for a clear and agreed standard of exploitation. Other suggestions for areas that might require guidance for practitioners include victim management, victim stabilization and the modernizing of evidence gathering in sexual exploitation cases to help lessen reliance on victim testimony.

¹⁶⁶ *Local Safety Audit Guide: To Prevent Trafficking in Persons and Related Exploitation* (National Crime Prevention Centre (NCPC), 2013), pp. 9–10.

4 National Law and Practice: Key Findings

4.1 Legislative approaches to exploitation: trends, commonalities and differences

There were significant differences between surveyed States' approaches to the 'purpose' element of the definition of trafficking in persons. Only one State surveyed (Canada) offers a stand-alone definition of exploitation in its legislation. Another State (Colombia) appears to provide a definition of exploitation but in fact adds criteria (financial gain or other benefit) to a list of exploitative purposes. The other ten surveyed States follow the approach taken by the Trafficking in Persons Protocol: offering a list of exploitative forms, rather than defining exploitation itself.

The stipulated forms of exploitation vary from country to country. Some have followed the list set out in the Trafficking in Persons Protocol. Others have added one or more other forms of exploitation to that list. A few have contracted the list to one or two of the Protocol's stipulated forms. Some States have included definitions of the stipulated forms of exploitation in their legislation, while others have not.

The list of exploitative purposes is exhaustive in some States and open-ended – or unclear on this point – in others.

The following table sets out the key features of the purpose element in States surveyed.

Table 1: Definitions and types of exploitation addressed in anti-trafficking legislation¹⁶⁷

<i>States that closely follow the Protocol's approach to exploitation</i>	
Malaysia	"...all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs." [Exploitation is not mentioned in the definition of trafficking, but is mentioned in the trafficking offence.]
United Arab Emirates	"...all forms of sexual exploitation, engaging others in prostitution, servitude, forced labour, enslavement, quasi-slavery practices, or detachment of organs."
<i>States that follow the Protocol's approach but provide for additional exploitative purposes</i>	
Bulgaria	"...for lecherous activities, for forced labour or for begging, for the removal of a body organ, tissue, cell or bodily fluid or for keeping them in forced servitude."

¹⁶⁷ Also see Annex 1 for a table outlining listed forms of exploitation.

	[The term exploitation is not explicitly used in legislation].
Colombia	“Exploitation shall mean to obtain financial gain or other benefit for himself or for another person through the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, exploitation of begging others, servile marriage, the removal of organs, sexual tourism and other forms of exploitation.”
Egypt	“...exploitation in any of its forms, including: exploitation of acts of prostitution and all forms of sexual exploitation, exploitation of children in such acts and in pornography, forced labour or services, slavery or practices similar to slavery or servitude, or begging or removal of human organs, tissues or a part thereof.”
Qatar	“...in whatever form, including; exploitation in acts of prostitution and all forms of sexual exploitation, exploitation of children in such acts and in pornography, begging, forced labour or the forced rendering of services, slavery or practices similar to slavery, servitude or the removal of human organs, tissues or body parts.”
Thailand	“... seeking benefits from the prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, causing another person to be a beggar, forced labour or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person’s consent.”
Uganda	“...at a minimum, sexual exploitation, forced marriage, child marriage, forced labour, harmful child labour, use of a child in armed conflict, use of a person in illegal activities, debt bondage, slavery or practices similar to slavery or servitude, human sacrifice, the removal of organs or body parts for sale or for purposes of witchcraft, harmful rituals or practices.”
<i>States that provide fewer forms of exploitation than the Protocol</i>	
Brazil	<i>Penal Code</i> limits human trafficking to international or internal trafficking for the purpose of sexual exploitation and prostitution. Some other exploitative forms addressed as stand-alone offences. <i>Draft Bill</i> presently under consideration, introduces a definition of trafficking that includes an exhaustive list of exploitative types (being organ removal, bondage, slavery-like conditions, illegal adoption or sexual exploitation.)
Sweden	“...for sexual purposes, the removal of organs, military service, forced labour or other activity in a situation that places that person in distress.”
<i>States that take a different approach</i>	
Australia	Legislation comprises base offences of trafficking in persons (that do not always require an exploitation element) and a list of stand-alone offences of exploitation that are typically added to base trafficking offences. The stand-alone offences are comprehensively defined and generally correspond to the Protocol’s list of exploitative purpose.
Canada	“...a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.”

4.2 Insights into specific forms of exploitation

The table on the following page shows the various forms of exploitation that are stipulated in the legal framework of surveyed States. The narrative that follows examines each of these forms with reference to key findings and insight from the survey.

Table 2: Definitions and types of exploitation addressed in national anti-trafficking legislation¹⁶⁸

Forms of exploitation explicitly included in the anti-trafficking legislation of:	1. Australia	2. Bulgaria	3. Brazil	4. Canada	5. Colombia	6. Egypt	7. Malaysia	8. Qatar	9. Sweden	10. Thailand	11. United Arab Emirates	12. Uganda
Forms of exploitation explicitly included in the TIP Protocol												
Exploitation of prostitution / other forms of sexual exploitation	X	X	X		X	X	X	X	X	X	X	X
Forced labour or services	X	X	X	X	X	X	X	X	X	X	X	X
Slavery (S) and /or practices similar to slavery (PSS)	X (S)	X (S / PSS)	X (S / PSS)		X (S / PSS)	X (S / PSS)	X (S / PSS)	X (S / PSS)			X (S / PSS)	X (S / PSS)
Servitude	X	X	X		X	X	X	X		X	X	
Removal of organs	X	X			X	X	X	X	X	X	X	X
Other forms of exploitation cited in national legislation												
Military service									X			X Child
Begging		X			X	X		X		X		
Illegal adoption												X
Forced marriage	X											X
Forced extortion										X		
Servile Marriage			X		X							
Sexual tourism					X							
Criminal activity												X
Child marriage												X

¹⁶⁸ Note the table shows only those forms of exploitation explicitly included in national anti-trafficking legislation; in some States separate legislation may be applicable to some forms of exploitation listed here. Lack of specific reference is not always determinative and certain forms of exploitation not specified may be incorporated into others that are. Further reference should be made to the country summaries in Part 3 above.

Human sacrifice													X
Debt bondage	X												X
Forms of exploitation exhaustive													
	Yes	Yes	Yes	No	No	No	Not clear	No	No	No	No	No	No

4.2.1 Exploitation of the prostitution of others / other forms of sexual exploitation

As noted in Part 2, neither ‘exploitation of the prostitution of others’ nor ‘sexual exploitation’ is defined in international law and it is clear that the drafters of the Protocol deliberately avoided attaching any definitions to these stipulated purposes. All States surveyed have included sexual exploitation (either explicitly or effectively) within their understanding of exploitative purposes in relation to trafficking in persons. In the majority of States surveyed, sexual exploitation is considered to be the most prevalent form of trafficking-related exploitation – or at least it is the most commonly investigated and prosecuted form. With the exception of one State, practitioners generally agreed that trafficking for purposes of sexual exploitation is easier to investigate and to successfully prosecute than other forms of trafficking-related exploitation, though the reasons as to why varied.

Relevance of national approach to prostitution: In States, where prostitution or aspects of prostitution (such as the purchase of sexual services) are criminalized, prostitution may be more readily equated with sexual exploitation and thereby indicative of trafficking. These States also appear to more readily identify sexual exploitation as a relatively ‘worse’ form of trafficking-related exploitation (for example in comparison with trafficking for forced labour). In States where prostitution is regulated rather than criminalized that tendency is not as evident: prostitution may be considered a site of potential trafficking-related exploitation but, along with exploitation of prostitution (pimping) will generally not be investigated as trafficking without clear indication of means – typically direct means such as coercion or deception. In other words, the use of ‘means’ is considered critical in differentiating trafficking from practices such as prostitution and pimping. In one State (Australia), where prostitution is largely legalized, the legal framework contains no reference to exploitation of prostitution or sexual exploitation as the practices falling within these terms are considered capable of being absorbed within other stipulated forms of exploitation such as forced labour.

Sexual exploitation generally considered well understood by practitioners: Only two surveyed States (Qatar and Uganda) have defined sexual exploitation in the context of trafficking. Practitioners in other States frequently asserted that the terms ‘exploitation of prostitution’ and ‘sexual exploitation’ are well understood in practice and do not require explicit definition. One exception is Brazil, where the

absence of a definition of sexual exploitation as it relates to adults is seen as contributing to the current conflation of prostitution with trafficking. It is relevant to note that in most, if not all States, there is abundant alternative legislation capable of capturing sexual exploitation offences and this is seen as contributing to the relatively higher number of such cases being investigated and successfully prosecuted. Practitioners pointed out that if a trafficking charge is difficult to prove, they often have abundant alternative offences to utilize. The means element is generally considered to be critical in differentiating between a crime of trafficking for sexual exploitation and a stand-alone sexual exploitation offence. This reality separates sexual exploitation from other forms of trafficking in relation to which there are usually much fewer alternative offences. For instance, while there are several alternative offences that can be relied on in instances of sexual exploitation, there are generally fewer alternative criminal offences to rely on in the alternative to forced labour.

Practices identified as falling within the concept of ‘sexual exploitation’: Cases and examples cited during the survey as falling within the concept of sexual exploitation included forced prostitution; prostitution of children and other commercial sexual dealings with children such as production of pornography; benefiting from prostitution; child sex tourism; commercial surrogacy and forced or servile marriage. Generally, the term ‘sexual exploitation’ is broadly construed, operating to expand (sometimes considerably) the scope of what is considered to be ‘trafficking.’

4.2.2 Forced labour or services

As noted in Part 2, the international legal definition of forced labour includes the two elements of involuntary offer and menace of any penalty.¹⁶⁹ Despite the existence of a definition, the scope of the prohibition is not firmly established, particularly in the context of trafficking. All States surveyed have included forced labour (either explicitly or effectively) within their understanding of exploitative purpose in relation to trafficking in persons. Some have left the term undefined; others have incorporated the international legal definition into national legislation. Two States – Australia and Thailand – have crafted their own detailed (and potentially more expansive) definition. The survey revealed, in some States, particular sensitivities around the issue of forced labour. Even in the face of compelling evidence, some practitioners were reluctant to admit the existence of a problem of forced – or even exploitative – labour in their country. In other States practitioners noted considerable difficulties in identifying forced labour. Even when this first hurdle is overcome, evidentiary and other problems associated with these cases (such as apparent consent on the part of the alleged victim) meant that few cases of trafficking for forced labour are pursued to successful conclusion.

The parameters of forced labour are not well established in national law and

¹⁶⁹ See section 2.3.2 above.

practice: With the possible exception of Brazil, practitioners in all States expressed at least some level of uncertainty around forced labour as an exploitative purpose of trafficking. In some States, inconsistent case law in this area provides evidence of significant confusion. For most practitioners the principal difficulty lies in establishing the line that divides bad working conditions (that would be more appropriately addressed under other legislation such as labour law) from exploitation of workers that is of sufficient severity to be brought within the definition of trafficking. That line may shift depending on the labour conditions in the country more generally. Difficulties are enhanced when the broader legal framework does not provide strong alternative offences. Some States appear to equate low wages, poor working conditions and deception about working conditions with trafficking for forced labour. In response to the concerns that this may expand the notion of trafficking in persons too far, they pointed out that this approach was within their law and in fact was supported by the Protocol – particularly through its embrace of indirect or less severe means such as deception and abuse of a position of vulnerability. All practitioners recognized the idea of a continuum of exploitation and were readily able to identify practices that might lie at either end. However, there was much less certainty and consistency in relation to conduct falling within these two extremes. Commonly cited indicators of forced labour associated with trafficking included no or low payment; inhuman living conditions; excessive working hours; failure to meet basic needs; extreme debt or debt bondage; and evidence of injuries or abuse. As explored further below, cultural and social factors appear to be important, if not determinative in establishing where the threshold may lie.

Forced labour and trafficking for forced labour: Practitioners found it difficult to distinguish ‘forced labour’ as a stand-alone concept or offence from ‘trafficking for forced labour’. This is understandable as the concept of forced labour necessarily includes a means element (use of force / coercion) and implies one or more of the stipulated acts. In practice there appears to be little or no difference between the two concepts, which means that cases of forced labour can readily be prosecuted as trafficking for the purpose of forced labour. Unfortunately there are few cases available against which to test this conclusion, which must therefore be considered provisional.¹⁷⁰

4.2.3 Slavery or practices similar to slavery and servitude

As noted in Part 2, slavery is defined in international law. While the term ‘practices similar to slavery’ is not explicitly defined it is understood as prohibiting debt bondage; serfdom; servile forms of marriage; and sale of children for exploitation.

¹⁷⁰ It should also be noted that the question of distinction between a stipulated exploitative purpose (e.g. forced labour) and trafficking for that stipulated purpose (e.g. trafficking for forced labour) extends beyond forced labour to include all proposes stipulated in the Protocol’s definition that contain or imply both exploitation and a ‘means’ element.

Servitude is not explicitly defined but is understood to be a lesser form of slavery. Most States surveyed have included slavery, practices similar to slavery and servitude within their list of stipulated purposes of trafficking. Some have attached definitions to these terms but most have not. In all but one or two States these purposes of trafficking appear to be of minor importance: rarely prosecuted and poorly understood. Only one country (Australia) has defined and developed substantive 'servitude' offences.

Understanding / importance of slavery: In two States (Brazil and Australia) the concept of slavery is central to how trafficking is understood and responded to. Practitioners in both States were adamant that this form of exploitation is critical to understanding trafficking and to the coherence of the overall response. Irrespective of whether the law included a specific definition, practitioners in most States were able to point to slavery as being qualitatively different to other forms of exploitation in embodying the idea of de facto ownership of one person over another. In most legal systems the concept of slavery pre-dates any trafficking legislation. However, apart from Brazil and Australia very little case law was made available to help explain how slavery is – or could be – understood and applied in the context of trafficking.

Confusion around practices similar to slavery: While several States have incorporated the international legal definition of slavery into their law, none has provided a definition of 'practices similar to slavery'. There is some indication that States do not understand well the scope and substantive content of this international legal prohibition. For example, practitioners were often unaware that reference to 'practices similar to slavery' in their law effectively extended the list of stipulated end-purposes to include debt bondage, serfdom, servile forms of marriage and sale of children for exploitation. In some cases it is evident that confusion on this point extended to the drafters of the legislation (indicated by legislation that includes both 'practices similar to slavery' and certain of the practices that fall within this concept as stipulated forms of trafficking-related exploitation).

Distinguishing between slavery and forced labour: Practitioners were generally unclear on the distinction between slavery / practices similar to slavery and other stipulated forms of exploitation, most particularly forced labour. Some were of the view that the distinction was a matter of degree: the more serious the exploitation and the more complete the control that the exploiter exerted over his or her victim, the more likely this situation would be characterized as one of slavery. In some States (such as Brazil), forced labour is considered to be a condition analogous to slavery. In one country (Bulgaria) discussions are currently underway about the feasibility of incorporating slavery and related offences under the umbrella of forced labour.

4.2.4 Removal of organs

Part 2 explained how this particular purpose of trafficking-related exploitation was included in the Protocol's definition at the last minute and with very little discussion. There has since been considerable debate and confusion with regard to the difference, if any, between 'trafficking in persons for purposes of removal of organs' and 'trafficking in organs'. That debate continues and has accelerated as cases emerge of persons being exploited in this way. International confusion and uncertainty around removal of organs as a form of trafficking-related exploitation is reflected at the national level. Most of the surveyed States have included this form of exploitation within their definitions of trafficking. However, organ removal is rarely treated as an exploitative purpose of trafficking in practice. Where illicit organ removal (or removal of other body parts) does occur, it is generally addressed under the legislative regime governing organ removal, or as a distinct criminal offence under the penal code or other legislation. With the exception of Uganda, where organ or body part removal is reported to occur for witchcraft purposes, surveyed States generally noted that they have encountered few or no instances of this form of trafficking. It is relevant to note that many States have expanded their legislation beyond removal of organs to include tissues, cells and other body parts / fluids.

4.2.5 Other forms of exploitation

Most of the surveyed States have gone beyond the list of exploitative purposes of trafficking set out in the Trafficking in Persons Protocol – either explicitly by adding additional forms in legislation, or implicitly, by interpreting certain stipulated forms as extending to other practices (e.g. sexual exploitation understood to include commercial surrogacy – or forced labour understood to include forced begging). This section briefly summarizes relevant findings and insights from the survey.

Begging: As explained in Part 2, this form of exploitation, while not included in the Trafficking in Persons Protocol, has been incorporated into other international legal instruments, most notably EU Directive 2011/36EU. Among States surveyed, there was general agreement that begging (accompanied by one of the stipulated means) is indeed an appropriate form of trafficking-related exploitation. Around half of the surveyed States have explicitly included begging in their legislation. Among those that have not, there appears to be very little difficulty in absorbing begging into one or more stipulated forms such as a 'situation of distress' (Sweden); 'illegal activity' (Malaysia) or forced labour. It is relevant to note that three States (Bulgaria, Sweden and Thailand) reported practical difficulties in establishing exploitative intent in cases of begging involving parents making their children beg.

Illegal adoption: Only one of the surveyed States (Uganda) includes illegal adoption in its anti-trafficking law. One other (Brazil) is expected to amend its law to also include illegal adoption. In Malaysia the umbrella exploitative form "other illegal activity" appears to be capable of absorbing illegal adoption. Debate around illegal

adoption in the context of trafficking centres on the question of whether it is possible to establish exploitative intent. If an adoption process seeks to place a child in a situation of exploitation (e.g. for forced criminality, marriage, sexual exploitation) then there appears to be little doubt that this could be recognized as a form of trafficking-related exploitation within most legal frameworks. However, where the purpose of the adoption is not exploitative, then that would be sufficient to exclude it from the trafficking framework of most States. In this regard it should be noted that sale of children for exploitation is included within the international legal understanding of ‘slavery-like practices’.

Commercial surrogacy: None of the States surveyed explicitly include commercial surrogacy as an exploitative purpose in anti-trafficking legislation. However, one (Bulgaria) has established trafficking in pregnant women for the purpose of selling their babies as an offence. Another (Thailand) has prosecuted commercial surrogacy involving force and fraud as a form of trafficking-related sexual exploitation. It is important to acknowledge that international commercial surrogacy is a very new issue for the international community and many States are yet to bring their laws in line with what is happening in practice. Practitioners from several States expressed the view that commercial surrogacy can indeed involve trafficking (typically of the surrogate but potentially also of women for purposes of egg retrieval), and were of the view that this must be addressed by all States concerned. Leaving aside the potential for the surrogate herself to be trafficked, it appears that international commercial surrogacy also falls within the international legal definition of ‘sale of children’.¹⁷¹ However, as with adoption, it would be necessary to also establish exploitative intent for this form of ‘sale of children’ to constitute a form of trafficking-related exploitation.

Exploitation of criminal activities: As explained in Part 2, this form of exploitation, while not included in the Trafficking in Persons Protocol, has been incorporated into other international legal instruments, most notably EU Directive 2011/36EU, that refers to “pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.”¹⁷² Of the States surveyed, only Uganda explicitly captures exploitation in criminal activities. Case law in Sweden has confirmed that the legislative reference to ‘situation of distress’ captures the trafficking of persons for the purpose of exploiting them in financial and social welfare fraud. Practitioners from other States surveyed indicated that exploitation of persons for use in criminal activities could be captured under existing heads of exploitation such as forced labour. In Malaysia, the term ‘other illegal activities’ (used to expand the forms of exploitation beyond those listed), is not considered to automatically include exploitation in criminal activities.

¹⁷¹ Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography, 2171 UNTS 227, done 25 May 2000, entered into force 18 January 2002, Art. 2(a).

¹⁷² EU Trafficking Directive 2011/36/EU, chapeau para. 11.

Forced or servile forms of marriage: As noted previously, the international legal understanding of ‘practices similar to slavery’ includes ‘servile marriage’. However, with only one exception (Brazil), practitioners in States that have included practices similar to slavery as a form of exploitation were generally unaware that servile marriage is presumed to be included in the scope of their anti-trafficking legislation. Legislation in several of the States surveyed makes explicit reference to exploitative forms of marriage including Colombia (servile marriage); Uganda (forced and child marriage); and Australia (forced marriage). Only Australia has attached a definition to the relevant offence. Many practitioners surveyed expressed unease and uncertainty around the issue of marriage and trafficking in persons. In some States it is apparent that the notion of a ‘servile’ marriage is unfamiliar and would not easily fall within accepted ideas of what can and should be regulated by the State. The concept of forced marriage is similarly fraught: some practitioners questioned the whole idea on the basis that a marriage entered into without consent is not valid in the first place. Others asserted that forced marriage could only be considered within the framework of trafficking if it resulted in sexual or other exploitation. In other words, like commercial adoption, it would be necessary to establish exploitative intent in order to elevate the forced marriage to a situation of trafficking. Some practitioners pointed to a difficulty in distinguishing between a forced marriage and an arranged marriage. In this context they questioned the impact of the principle of the irrelevance of consent – surely it is essential to consider consent in determining whether a marriage that had been arranged by others was in fact, forced? Culture and religion play a critical role in determining what circumstances – if any – would transform a marriage act or situation into a form of trafficking-related exploitation. This aspect is considered further in the following section.

Other forms of exploitation stipulated or discussed: A number of surveyed States have included a form of trafficking-related exploitation that was not contemplated by the drafters of the Trafficking in Persons Protocol and that is not stipulated by any other surveyed State. These include recruitment of minors into military service (Sweden); exploitation for the purpose of social welfare fraud (Sweden); trafficking of pregnant women for the purpose of selling the child (Bulgaria); exploitation of children as camel jockeys (Qatar); exploitation of children for political purposes (Egypt); exploitation through extortion (Thailand) and witchcraft and human sacrifice (Uganda).

4.3 General findings and issues for practitioners

This section briefly identifies and explains the generally applicable findings of the survey – as well as the main issues that were raised during interviews with practitioners in relation to the exploitation aspect of the definition of trafficking in persons.

The exploitation element of the definition is often not well or uniformly understood and this obstructs investigations and prosecutions: In almost all States surveyed, interviews with practitioners confirmed that exploitation is not always well and uniformly understood and this is contributing to less than optimal criminal justice responses. The absence of clear definitions in the law (both of exploitation and of stipulated forms of exploitation) is seen as part of the problem, providing individuals with a measure of interpretative discretion that can lead to inconsistency. Detailed and operationally focused definitions appear to reduce, but not eliminate, confusion. Many practitioners noted that even with the help of clear legal definitions, it is often difficult to distinguish trafficking from other crimes. For example, under what circumstances would (or should) a situation of criminal sexual exploitation constitute trafficking? Is all forced labour trafficking and, if not, how can the trafficking crime be distinguished from the stand-alone offence? The principle of the irrelevance of consent was cited by a number of practitioners as a source of confusion in relation to exploitation. Put simply, those responsible for investigating, prosecuting and adjudicating trafficking cases may have trouble understanding how a person who consented to his or her situation is a victim of trafficking related exploitation.

Practical and evidentiary challenges, which exist in all trafficking cases, are particularly acute in relation to forced labour: Many practitioners pointed out that trafficking cases, irrespective of the form of exploitation involved, are invariably challenging to investigate and prosecute. Convictions are considered to be virtually impossible to secure without the active involvement of victims and their safe and effective cooperation is often very difficult to secure. In most States there is a disproportionate focus on trafficking for sexual exploitation, even when it is clear that other forms of exploitation are also prevalent. While many factors may help explain this situation,¹⁷³ practitioners interviewed for the survey pointed to the relatively greater difficulties involved in investigating and prosecuting non-sexual forms of exploitation as the principal reason for any discrepancy. The example of forced labour was frequently cited in this context; this form of exploitation is often well hidden within an otherwise legitimate industry making it difficult to identify in the first place. There are also indications that political and social acceptance of exploitative working conditions, particularly among migrants, contributes to the lower profile of such conduct. Practitioners in many States experience great difficulty in separating bad working conditions from a situation that could or should be pursued as a trafficking offence. The lack of definitive guidance in this regard was frequently referred to, as was the absence of alternative offences which means that failure to establish trafficking for forced labour can result in highly exploitative conduct being addressed as an administrative offence or even going unpunished.

¹⁷³ For example, in many States (and internationally) trafficking has historically been understood as relating primarily to sexual exploitation and it has taken some time to cultivate a broader understanding, particularly among criminal justice practitioners.

Severity is relevant to establishing exploitation in practice: Practitioners were asked to consider the relevance of severity / degree of harm to establishing exploitation in the context of trafficking. In general the view was expressed that these are not relevant considerations under the law: even ‘mild’ exploitation is sufficient to establish the purpose / exploitation element of the offence. However, most agreed that the *severity of the exploitation; severity of the means used* (force, deception, etc.); and *degree of harm* are important practical considerations at both the investigative and prosecutorial stages. It follows that borderline cases – where the exploitation and/or means used are not considered to be particularly severe, or where the exploitation does not appear to have caused substantial harm to the victim, then a case may not, for resource and other reasons, be pursued as trafficking. However, there was a general sense that despite borderline cases causing problems, attempts to precisely delineate a ‘threshold of seriousness’ would be risky and possibly counterproductive. A number of practitioners noted that robust alternative offences are important in ensuring that exploitative conduct that might not reach the necessary threshold for trafficking does not go unpunished. In most surveyed States it was noted that severity of exploitation and/or degree of harm would be relevant to sentencing – including through the application of aggravated offences. It is also relevant to point out a link between severity of exploitation and the question of consent. The surveys confirmed a finding of the previous Issue Paper on consent – the more severe the exploitation, the less relevant assertions of consent become.¹⁷⁴

Culture and national context are relevant to determining exploitation: Interviews with practitioners confirmed that culture and national context (including religion) are often highly relevant in determining whether a particular situation is identified as a form of trafficking-related exploitation. These factors appear to be especially relevant in relation to sexual exploitation and other forms of exploitation particularly affecting women and girls. For example, in States where prostitution is considered inherently exploitative there are indications of a relatively greater willingness to view situations of prostitution as indicative or predictive of trafficking for purposes of sexual exploitation. In these States sexual exploitation may be considered ‘worse’ than other forms of exploitation. In some States, the concept of a ‘forced or servile marriage’ is inimical to national culture and tradition and practitioners were clear that extreme circumstances would be required to trigger investigation of a marriage for trafficking-related exploitation. Cultural and context specific considerations of course can also be of significant importance in cases affecting men and boys. The exploitation of migrant workers was acknowledged by some to have been ‘normalized’ in the national culture to the point that it would not quickly be considered trafficking, particularly when compared against a situation involving a national. Cultural considerations also play a role in determining whether other forms of marriage (child marriage, temporary marriage) will be considered as exploitative for purposes of the trafficking framework. Issues around

¹⁷⁴ UNODC, Issue Paper: The Role of ‘Consent’ in the Trafficking in Persons Protocol (2014), pp. 82–84.

religion and ethnicity can also play a role in determining whether a particular practice meets the threshold of exploitation within the context of trafficking. For example practitioners in one State noted that practices such as child marriage and child begging might be viewed differently depending on the ethnic background of those involved. This can result in a reverse kind of discrimination whereby exploitation that would not be tolerated within the mainstream culture is viewed as somehow more acceptable if it involves particular ethnic minorities. The exploitation of migrant workers was acknowledged by some to have been 'normalized' in the national culture to the point that it would not quickly be considered trafficking, particularly when compared against a situation involving a national.

There is a need for breadth and flexibility – but also clear parameters: With only a few exceptions, practitioners affirmed the need to retain a degree of flexibility in defining and understanding trafficking-related exploitation. Many pointed to the emergence of new or hidden forms of exploitation; changes in criminal methodology; and improvement in understanding of how exploitation happens as factors underlining the importance of such an approach. However, it was also noted (by noticeably fewer practitioners) that vague law is not good law: that basic principles of legality and justice require crimes to be delineated with certainty. The question of how these two important principles could be reconciled was not addressed.

4.4 Views on guidance for practitioners

With a few exceptions, practitioners agreed that guidance on the 'exploitation' element of the definition of trafficking in persons would be helpful to those involved in investigating, prosecuting and adjudicating such cases. Some practitioners noted that such guidance would also be useful to others – for example labour inspectors and victim support agencies that are involved in identifying and referring potential victims. However, it was acknowledged that different criteria may well be applicable in determining exploitation for the purposes of establishing a person's eligibility for victim support.

For some practitioners, the need for guidance is most crucial at the national level: exploitation and forms of exploitation stipulated in the law need to be explained clearly and their parameters firmly established in a way that reflects national conditions and the national context. Other practitioners considered that international guidance is more important – both in its own right but also in terms of providing a framework within which more detailed and tailored national guidance could be developed. A number of practitioners expressed concern that guidance – whether national or international – could operate to restrict the flexibility that is so important to ensuring that trafficking laws can accommodate new and changing situations. Practitioners were divided on the question of whether there could be a universal understanding of what constitutes exploitation for purposes of trafficking. Some expressed the view that differences between States (in term of situation,

attitudes and values) are too great to support a genuinely common understanding. Others pointed to international human rights standards as providing a robust foundation for a universal understanding of exploitation. These views should be considered with reference to the finding set out above: that culture and national context can be important determinants of what is considered 'exploitation'.

5 Guidance on policy and practice for further consideration

The following guidance reflects general points that emerged during the development of this Issue Paper, including through the surveys and expert interviews as well as in the Expert Group meeting.

1. Understanding the Protocol

1.1. Not all exploitation is trafficking. The forms of exploitation stipulated in the Protocol's definition of trafficking are not 'trafficking' under that instrument unless the other required element/s (act / means) are also established. The only exception to this relates to trafficking in children, the definition of which does not contain a means element.

1.2. In relation to the 'purpose' element of the definition of trafficking, the Protocol's formulation is to be considered a minimum standard, below which States Parties should not fall. States parties may go beyond the standard set in the Protocol. However in this regard, it is important to acknowledge that the Protocol's formulation is designed to address serious forms of criminal conduct and not to encompass less serious forms of conduct or mere technical violations of the law.

1.3. Exploitation in the context of trafficking is not subject to precise international legal definition, although some types of exploitation stipulated in the Protocol have been defined through other international legal instruments. When States are considering definitions and understandings to be attached to particular forms of exploitation in their national legislation guidance should be sought from the relevant international legal instruments including human rights treaties that clarify a number of the concepts associated with trafficking in persons.

1.4. A measure of flexibility in how 'exploitation' is understood and applied can be important in capturing different forms of exploitation that may be encountered in practice or that may emerge over time. However, it is of paramount importance as a matter of fundamental fairness and to protect the rights of all that the national legal framework provides criminal justice practitioners and the community with sufficient clarity to meet accepted criminal justice standards.

1.5. States may find it useful to recognize emerging forms of trafficking-related exploitation that go beyond those listed in the Protocol. Examples drawn from national laws include begging, exploitation in criminal activities, commercial adoption and surrogacy, removal of tissues or bodily fluids, military service, financial or social welfare fraud, forced or servile marriage, exploitation of children

for political purposes, use of children in armed conflict, and harmful rituals or practices.

2. Relevance of severity

2.1. In principle, the apparent severity of exploitation should not be a consideration in determining whether the element of exploitation has been established. Given that the Protocol is designed to address serious criminal conduct, practitioners may benefit from nationally tailored guidance aimed at helping them to identify forms and manifestations of exploitation which should be considered in determining whether prosecution under the national trafficking law is warranted.

2.2. Practitioners should be aware of the risks of establishing a hierarchy of exploitative types: significant harm can result from any type of exploitation. Accordingly, assumptions about impact should not be made on the basis of the *type* of exploitation.

3. Cultural, economic and contextual considerations and the importance of an objective standard

3.1. Practitioners should be aware of the risk of making assumptions or judgments about exploitation based on victim stereotypes or cultural expectations. Only those objective standards *set out in the national law governing investigation or prosecution of trafficking cases should be considered*. For example, the fact that a victim may have experienced apparent improvement in his or her previous situation should not be relevant to determining whether the purpose element of trafficking has been established. While potentially useful in establishing means, the victim's subjective belief regarding his or her situation should also not interfere with the application of an objective standard to determine whether the purpose element of the trafficking definition has been established.

3.2. In practice, culture and national context (for example religious beliefs, ethnicity of victim, etc.) may impact on how different forms of exploitation (and thereby the purpose element of the definition) are understood and applied. There is a risk that such approaches result in differing application of criminal justice standards. When considering cultural and national perspectives, States Parties and their practitioners should be guided by the overall purposes of the Protocol¹⁷⁵ and by relevant international human rights standards including those protecting human dignity and freedom.

¹⁷⁵ Article 2 of the Protocol states that its purposes are: (a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives.

4. Evidentiary and procedural issues:

4.1. For many reasons - including the complexity of the offence and obstacles to securing victim cooperation as well as the lapse of time that often occurs between the commission of the offence and the trial, the investigation and prosecution of trafficking cases is often difficult, time-consuming and complex. These realities should not detract from the overall responsibility of the practitioner to carefully and objectively analyze all relevant evidence to ensure that each and every element of the proposed trafficking charge is adequately supported by credible facts before any trafficking charges are laid and pursued.

4.2. The establishment of a relationship of trust between criminal justice officials and victims of exploitation is essential to an effective criminal justice response. Practitioners should expect that this critical process will require substantial investment in terms of both time and commitment.

4.3. When addressing problems associated with establishing the purpose element of the crime (exploitation), practitioners may wish to consider certain promising practices that are emerging. For example, many States find that the task of securing evidence of exploitation can be made easier through early, effective partnerships between: (i) investigators and prosecutors; (ii) criminal justice agencies and other officials such as labor inspectors; and (iii) criminal justice agencies and those working with victims such as social workers, who may be in a position to build trust of victims and work with investigators in obtaining statements.

4.4. Other promising practices that may facilitate the securing of evidence of exploitation include: (i) specialization of the investigative and prosecutorial response through both institutional reform and targeted training; (ii) multi-disciplinary teams that include victim support agencies as well as different criminal justice agencies; (iii) parallel financial investigations aimed at identifying assets and proceeds of crime; (iv) international cooperation aimed at securing information and evidence from another country; and (v) plea bargaining to obtain cooperation from minor offenders in order to strengthen the evidence against major offenders; (vi) strategic use of non-trafficking or less serious offences to target lower-level offenders for purposes of securing evidence against high-level offenders.

4.5. Where there are indications of trafficking-related exploitation, practitioners should seek to obtain corroborative evidence of that exploitation in a timely and efficient way. This evidentiary task is necessary in all cases and can be especially vital in situations where victims appear to be unaware they have been exploited or assert they have not been exploited.

4.6. Practitioners should be aware of the possibility that national law may permit a situation of exploitation to be appropriately charged as a non-trafficking offence (either on its own or concurrently with a trafficking charge). When considering charging options, care should be taken to ensure that the sentencing range of any

alternative offence considered or charged adequately reflects the gravity of the exploitation and the role played by the accused in that exploitation. Care should also be taken that this approach does not result in a denial of protections and entitlements to victims – or indeed a failure to identify and respond effectively to all victims of criminal exploitation.

4.7. States are often required to prioritize scarce criminal justice resources. In this regard and consistent with the overarching purpose of the Protocol to address serious crime, consideration should be given to ensuring that resources are allocated in a way that enables criminal justice officials to address forms and manifestations of exploitation that present the most serious risks to the rights of victims and their physical and psychological wellbeing.

ANNEX 1: Issues for consideration and discussion

The following is a list of questions and issues for discussion that have been raised by the survey and the analysis and then were considered during the Expert Group Meeting in October 2014.

Broad questions of values, policy and risk

- Is there a risk that an overly broad or flexible understanding of exploitation (particularly when coupled with more ‘subtle’ means and a rigid application of the principle of the irrelevance of consent) will expand the definition of trafficking in an unhelpful way?
- In relation to the above, what are the risks associated with current advocacy efforts to identify all trafficking as slavery, and all forced labour as trafficking? Can such claims be legally sustained? (i.e. are there situations where the establishment of the purpose element alone would be sufficient to meet the definition of trafficking? What are the implications of this for the existence of a stand-alone legal concept of trafficking?)
- Is there a risk that an overly narrow or restrictive understanding of exploitation will contract the definition of trafficking in an unhelpful way?
- When considering the above risks, how important and relevant is the principle *nulla crimen sine lege, nulla poena sine lege* (no crime or penalty without law – implying that the law must be formulated in such accurate terms that one can establish beforehand what judicial consequences certain acts will have)?
- Is it possible to identify common values that should guide States toward a common understanding of what ‘exploitation’ should mean in the context of trafficking? To what extent would differences between States (economic, cultural, etc.) prevent the emergence of a common understanding?
- From the perspective of values and policy – should it be possible for a person to be able to consent to their own exploitation? To severe exploitation? To enslavement?

Defining and understanding exploitation

- Should ‘exploitation’ be defined in national law? If yes, what elements are most important? If not, why not?
- Need exploitation be ‘economic’ or ‘material’? Why or why not?
- Should the forms of exploitation stipulated in national law be defined?
- Are existing definitions of specific types of exploitation in international law (**forced labour, slavery**) appropriate in the trafficking context? If not, what refinements to those existing definitions would be appropriate?
- Should efforts to expand the concept of ‘**slavery**’ be considered as potentially relevant to the international legal definition of trafficking and does the Trafficking in Persons protocol provide guidance as to how such expansionist efforts should be considered and responded to?

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- Is the generally accepted international understanding of ‘**exploitation of the prostitution of others**’ appropriate in the trafficking context? If not, what refinements to that existing understanding would be appropriate?
 - Is the generally accepted international understanding of ‘**servitude**’ appropriate in the trafficking context? If not, what refinements to that existing understanding would be appropriate?
 - Is the generally accepted international understanding of practices that fall within the term ‘**practices similar to slavery**’ appropriate in the trafficking context? Further, are the existing international legal definitions / understandings attached to those practices (**debt bondage, sale of children for exploitation, serfdom and servile forms of marriage**) appropriate in the trafficking context? If not, what refinements to those existing definitions would be appropriate? For example, is the definition of debt bondage suited to a world where debt-financed migration has become so important? Is the definition of servile marriage appropriate given the wide range of cultural practices around marriage and the possible negative consequences of associating marriages with trafficking?
 - To what extent has ‘**removal of organs**’ been accepted as a form of trafficking in persons?
 - Should States be encouraged to go beyond the minimum forms set out in the definition, to add additional forms in their domestic legislation? Are there some forms of exploitation that States should be encouraged *not* to include on the basis that these would be better addressed through an alternative legal framework (for example **commercial adoption, commercial surrogacy** and **forced marriage**)? In relation to these three practices, should guidance be offered as to whether or not they also require exploitation to meet the threshold of being a ‘purpose’ of trafficking?
 - Is the reported practice of holding migrants in detention for purposes of **criminal extortion** (sometimes also involving forced labour and sexual exploitation) a form of trafficking-related exploitation? Is ‘trafficking’ an appropriate framework for understanding and responding to this practice?

National and international perspectives

- Is it possible to secure a universal understanding of exploitation that also recognizes substantial differences (economic, cultural, etc.) between States?
- It is widely accepted that decisions about whether a particular situation constitutes ‘exploitation’ for purposes of trafficking should reflect the standards of the country in which the exploitation occurs. For example, accepted labour standards may be lower in one country than another. Is this principle still applicable when those standards fall well below international standards?
- Following from this: is exploitation culturally or contextually relative? Should it be? What is the impact of relativity on achieving universal understanding of trafficking in persons? For instance, should it be possible that a situation is considered trafficking in one country and not in another?

-
- Can a potential victim's membership of a particular ethnic, religious or cultural group be decisive in determining whether a particular situation constitutes 'exploitation' for purposes of trafficking?

Links between exploitation and 'means'

- Is it relevant that some forms of exploitation (for example, forced labour) entail 'means' and others (for example, removal of organs, begging) do not? Should there be a difference in how forms of exploitation entailing 'means' and forms of exploitation not entailing means should be addressed?
- In relation to forms of exploitation that do entail means, do these essentially constitute trafficking? (i.e., is forced labour trafficking?)
- Is it relevant that some forms of exploitation (for example, forced labour) infer the absence of consent and others (for example, removal of organs) do not?
- Some States have omitted the 'means' element from their definition of trafficking. Does this omission have any impact on how exploitation is understood?

Relevance of severity / form of exploitation / impact and harm

- The idea of a continuum of exploitation is widely understood and accepted and it is generally agreed that the serious crime of trafficking should be attached to serious forms and manifestations of exploitation. However, the Protocol's definition does not require a certain level of seriousness (beyond that implied in the stipulated forms of exploitation). Does exploitation need to be of a particular severity in order to establish the purpose element? Does the threshold differ depending on the type of exploitation? Should it? For what other reasons would the 'threshold' differ?
- Can *extreme* exploitation occur outside the trafficking context?
- To what extent should the severity of exploitation be a consideration in establishing criminal justice priorities?
- Is the severity of exploitation established with reference to the harm caused? What other factors are relevant?
- When determining whether a particular situation constitutes 'exploitation' for purposes of trafficking could apparent *benefit* to the victim ever be a relevant consideration?
- Can human rights considerations help determine where the line should be drawn between exploitation that does not meet the threshold for trafficking and exploitation that does? (For example, conduct or practices that violate fundamental human rights vs conduct or practices that do not).
- Can cultural or other considerations help determine where the line should be drawn between exploitation that does not meet the threshold for trafficking and exploitation that does? Are there risks with this approach?

Evidentiary considerations

- The purpose element of the trafficking offence requires intention to exploit:

exploitation need not be of a certain severity (other than required or implied by the stipulated forms of exploitation), or even to have occurred. Can or should exploitation be considered when establishing other elements (acts and means)?

- Is it reasonable / practicable to pursue trafficking prosecutions where there is evidence of exploitative intent but not of exploitation?
- Why are some forms of exploitation more difficult to identify, investigate and prosecute than others? Would clearer definitions assist in identification and investigation?

General guidance considerations

- Is it possible to provide guidance that could be useful for all States and national contexts?
- Is it possible to provide guidance that balances the need for a level of certainty with the need to preserve the flexibility that is so important to ensuring that trafficking laws can accommodate new and changing situations?
- How can guidance be offered in such a way that does not exacerbate the risk of the concept of trafficking being expanded or contracted in a way that may not be in the spirit of the Protocol?
- How can guidance be offered in such a way that it is practical, useful and accessible to criminal justice practitioners charged with the responsibility identifying and prosecuting trafficking?
- How can guidance be offered in a way that acknowledges realities of limited criminal justice resources and the need to prioritize their use?

ANNEX 2: Survey Instrument

SURVEY

The concept of 'exploitation' in the context of trafficking in persons

This survey instrument is a template only. It was tailored to every individual within each country, on the basis of his or her expertise, experience and the relevant domestic legislation.

Country:	
Interviewee:	
Date/Time/Place:	

PART I: GENERAL

1. What is your view of the definition of trafficking in persons in national legislation?

- Do you think it is too broad / not broad enough?
- Do you think it is a useful tool to prosecute exploitation?
- What are the main problems, if any, with the definition?
- Are there specific evidentiary concerns associated with the definition?
- Is prosecuting trafficking-related exploitation difficult? Why?

PART II: EXPLOITATION

National legislation definitions

2. How is exploitation delimited / described / defined in your legislation?

- Is exploitation itself defined? How would you explain the meaning of exploitation?
- Are definitions attached to stipulated forms of exploitation? (specify)
- If some / all stipulated forms of exploitation are not explicitly defined, is this problematic or potentially problematic?
- Do you think exploitation is defined too broadly or narrowly?

National practice

3. Are the parameters of certain forms of exploitation clear to practitioners and the courts?

- Have the parameters been discussed / established in court?
- Do certain forms of exploitation present particular evidentiary or other difficulties?
- Can you offer any examples of cases that have grappled with these concepts?

4. What is the relationship between stand-alone exploitation offences and trafficking in persons?

- *What stand-alone offences relating to human trafficking exist? How do sentences compare with that of trafficking?*
- *Is it easy or difficult to distinguish between stand-alone exploitation offences and exploitation in trafficking contexts?*
- *Why or why not?*
- *What considerations are relevant to determining whether an offence will be prosecuted as a stand-alone exploitation offence, as exploitation in trafficking, or both?*

Trafficking patterns and trends

5. Which are the most commonly investigated / prosecuted forms of exploitation in your country?

- *Are investigations / prosecutions for some types of exploitation in trafficking more successful than others? Why?*

6. What are the challenges of investigating / prosecuting trafficking exploitation?

- *How is exploitative intent of the alleged trafficker proven?*
- *How is the exploitative intent of the alleged trafficker proven?*
- *Can a prosecution for intent to exploit be successful when no exploitation has actually occurred?*
- *Can a prosecution be successful even where it is not possible to prove which type of exploitation was intended?*
- *Can a prosecution be successful even where the intended extent of exploitation cannot be shown?*

7. What is the relevance of cultural or traditional practices in understanding, investigating and prosecuting exploitation in trafficking cases?

- *Do cultural or traditional practices of alleged victims / perpetrators influence how exploitation is viewed?*
- *Do cultural or traditional views of judges and other actors influence how they approach exploitation?*

Breadth of the concept of exploitation

8. Under what conditions would the following purposes be identified as exploitative under your law?

Forms of exploitation explicitly contained in the Trafficking in Persons Protocol	
Exploitation of the prostitution of others or other forms of sexual exploitation	
Forced labour or services (Labour exploitation)	
Slavery or practices similar to slavery	
Servitude	
Removal of organs	
Other forms of exploitation	
Commercial surrogacy:	
Commercial adoption: <i>Whose exploitation is relevant: the birth parents', the adoptive parents', the child's?</i>	
Forced or servile forms of marriage: <i>When does arranged marriage become forced marriage?</i>	

Prostitution / Pornography:	
Criminal activities:	
Begging:	
Military practice:	
Domestic workers: <i>Would this fall within trafficking? Under Labour laws?</i>	
Other?	

Extent or severity of exploitation

9. Is a certain threshold of exploitation required (or apparently required) in order to establish the exploitation element of the trafficking offence?

- *If so, how is the severity of exploitation determined and measured?*
- *Does the severity required change depending the type of exploitation? How?*
- *Would some exploitation be considered to be too 'mild' to fulfil the exploitation element of the trafficking offence?*
- *Is the threshold of exploitation required for trafficking offences, the same, higher or lower than for standalone trafficking offences?*
- *Are more severe forms of exploitation more likely to be prosecuted as an element of a trafficking than as a standalone form of exploitation?*

10. How is the type or severity of exploitation relevant in sentencing?

- *How does the severity of exploitation impact on sentencing? How is that severity measured or determined?*
- *Are sentences more likely to be higher for some types of exploitation than others? Which types of exploitation attract higher penalties? Why?*

Relationship of exploitation with the 'means' element and irrelevance of 'consent'

11. What is the nature of the relationship between the 'means' element and the purpose element (exploitation) in domestic law?

- *Do some 'means' overlap with exploitation?*
- *For instance, is debt bondage a means or an exploitative purpose or both?*
- *In servile forms of marriage how are the means and the exploitative purpose separated?*
- *How are situations of forced labour distinguished from situations of trafficking for forced labour, given that the means element is always present?*
- *Can the three elements of trafficking be established when the means element and the exploitative purpose overlap? (For instance, how is 'forced labour' dealt with given it encapsulates a means? Is an additional means required?)*

12. What is the nature of the relationship between the irrelevance of consent and the purpose element (exploitation) in domestic law?

- *Does the irrelevance of consent pose particular challenges in proving some types of exploitation more than others?*

Guidance for practitioners

13. What guidance, if any, do you think practitioners should be given on the issue of exploitation in the definition of trafficking?

- *What good practices can you offer in regard to areas you think lack clarity?*

14. Can you share any relevant case judgments / decisions or other materials?

Other

15. Are there any other matters relevant to the study that you would like to address?

* * * * *

ANNEX 3: List of persons consulted, including expert group meeting participants

Mr. Thomas Ahlstrand (Sweden)

Ms. Adilla Ahmad (Malaysia)

Mr. Ahmad Murad Ahmad (United Arab Emirates)

Mr. David Alamos (Colombia)

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Mr. Saad Salim Aldosari (Qatar)

Mr. Tawfik Allam (Egypt)

Mr. Hasan Al Hamadi (United Arab Emirates)

Mr. Ahmad Abdullah Al-Harami (Qatar)

Mr. Ahmad Ali Falih Nassir Al-Thani (Qatar)

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Ms. Dana Darwish (Qatar)

Ms. Martha Liliana Diaz (Colombia)

Mr. Evgeni Dikov (Bulgaria)

Mr. Khalifa Rashed Ben Dimas (United Arab Emirates)

Mr. Ahmed El-Sergany (Egypt)
Mr. Khalid Fakhra (United Arab Emirates)
Mr. Aysar Fouad (United Arab Emirates)
Ms. Rahel Gershuni (Israel)
Ms. Isabel Gutierrez (Colombia)
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Ms. Farah Kareena Hadenan (Malaysia)
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Ms. Laura Hernandez (Colombia)
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Ms. Maryam Jaber (Qatar)
Ms. Patience Kabiije (Uganda)
Ms. Rebekah Kilpatrick (Australia)
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Ms. Carmen Torres Malaver (Colombia)
Mr. Eden Martingo (Brazil)
Mr. Bo Mathiasen (Colombia)
Ms. Aksiniya Matosian (Bulgaria)
Mr. Mohamed Mattar (United States of America)
Mr. Binoga Moses (Uganda)
Mr. Albert Moskowitz (Australia-Asia Program to Combat Trafficking in Persons)
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Mr. Carlos Perez (Colombia)
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Ms. Ivonne Pineda (Colombia)
Ms. Veronica Puls (Canada)
Mr. Muhd Khair Razman bin Mohamed Annuar (Malaysia)
Mr. Wanchai Roujanavong (Thailand)

Mr. John Cotton Richmond (United States of America)

Mr. Mahmoud Said (Qatar)

Mr. Harjeet Singh Hardev Singh (Malaysia)

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Ms. Syuhaida Binti Abdul Wahab Zen (Malaysia)



UNODC

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