



**UNODC**

United Nations Office on Drugs and Crime

Issue Paper

**THE ROLE OF 'CONSENT'  
IN THE TRAFFICKING IN PERSONS PROTOCOL**



UNITED NATIONS  
Vienna, 2014

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## Acknowledgements

The present publication was developed by the UNODC Human Trafficking and Migrant Smuggling Section under the overall coordination of Ilias Chatzis and the substantive guidance of Rahel Gershuni, in collaboration with Simone Heri. The publication was drafted by Dr. Anne T. Gallagher (consultant), with the support of Dr. Marika McAdam (consultant), who was responsible for conducting the majority of country surveys. Special thanks are extended to Silke Albert, Tatiana Balisova, Simona Schreier and Katharina Peschke at the Human Trafficking and Migrant Smuggling Section for their input.

UNODC expresses its appreciation to those who attended the expert consultation in Vienna on 17-18 February 2014 and who provided important follow-up input: Philip A. Aguinaldo, Dalia Avramoff, Julia Borgianni Batho, Pamela Bowen, Carmela Bühler, Parosha Chandran, Marcelo Colombo, John Cotton Richmond, Arie Dharmanto, Federica Donati, Joy Ngozi Ezeilo, Patricia Fernández Olalla, Saša Gosiaë, Paul Holmes, Sommanat Juaseekoon, Vipon Kititasnasorchai, Lalu Muhamad Iqbal, Martha Lovejoy, Carla Menares Bury, Branka Milosavljevic, Eurídice Márquez Sánchez, Kerry Neal, Wanchai Roujanavong, Zoi Sakelliadou, Silje Elisabeth Stenvaag, Matthew Taylor, Shabda Thian, and Lisa West.

Thanks are also due to the large number of government officials and practitioners, listed in Annex 3, who gave generously of their time and expertise in helping with the country case studies and reviewing various draft sections of the text.

The study was made possible through funding received from the Government of Switzerland.

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## Abbreviations and Acronyms

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

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## 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): namely, exploitation.<sup>1</sup> The definition makes clear, 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 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. 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 is currently a tension between those who support a conservative or even restrictive interpretation of the concept of trafficking, and those who advocate for its expansion. The former position embodies a concern that too wide a definition may encompass practices that do not meet the high seriousness threshold expected of ‘trafficking’. The latter position embodies a different concern: that too narrow a definition may impede investigations, prosecutions and convictions related to practices that should indeed fall under the rubric of ‘trafficking’ – or indeed operate to exclude such practices altogether.

The risk that important concepts contained in the Protocol are not clearly understood and, therefore, are not being consistently implemented and applied has been acknowledged by States Parties. In 2010, the Open-ended Interim Working

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<sup>1</sup> 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.



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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” was completed and issued in 2012, along with a Guidance Note for Practitioners. The present study, which deals with the issue of “consent”, will be followed by a third study on the concept of “exploitation”. The methodology of each study 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; (iv) 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 Issue Paper is divided into four parts. Part 1 sets out introductory and background material. Part 2 provides an overview and analysis of the international legal and policy framework around consent and related concepts explored in the Paper. Part 3 summarises and analyses the results of the survey conducted of national law and practice as it relates to consent within the definition of trafficking. Part 4 seeks to draw together the findings from the survey around a series of key statements. The final part, Part 5, sets out a list of issues and questions for discussion.

The following emerges 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:

***The Protocol’s statement on consent reflected dangers foreseen by Member States:***

Member States were highly conscious of the danger that consent would become the first line of defence for those accused of trafficking offences, most particularly in cases where victims may have consented at some point (e.g. to migrate for work and / or to engage in prostitution). This danger was considered particularly acute because the Protocol sought to capture the more subtle means of control that could be masked by apparent consent.

***Irrelevance of consent is integral to the Protocol’s definition and understanding of adult trafficking:***

The lack of consent to a situation of exploitation is considered integral to the understanding of trafficking and, through the operation of the means element, has been accepted as a distinct and important part of the definition of trafficking in persons. The Trafficking in Persons Protocol states that the consent of the victim of trafficking in persons to the intended exploitation is irrelevant when any of the "means" set forth in it are used. This reference to the irrelevance of consent when

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means are used has been repeated in all major instruments adopted after the Protocol that incorporate a definition of trafficking, and affirmed in policy documents and interpretative texts.

The Trafficking in Persons Protocol statement is clear: consent is always irrelevant to determining whether the crime of human trafficking has occurred. In the case of adult trafficking, consent is irrelevant, whether means like force or abduction are used, or whether more subtle means like “abuse of a position of vulnerability” are used. In the case of children, consent is irrelevant regardless of whether any means were used or not. However, in practice, considerations regarding consent can still assume a role, as can be seen in the country surveys conducted.

***Irrelevance of consent is integral to the Protocol’s definition and understanding of child trafficking:***

The Trafficking in Persons Protocol unequivocally rejects the relevance of consent to the offence of trafficking in children. Trafficking in children is established by the fact of an ‘act’ and exploitative ‘purpose’, without ‘means’ required as an element of the offence.

***Interpretative questions emerge from the Protocol regarding the issue of consent:***

Despite the seeming clarity of the Trafficking in Protocol’s statement regarding consent, interpretative questions emerge which can legitimately be answered differently in various jurisdictions. For example:

- Does the Protocol require that the ‘means’ actually vitiate or impair consent of a particular alleged victim?
- Need the means be of sufficiently serious character so as to negate consent?
- When is consent relevant and in relation to what stage of the trafficking process / element of the offence?

***The requirement to show ‘means’ affirms that, at least within the Protocol, exploitative conditions alone are insufficient to establish trafficking of adults:***

Agreement to work in a situation that may be considered exploitative will not constitute trafficking if that agreement was secured and continues to operate without threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. While exploitation alone may involve offences including human rights violations, ‘means’ must be used to constitute trafficking of adults within the confines of the Trafficking in Persons Protocol.

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The survey of national law and practice, set out in Parts 3 and 4, together with the insights which emerged from the subsequent expert group meeting, show widespread agreement on the core principles and values around consent, but also a range of solutions which reflect different approaches that are in turn influenced by differing interpretations, conflicting priorities and practical realities. It appears that many States struggle with understanding the place of consent within national law and the Trafficking in Persons Protocol. For example, while the Trafficking in Persons Protocol does *not* require that the ‘means’ used must operate to vitiate or damage consent, the survey confirmed that the question of whether ‘means’ used actually impacted consent is a live one in some jurisdictions. The following points summarise the major findings of the survey, as modified and supplemented tempered by practitioners’ presentations and comments during the expert group meeting, which took place in Vienna on 17-18 February 2014. Note that in Part 5 detailed “issues for consideration and discussion” are provided in respect of these findings.

***High acceptance of the principle of the irrelevance of consent:***

The *principle* that consent is always irrelevant in cases of child trafficking and is irrelevant when ‘means’ are used in cases of adult trafficking is widely accepted but reflected in varying ways. In relation to trafficking in children the survey confirmed that surveyed States either explicitly or implicitly accept the principle that the consent of a child to any part of the trafficking process or outcome will always be irrelevant. However, during national consultations and the expert group meeting, practitioners pointed out that in practice, there have been cases in which consent became an issue even though the victim was a minor. In addition, some practitioners maintained that some adult victims can be even more vulnerable than children, for example, those with a physical or mental disability. With regard to trafficking in adults the survey confirmed that the principle of the irrelevance of consent when means are used is widely accepted. (Note however that some States do not tie the irrelevance of consent to the use of ‘means’, whether in legislation, case law or in practice). The majority of States surveyed have incorporated the principle directly into their law. Amongst that group some have adopted the language of the Trafficking in Persons Protocol while others have stipulated that consent may not be a defence to any conduct that would otherwise constitute an offence; that it has no bearing on the existence of any relevant criminal offence; that it does not absolve the perpetrator from liability; or that it does not prevent the State from prosecuting. In States where the law does not refer to consent, this should not always be construed as silence on the issue as there is often jurisprudential affirmation of its irrelevance in trafficking cases and / or evidence of practitioner understanding of and support for the principle – at least at the prosecutorial level, which was the focus of the survey.

***Attitudes to the principle: Underlying values around consent:***

All practitioners interviewed expressed broad support for the idea that perpetrators of trafficking should not be allowed to escape justice by pointing to apparent

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consent on the part of victims. Most consider that it is the intention and actions of the perpetrator that should be the focus of attention, rather than the intention and actions of the victim. Particularly in discussions around complex cases where victims continue to assert consent, a significant number of practitioners raised the notion of *values*: that consent should not be permitted to trump fundamental human and social values such as dignity, freedom and protection of the most vulnerable within society. However, while there was general accord among practitioners about the nature of these values, there was not universal agreement on what those values are and how they should be understood and applied, and it is apparent that ‘values’ can be invoked to support very different positions on the issue of trafficking. The issue of trafficking for sexual exploitation provides a good example: values of human dignity are often invoked to support a broad reading of exploitation in this context, on the basis that prostitution cannot be meaningfully consented to. However other practitioners pointed out that to reject the possibility that some persons working in prostitution are exercising a form of agency may undermine the core values of autonomy and freedom.

***Irrespective of the approach taken in law, consent is often highly relevant in practice:***

A major finding of the survey is that, despite the Trafficking in Persons Protocol affirming the irrelevance of consent once means are established (in the case of adults), and irrespective of how (and whether) the irrelevance of consent is framed in legislation, the issue is often an important subtext at every stage in the criminal justice response to trafficking: from victim identification to decisions about which cases to prosecute to credibility issues during the trial itself and in respect of sentencing. While expressing strong support for the *principle*, criminal justice practitioners appear to experience genuine difficulty internalizing a concept that in some senses appears to be counter-intuitive, or at least in conveying it effectively to judges and juries. Questions around consent may not arise in the ‘hard’ and ‘straightforward’ trafficking cases but this is usually because the circumstances of those cases make it obvious that consent was never present in the first place. Other pertinent observations include the following:

- In the case of child trafficking assertions of consent are more quickly rejected as irrelevant but consent can still be an issue.
- Criminal justice focus on the victim (exacerbated through heavy reliance on victim testimony) may enhance the focus on consent.
- Even if legally irrelevant, courts will often entertain discussions around consent, and indications of consent can impact on how the victim is perceived and how his / her actions are interpreted.
- Apparent consent, particularly when asserted by the victim himself / herself, can make cases difficult to prosecute and make prosecutors reluctant to submit indictments.
- Consent can be relevant to determining the intention of the accused.
- Indicators of consent and the means by which it is secured can affect sentencing.

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***Means are often critical to considerations of consent:***

In many States surveyed, the extent to which consent is relevant in a particular case appears to depend heavily on the ‘means’ used and the way in which the ‘means’ element of the definition is understood and applied. This was the case even where ‘means’ are not a formal element of the crime of trafficking but rather tied to the ‘purpose’ element. Because the means themselves are not clearly defined or delineated in the Trafficking in Persons Protocol and in most national laws, there is considerable scope for States to develop and apply highly restrictive, exceedingly broad or even contradictory interpretations of particular means: from interpretations by which means must be so severe enough to vitiate or seriously damage consent, to interpretations by which means need not vitiate or even seriously damage consent in order to trigger the “irrelevance of consent” provision. (Note again that in some of the States surveyed, the issue of consent was not tied to ‘means’, whether in legislation, case law and/or practice). Other pertinent observations included the following:

- The type of ‘means’ used tends to affect how issues of consent arise and how they are considered. Typically, the practical relevance of consent is diminished relative to the harshness of the ‘means’ used and their impact on the victim.
- There is a lack of clarity around the parameters of certain of the more ‘subtle’ means. It is an interpretative question whether the means must be of a certain severity in order to trigger the irrelevance of consent provision. Therefore questions were raised in the country surveys as to whether any kind of fraud, deceit or coercion, no matter how minor in substance or impact, is sufficient to establish the ‘means’ element of trafficking – and thereby to render irrelevant any assertion of consent
- Abuse of a position of vulnerability is often the ‘means’ of greatest relevance in cases of trafficking where victim consent is indicated or asserted. This is unsurprising, as the assertion of consent in the face of overt means such as force, abduction and fraud appears to be counter-intuitive.
- Despite the Trafficking in Persons Protocol’s clear statement that consent is irrelevant where ‘means’ are established, there is lack of agreement among practitioners as to whether it is sufficient to just establish use of means, or whether it is also required to prove that the means used actually vitiated consent. This is unsurprising in view of the fact that the Protocol itself appears open to both interpretations.
- In order to assess if trafficking in persons has taken place, in some jurisdictions practitioners look to “a constellation of circumstances” that extend beyond ‘means’ to include the nature and severity of the exploitation and – depending on the language of the law – other circumstances as well.

***The extent to which consent is relevant in a particular case may also depend on the type of exploitation, as well as the severity of that exploitation:***

While practitioners affirmed that the type of exploitation should not be relevant to the issue of consent, there are strong indications that, in practice, this is a highly relevant consideration. In some cases this is simply because the question of

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whether a person consented to an act that would otherwise be lawful is critical to establishing the existence of an offence (e.g. consensual marriage versus forced marriage). In other cases it appears that values and attitudes around what is acceptable or not within different spheres of activity can play a role in determining the relative relevance of consent in particular situations. Practitioners generally acknowledged that severity of exploitation would make a difference to considerations of consent in much the same way that severity of means operates: the more severe the exploitation the more self-evident it would be to criminal justice officials, courts and others that any consent asserted by perpetrators or victims is spurious and should be disregarded. The survey also revealed a link between the type of exploitation, its severity and considerations of consent: thus in some jurisdictions, while the use of ‘means’ may be sufficient to establish the irrelevance of consent in cases of trafficking for sexual exploitation, in cases of trafficking for labour exploitation evidence of the use of ‘means’ may need to be supplemented by evidence that the exploitation suffered was particularly severe. On the other hand, in at least one jurisdiction, the opposite approach prevailed with sexual exploitation requiring evidence of more severity and labour exploitation less. Other pertinent observations included the following:

- In relation to forms of exploitation that embody means in themselves (such as forced labour, which entails the means of ‘force’), consent is directly relevant in establishing the exploitative purpose given that the ‘means’ are integral to the offence. This would be the case even if the ‘means’ element were not a separate consideration.
- “Removal of organs” is an anomaly to the extent that it does not necessarily constitute an inherent wrong – or indeed a crime at national law. It is possible that consent will operate differently in relation to this end-purpose. However, the paucity of case law and practical experience make it difficult to draw any strong conclusions on this point.
- The type of trafficking-related exploitation at issue, in particular whether sexual exploitation or labour exploitation, can make a difference to how assertions of consent are understood and how they impact on the criminal justice process. Generally, the role of consent is considered more complex in the latter cases and there are different, typically higher evidentiary burdens at play. There is a strong gender dimension to how consent is considered in these different types of trafficking cases in some jurisdictions.

***The issue of criminal liability of trafficked persons can expose the limits of the principle of the irrelevance of consent:***

The principle of non-criminalization (or non-penalization) of trafficked persons for offences they have been compelled to commit or committed as a direct consequence of being subject to trafficking is widely accepted. However the situation is less clear with regard to legal responsibility for victim involvement in criminal activities where such activities appear to be the exploitative purpose of the trafficking itself - such as trafficking for purposes of drug production and organized theft. The survey confirmed that most States have not taken an explicit position on

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this issue. In practice however it appears clear that crimes committed incidentally in the course of an individual's exploitation are more readily overlooked than crimes committed as a direct manifestation of the exploitative purpose, particularly where there is some indication of possible consent in the latter case. In such cases the threshold for disregarding apparent consent appears to be relatively higher and courts have been relatively less willing to accept broad interpretations of subtler means (such as abuse of a position of vulnerability) as a justification for disregarding apparent consent to involvement in criminal activities.

***Practitioners voiced the desire for greater clarity and guidance on the issue of consent. Guidance should take into account the need for clarity balanced by flexibility:***

The survey revealed a desire for clear guidance around consent in the interests of justice, consistency and certainty. Most practitioners find this issue complex and difficult to deal with in practice, even when the law or other materials state a particular position very clearly. On the other hand, during the expert group meeting, practitioners also expressed an awareness of the diversity of legitimate approaches to this topic and of the complexity of the issue, both of which require striking a balance between clarity and flexibility. Thus, some practitioners expressed the view that guidance could be useful in raising the issues around consent, even if it does not give one answer.

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The Issue Paper concludes with a list of questions and issues for discussion, generally tied to the major findings of the survey outlined above. The following are the key questions that relate most directly to matters of **policy and risk**:

- Is there a risk that the principle of the irrelevance of consent when means are established, particularly when applied in the context of a liberal interpretation of means, will result in a widening of the concept of trafficking that goes beyond the spirit of the Protocol and the intention of Member States who participated in its drafting?
- Is there a risk that a restrictive understanding of the irrelevance of consent will result in a narrowing of the concept of trafficking that is not in accordance with the spirit of the Protocol and the intention of Member States who participated in its drafting?
- Is there a related risk that the principle of the irrelevance of consent when means are established, may be ignored in practice: that investigators, prosecutors and courts may use indications or assertions of consent to reduce focus on 'difficult' or 'unclear' trafficking cases? Could such an approach be justified on pragmatic grounds? Not justified on pragmatic grounds?
- Is the approach of the Protocol to consent correct, complete and realistic? Specifically, are there situations where the elements of trafficking are

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indeed present but the consent asserted by the 'victim' is so meaningful that it should not be disregarded?

- Not all States have included the 'means' element within their definition of trafficking. Is it possible to identify situations where no means have been employed and yet consent should still be considered irrelevant?
- Criminal justice systems are routinely being called on to distinguish between situations characterized by poor conditions of employment and situations where a person is the victim of trafficking. Should considerations of consent be used to help bring rigour and clarity to this difficult but necessary process? What would be the risks in this use of consent? What would be the value in using consent in this way?



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# 1 Background

## 1.1 Context of this study

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime<sup>2</sup> (Trafficking in Persons Protocol) is considered to be “the principal, legally binding global instrument to combat trafficking in persons.”<sup>3</sup> It defines trafficking in persons as consisting of 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.<sup>4</sup> 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.<sup>5</sup> The consent of an adult victim of trafficking is specified as irrelevant when any of the stipulated ‘means’ are used.<sup>6</sup>

Achieving international agreement on the definition on trafficking in persons was widely considered to be a major step forward in articulating a common understanding of the nature of the problem and establishing the foundation upon which the necessary cooperation between States could be developed. 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.

However, it has become evident that questions remain about certain aspects of the definition – most particularly those aspects that are not elsewhere defined in

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<sup>2</sup> 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).

<sup>3</sup> 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.

<sup>4</sup> Trafficking in Persons Protocol, Art. 3.

<sup>5</sup> Ibid, Art. 3(c).

<sup>6</sup> Ibid, Art. 3(b).

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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, many 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 understanding of the problem and / or existing legal and policy frameworks. Generally, however, the correlation between the Trafficking in Persons Protocol and domestic law on the issue of trafficking is very high, underscoring the value of guidance on those issues or aspects that remain unclear.

It is important to reaffirm a point made in the context of the first study in this series<sup>7</sup>: that questions around the definition of trafficking have a practical as well as legal dimension. This is relevant because characterizing certain conduct as 'trafficking' has significant and wide-ranging consequences for the alleged perpetrators of that conduct, and for the alleged victims. For the State, characterization of certain conduct as "trafficking" will trigger a range of criminalization and cooperation obligations both internally and in relation to other States. 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. Persons who are "victims of trafficking", are entitled to special measures of assistance and protection that will be unavailable to those who are considered to have not been trafficked.

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 and related crimes. The complex and fluid definition contained in the Trafficking in Persons Protocol has contributed to such tensions and may, ultimately, mean that such tension remains unresolved. As with the previous study on 'abuse of a position of vulnerability', the subject of the present study, consent, provides a case in point. The way in which consent is understood will inevitably operate to either expand or contract the range of practices identified as trafficking and, thereby, the categories of person identified as having been trafficked or having perpetrated trafficking crimes.

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<sup>7</sup> UNODC, *Issue Paper: Abuse of a Position of Vulnerability and other Means within the Definition of Trafficking in Persons* (2012).

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## 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.”<sup>8</sup> 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.<sup>9</sup> 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 implementing, supporting and promoting the Protocol.<sup>10</sup>

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 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

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<sup>8</sup> United Nations Convention against Transnational Organized Crime (Organized Crime Convention), adopted by resolution A/RES/55/25 of 15 November 2000 and entered into force on 29 September 2003, Art. 32(1).

<sup>9</sup> 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”.

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

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such as consent; harbouring, receipt and transport; abuse of a position of vulnerability; exploitation; and transnationality.<sup>11</sup>

In October 2010, at its fifth session, the COP welcomed the recommendations of the Working Group on Trafficking in Persons<sup>12</sup> and requested the Secretariat to continue its work on the analysis of key concepts of the Trafficking in Persons Protocol.<sup>13</sup>

The first issue paper on “abuse of a position of vulnerability”, 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 on abuse of a position of vulnerability and other ‘means’ within the definition of trafficking in persons 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.<sup>14</sup>

The present issue paper on ‘consent’ is the second in the series. It will be followed by a study into the concept of ‘exploitation’ within the Protocol’s definition of trafficking in persons.

### 1.3 Methodology

The methodology for preparation of this Issue Paper was similar to that adopted for the first study, with some minor modifications on the basis of that previous experience:

**Initial desk research:** involving (i) a review and analysis of existing scholarly writings and technical materials; (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

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<sup>11</sup> “Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010”, CTOC/COP/WG.4/2010/6, 17 February 2010, para. 31(b).

<sup>12</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 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.

<sup>13</sup> Ibid. op. 10.

<sup>14</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 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.

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survey instrument (see Annex 2) was then used to guide in-depth interviews with practitioners and experts from twelve States representing different regions and legal traditions (Argentina, Australia, Belarus, Indonesia, Israel, the Philippines, Norway, Serbia, Spain, Thailand, the United Kingdom of Great Britain and Northern Ireland, and the United States of America).

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 and common law systems. States Parties were also reminded of the process and invited to participate in the surveys during deliberations at the third session of the Open-ended Interim Working Group on Trafficking in Persons that took place from 6-8 November 2013. All States Parties that expressed interest in participating in the process have been included in the survey.

Additional information was received from several States that were not formally surveyed for this study. The People's Republic of China provided a summary of a case; Japan forwarded police and prosecutorial guidelines; Finland's Senior Advisor, Office of Ombudsman for Minorities, provided cases; a prosecutor from Tonga forwarded a case analysis. The legislation of Kenya was also analysed by UNODC and included among the survey's findings.

**Presentations and discussions at the Working Group on Trafficking in Persons:** The issue of consent was the subject of discussion at several events held during at the fifth session of the Working Group (November 2013): (i) a plenary panel discussion with speakers from Australia, Finland and Thailand; and (ii) a side event with participation of the UN Special Rapporteur on Trafficking, UNODC, the International Labour Organization (ILO) and the lead consultant for the present issue paper.

**Drafting of 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 detailed Survey Report that formed a major input into the present Issue Paper. Additional analytical materials prepared by UNODC and documentation collected during the desk research were also utilized in the drafting process.

**Review by expert group:** UNODC convened an expert group meeting in Vienna on 17–18 February 2014, attended by national experts from twelve jurisdictions, including eleven from States that had taken part in the survey process.<sup>15</sup> Representatives of international and regional organizations also attended the meeting,<sup>16</sup> as did a representative from Switzerland, which has provided on-going financial support for this project. A draft of the Issue Paper was provided to

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<sup>15</sup> Argentina, Australia, the Republic of Indonesia, Israel, Norway, the Philippines, the Republic of Serbia, Spain, Thailand, the United Kingdom, the United States of America were surveyed and sent experts to the expert group meeting. In addition, an expert from Canada attended the meeting.

<sup>16</sup> These included the United Nations Special Rapporteur on Trafficking in Persons, especially Women and Children, from OHCHR and a representative from her office, the ILO, the IOM, UNICEF, Office of European Union Anti-Trafficking Coordinator, Australia-Asia Program to Combat Trafficking in Persons and UNODC.

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participants in advance. The purpose of the meeting was to discuss in depth the issues addressed in the draft in order to arrive at a better understanding of them. Among the subjects discussed was whether it would be valuable to draft guidance and what form it should take. While care was taken to ensure adequate representation both geographically and in terms of legal systems, the States surveyed and the experts who attended only reflected a small sample of States that have ratified the Trafficking in Persons Protocol.<sup>17</sup> Against a backdrop of significant variance in legislation, case law and practice, discussions succeeded in raising central common issues and problems which arise in many States and in presenting an array of solutions, all of which enrich the Issue Paper.

**Review of final draft by experts:** Following the expert group meeting, the draft was revised and submitted for further review to the experts who participated in the meeting and to additional experts. Comments received were taken into account in the final Issue Paper.

## 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 'consent' and related concepts. It commences with some general observations on principles underlying the defence of 'consent' to criminal liability and evolving approaches to consent within major legal systems. The next section considers 'consent' within the specific context of trafficking: briefly outlining how the issue was dealt with in early trafficking treaties; undertaking a detailed examination of the concept of consent within the Trafficking in Persons Protocol itself; and reviewing the approach taken by the specialist regional instruments. 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 consent 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 three groups: (i) States that have explicitly affirmed, in law, the irrelevance of consent; (ii) States that have omitted reference to consent where the legal framework is otherwise silent on the issue; and (iii) States that have omitted the reference to consent but nevertheless have clearly clarified the irrelevance of consent in case law.

Part 4 draws together findings from legislation, case law and the views of practitioners around a series of key statements, based on the surveys and the subsequent expert group meeting insights including: (i) the principle of the

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<sup>17</sup> As of September 2014, there are 161 States parties to the Trafficking in Persons Protocol.

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irrelevance of consent is widely accepted; (ii) irrespective of the approach taken in law, consent is often highly relevant in practice; (iii) ‘means’ are often critical to considerations of consent; (iv) the type and severity of exploitation are also relevant to considerations of consent; and (v) the issue of criminal liability of trafficked persons can expose the limits of the principle of the irrelevance of consent.

Practitioners consulted for the survey were of the view that international guidance around consent may be helpful to improving clarity, certainty and consistency in understanding and application of the law. During the expert group meeting, some practitioners stressed the need for any guidance to provide both clarity and flexibility, in recognition of the diversity of national systems and the complexity of the topic. Annex 1 offers some “Key Considerations For Criminal Justice Practitioners on the Irrelevance of ‘Consent’ in Trafficking in Persons”.

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## 2 The concept in international law and policy

Article 3(a) of the Trafficking in Persons Protocol defines trafficking in persons as consisting of 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): namely, exploitation. Article 3(b) of the definition states that consent of the victim to the intended exploitation is irrelevant when any of the stipulated ‘means’ have been used. The element of ‘means’ is not required to establish trafficking in children. It is widely accepted that in addition to simplifying the evidentiary requirements for prosecutions involving children, this represents an additional affirmation that consent should never be at issue in such cases. Children have, in law, often been recognized as being unable to consent to certain types of activities in recognition of the fact that they are more vulnerable and there exists a potential power imbalance. This definition of trafficking, including its provision on the irrelevance of consent, has been included in a number of other instruments and has been analysed in various interpretative texts and guides. There is also some relevant, if limited, international jurisprudence.

This section commences with some general observations on the place of consent in criminal law before examining international legal and policy developments and drawing some preliminary conclusions.

### 2.1 Consent in criminal law: Some general observations on principles and approaches

The principle underlying the defence of consent to criminal liability, *volenti non fit injuria* (to the consenting, no wrong is done), can be traced back to sixth century Roman Law.<sup>18</sup> Originally operating as a complete barrier to prosecution, the rule has been modified in different legal systems over time to permit certain exceptions, often to actions that involved serious bodily harm or were otherwise considered to be harmful to society as a whole. This shift was commonly the result of the recognition of a public dimension to previously private harm: “the individual lost the power to consent to what the state regarded as harm to itself.”<sup>19</sup>

Parallel considerations across different legal traditions have related to the *quality* of consent in respect of conduct where consent invalidates an essential element of the

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<sup>18</sup> V. Bergelson, “The Right To Be Hurt Testing The Boundaries Of Consent” 75 *George Washington Law Review* 165 (2007), p. 9.

<sup>19</sup> *Ibid*, p. 11.



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act (for example rape or burglary). In all major legal systems, where the defence of consent is available it must satisfy a certain standard: generally that it is both informed and freely given. Consent to the perpetrator's act that is obtained through obstructive agents such as coercion or fraud will be void from the beginning. In addition, certain groups of persons, most particularly children and the mentally disabled (but also sometimes women and those whose decision-making capacity was or is considered to be impaired in some way) are deemed to be incapable of delivering the necessary quality of consent. 'Age of consent' laws have sought to establish a line between legal capacity and incapacity to provide meaningful consent in relation to matters such as sexual relations and marriage.

The legal invalidity of consent obtained through coercion and fraud appears to have been consistently recognized and upheld in all major legal systems. However questions have arisen with respect to 'more subtle' forms of duress or coercion, often framed in terms of vulnerability. Specifically: can consent be vitiated – or its quality damaged – when the individual providing that consent is vulnerable in some way and the consent relates to an act that appears to do harm to that person? Much available research material on this point relates to Anglo-American jurisprudence, which appears to confirm that the central issue is one of degree: the greater the vulnerability and the riskier and more harmful the conduct, the more compelling the evidence of consent that should be required.<sup>20</sup> Importantly, the origin of the consent-damaging factor has been considered significant: thus, 'economic coercion of circumstances' would not invalidate consent in the criminal law context as it arises within the consenting individual and does not come from another person.<sup>21</sup> As one scholar explained, a person's compulsion to choose between working or starving does not render the apparent consent to work involuntary: provided the person to whom consent is given is not the cause of starvation or lack of any reasonable alternative, then the consent should be considered valid.<sup>22</sup> It should be noted that this view does not precisely correspond to the Trafficking in Persons Protocol's position on 'abuse of a position of vulnerability'. For consent to be considered irrelevant on that basis, the person to whom consent is given must have abused an existing or created vulnerability (the origin of which is irrelevant) in order to secure an act intended to result in exploitation.<sup>23</sup>

Major legal systems have also recognized that, in the criminal law context, consent that is otherwise valid (i.e. that which is informed and freely given) can be overridden on the basis of public interest, order or morality. For example, a number of States have asserted a legitimate State interest in rejecting consent as a defence

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<sup>20</sup> Ibid, p. 31.

<sup>21</sup> D. Beyleveld, and R. Brownsword, *Consent in the Law* (2007), p. 127.

<sup>22</sup> Robert Nozick, *Anarchy, State and Utopia* (1974), as cited in Samuel Vincent Jones, "Human Trafficking Victim Identification: Should Consent Matter?" 45 *Indiana Law Review* 483 (2012), pp. 508–509.

<sup>23</sup> UNODC, *Issue Paper: Abuse of a Position of Vulnerability and other Means within the Definition of Trafficking in Persons* (2012), pp. 90–91.

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to charges related to exploitation of prostitution.

Despite careful legal rationalizations for particular policy positions on consent, it is evident that *values* have played a key role in how those positions are shaped and defended. For example, in relation to the example given above, it is the ‘fundamental values’ of public interest, order, protection of vulnerable populations and morality that serve to render consent irrelevant. Similarly, considerations of ‘human dignity’ have been used to strengthen the position that one cannot consent to prostitution or to serious bodily harm or indeed to one’s own exploitation – whatever form that exploitation takes. A competing – or at least balancing – liberal value in criminal law and policy around consent has been ‘personal autonomy’ and the related value of respect for voluntary undertakings. In this context, these ideas recognize that people can and do take decisions that others would not take; decisions that are high risk; that entail hardship and even some measure of harm; or that end badly. It accepts the individual’s right to decide what is in his or her best interests and rejects attempts to invalidate such choices when these are rational and voluntary, even if they are patently unwise or likely to result in harm to the individual. Of course some values are amenable to being argued for very different ends. For example, the value of ‘human dignity’ has been used to advance different approaches to prostitution.

## 2.2 Consent in the specific context of trafficking

Consent has been central to the narrative around trafficking since the practices traditionally associated with trafficking (cross-border movement of women and girls into sexual exploitation) were subject to international regulation during the first decades of the twentieth century. Initial international agreements focused on force and deception, implying that consent needed to be vitiated or compromised in some way by the actions of the exploiter.<sup>24</sup> However, the means element was subsequently eliminated, thereby rendering consent wholly irrelevant once the act (procuring, enticing, or leading away any woman, of any age, across an international border) and purpose (“immoral purposes”) were both established.<sup>25</sup> The 1949 Trafficking Convention continued this approach, requiring States to punish:

Any person who, to gratify the passions of another: (1) procures or entices or leads away, for the purposes of prostitution, another person, even with

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<sup>24</sup> International Agreement for the Suppression of the White Slave Traffic, 1 LNTS 83, done 4 May 1904, entered into force 18 July 1905; International Convention for the Suppression of the White Slave Traffic, 3 LNTS 278, done 4 May 4, 1910, entered into force 8 August 1912. (Both amended by a protocol approved by the General Assembly on 3 December 1948, 30 UNTS 23.); and International Convention for the Suppression of Traffic in Women and Children, 9 LNTS 415, done 30 September 1921, entered into force 15 June 15 1922.

<sup>25</sup> International Convention for the Suppression of the Traffic in Women of Full Age, 150 LNTS 431, done 11 October 1933, entered into force 24 August 1934. Amended by a Protocol approved by the General Assembly on 20 October 1947, 53 UNTS 13.

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the consent of that person; (2) exploits the prostitution of another person, even with the consent of the person.<sup>26</sup>

States Parties were further required to punish any person who “exploits the prostitution of another person, even with the consent of that person.”<sup>27</sup>

The centrality of consent continued through the development and adoption of the modern legal framework established through the Organized Crime Convention and its supplementary Protocols. Consent is often considered a distinguishing feature between migrant smuggling and trafficking: those who were smuggled have somehow *consented* to their situation;<sup>28</sup> the implication in this assertion was that those who were trafficked have not.<sup>29</sup> Migrant smuggling has continued to be perceived as voluntary.<sup>30</sup> However, there is growing understanding that this binary distinction may not always be an accurate reflection of reality.

### **2.2.1 The Trafficking in Persons Protocol and the concept of consent**

As noted previously, 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, 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, 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” introduces a specific *mens rea* requirement into the definition, subject to the *mens rea* of a given country. 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

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<sup>26</sup> 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, Art. 1.

<sup>27</sup> *Id.*

<sup>28</sup> See for example the UNODC Model Law on Smuggling of Migrants at p. 19 (“generally, a person consents to being smuggled”).

<sup>29</sup> For example, in her 2000 Report the UN Special Rapporteur on Violence against Women stated that it is “the non-consensual nature of trafficking that distinguishes it from other forms of migration”. “Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women” UN Doc. E/CN.4/2000/68, 29 Feb. 2000. The Special Rapporteur stated in the same report: “The lack of informed consent must not be confused with the illegality of certain forms of migration. While all trafficking is, or should be, illegal, all illegal migration is not trafficking. It is important to refrain from telescoping together the concepts of trafficking and illegal migration. At the heart of this distinction is the issue of consent”.

<sup>30</sup> See for example Crown Prosecution Service (United Kingdom), *Human Trafficking and Smuggling* (2012) (describing smuggling as a “voluntary act”).

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through one of the stipulated means) would lead to exploitation.<sup>31</sup> Trafficking is, thereby, a crime of specific or special intent (*dolus specialis*).<sup>32</sup>

The second part of the *actus reus* of trafficking, the ‘means’ element (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person) is relevant only to trafficking in adults. This aspect of the definition generally confirms the position already reflected in earlier treaties on the subject that individuals can end up in a situation of exploitation through indirect methods such as deception and fraud as well as by sheer physical force. Beyond a clarification of abuse of a position of vulnerability in an Interpretative Note that forms part of the Protocol’s *Travaux Préparatoires*,<sup>33</sup> none of the stipulated ‘means’ are defined and there appears to be significant overlap between some of them. There has been little discussion to date as to the question if there needs to be requisite seriousness or the extent of the coercion, deception, fraud or abuse of a position of vulnerability that could constitute a ‘means’ for the purposes of the definition of trafficking.

The baseline established by the Trafficking in Persons Protocol is that the consent of an adult victim to the intended exploitation is irrelevant if any of the listed ‘means’ are used.<sup>34</sup> The consent of a child victim of trafficking is irrelevant regardless of whether or not ‘means’ have been used. The Trafficking in Persons Protocol *does not* say that the use of means must operate to invalidate or damage consent. Lack of consent is not an element of the crime of trafficking in persons. Two Interpretative Notes are attached to the paragraph. The first, characterized as “puzzling” by one commentator,<sup>35</sup> indicates that the paragraph should not be

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<sup>31</sup> The Trafficking in Persons Protocol does not define ‘exploitation’, rather providing an open-ended list that includes, *at a minimum*: “the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs”. Trafficking in Persons Protocol, Art. 3(a). The *Travaux Préparatoires* indicate that the words “at a minimum” were included to ensure that unnamed or new forms of exploitation would not be excluded by implication: 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*), p. 343, note 22 and p. 344, note 30.

<sup>32</sup> UNODC, *Anti-Trafficking Practitioners’ Manual* (2009), Module 1, p. 4. UNODC further notes that domestic law could enable *mens rea* to be established on a lesser standard than direct “intent” (such as recklessness, wilful blindness or criminal negligence): *ibid.*

<sup>33</sup> The *Travaux Préparatoires* to the Trafficking in Persons Protocol include an interpretative note to the effect that reference to the abuse of a position of vulnerability “is understood as referring to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.

<sup>34</sup> Trafficking in Persons Protocol, Art. 3(b).

<sup>35</sup> D. McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007), p. 328 (“The puzzle lies in finding why anyone would think that it might have [an effect on the application of mutual legal assistance obligations]. A possible explanation is that evidence as to whether the victim did consent might be needed for sentencing purposes; the irrelevance of that evidence in terms of the definition of ‘trafficking’ would not bar the use of Article 18 to obtain the evidence”).

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interpreted as restricting the application of mutual legal assistance in accordance with Article 18 of the Organized Crime Convention.<sup>36</sup> The second Note states that the paragraph should not be interpreted as imposing restrictions on the right of accused persons to a full defence and to the presumption of innocence. It should also not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law.<sup>37</sup> The latter Note also makes reference to Article 11, paragraph 6 of the Organized Crime Convention, which preserves key legal principles in the domestic law of States Parties including “legal principles controlling the lawfulness of conduct”.<sup>38</sup>

A review of the *Travaux Préparatoires* confirms that the issue of consent was not subject to substantive consideration until very late in the negotiations, when the definition of trafficking came to be discussed and finalised.<sup>39</sup> At that point, there appeared to be general agreement among participating States that consent of the victim should not be an issue in determining whether or not the crime of trafficking had been established. The question remaining was whether express reference was necessary or advisable. Some delegations proposed an explicit statement on the irrelevance of consent, while others recommended that it not be referred to at all, lest this imply that under some circumstances it would indeed be possible to consent to trafficking in persons.<sup>40</sup> Suggested alternatives included “with or without

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<sup>36</sup> “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions: Addendum Interpretative notes for the official records (*Travaux Préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto” UN Doc. A/55/383/Add.1, 3 Nov. 2000, Note 67.

<sup>37</sup> *Ibid*, para. 68.

<sup>38</sup> Organized Crime Convention, Art. 11(6): “Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.”

<sup>39</sup> Note however references to consent in the earliest proposals for definitions (both of trafficking and of particular end purposes ‘sexual exploitation’ and ‘forced labour’. See *Travaux Préparatoires*, p. 341, 352–354. Note further the repeated affirmations, throughout the drafting process, that the consent of children to any forms of trafficking related exploitation would always be irrelevant. See for example *Travaux Préparatoires*, pp. 342–343, 345, 355 note 10.

<sup>40</sup> *Travaux Préparatoires*, pp. 343–344 (“...there was extensive discussion of whether a reference to the consent of the victims should be made in the definition of ‘trafficking in persons’ and if so, how it should be worded. Most delegations agreed that the consent of the victim should not, as a question of fact, be relevant to whether the victim had been “trafficked”. However, many delegations expressed legal concerns about the effect of expressly excluding consent from a provision in which many of the means listed, by their nature, precluded the consent of the victim. Several expressed concern that an express reference to consent might actually imply that in some circumstances it would be possible to consent to such things as the use or threat of force or fraud. Several delegations pointed out that proving lack of consent was difficult because the victim’s consent or ability to consent often changed while the offence was on-going. In trafficking cases, the initial consent of the victim was often withdrawn or vitiated by subsequent changes in circumstance and in some cases, a victim abducted without consent might subsequently consent to other elements of the trafficking. There was agreement that both the protocol and legislation implementing it should

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[victim] consent”; “irrespective of the initial consent of the victim”; and an assertion that the existence of any of the stated means “shall be considered as vitiating any alleged consent of a victim of trafficking”.<sup>41</sup> The reference to consent being vitiated by the means survived until the final negotiating session at which time it was replaced with the reference to consent being rendered “irrelevant” the same way.<sup>42</sup> The final wording was, in some senses a compromise: explicitly affirming the irrelevance of consent but making clear that this irrelevance was conditional upon the use of ‘means’.

The *Travaux Préparatoires* do not provide clarity as to why the irrelevance of consent was tied to the “intended exploitation” rather than the act element of recruitment, transfer etc. (to which the ‘means’ is tied). It is also unclear why the “consent is irrelevant” phrase was chosen over a statement to the effect that consent would not be a valid defence or that means would vitiate consent.

As guardian of the Organized Crime Convention and its supplementing Protocols, UNODC has produced a number of resources and guides that, while not determinative, offer useful insight. The following summarises their treatment of the issue of consent.

The **Legislative Guide to the Convention and Protocols**, released in 2004, makes only passing reference to consent, affirming that: “[o]nce it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence.”<sup>43</sup> The Guide also refers to consent in the context of migrant smuggling involving exploitation, affirming that “if there is no consent [to the exploitation] or if there is consent that has been vitiated or nullified as provided for in ... the Trafficking in Persons Protocol, the presence of exploitation in what would otherwise be a smuggling case will generally make the trafficking offence applicable ...”<sup>44</sup>

The 2009 UNODC **Model Law on Trafficking in Persons** is more expansive, offering the following interpretation of Article 3(b):

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reduce this problem for prosecutors and victims as much as possible. At the ninth session of the Ad Hoc Committee, no consensus was reached... and the Chairperson asked delegations to consider... options...”). A similar discussion was held in the context of debate around the difference between child and adult trafficking and the question of whether that difference should be expressed in terms of consent. A note in the *Travaux Préparatoires* states that “...an alternative way to criminalize trafficking in children might be to state that children could not consent to certain activities. One delegate, however, expressed concern that using a consent exception for some purposes could imply that consent could be given for other purposes. Several delegations also expressed concern that a consent exception for children would suggest that adults could consent to slavery, forced labour or servitude, when, in fact, no person should consent to slavery, forced labour or servitude. The text... avoided this confusion by not using the word “consent” (p. 342, note 17).

<sup>41</sup> *Travaux Préparatoires*, pp. 343–344.

<sup>42</sup> *Ibid*, p. 345.

<sup>43</sup> 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. 270.

<sup>44</sup> *Ibid*, p. 347.

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[O]nce the elements of the crime of trafficking, including the use of one of the identified means (coercion, deception, etc.), are proven, any defence or allegation that the victim “consented” is irrelevant. It also means, for example, that a person’s awareness of being employed in the sex industry or in prostitution does not exclude such person from becoming a victim of trafficking. While being aware of the nature of the work, the person may have been misled as to the conditions of work, which have turned out to be exploitative or coercive.

This provision restates existing international legal norms. It is logically and legally impossible to “consent” when one of the means listed in the definition is used. Genuine consent is only possible and legally recognized when all the relevant facts are known and a person exercises free will.<sup>45</sup>

Not all issues are resolved from a reading of the Trafficking in Persons Protocol and the *Travaux Préparatoires*. Key questions raised in the above analysis and considered at various points throughout this study include: does the Protocol require that the ‘means’ actually vitiate or impair consent of a particular alleged victim? Need the means be of sufficiently serious character so as to negate consent? When is consent relevant, and to whom?

## 2.2.2 Regional instruments

**The European Trafficking Convention**<sup>46</sup> reproduces the definition of trafficking set out in the Trafficking in Persons Protocol, including the element of ‘means’ and the provision relating to the irrelevance of consent when any of the means are established. The Explanatory Report that accompanies the Convention discusses this provision with reference to the exploitative purpose of forced labour:<sup>47</sup> noting the international legal definition (“service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”<sup>48</sup>) and citing a judgment of the European Court of Human Rights (ECHR) that, in certain circumstances, a service “could not be treated as having been voluntarily accepted beforehand”; that consent is therefore not sufficient to rule out forced labour; and its validity must be evaluated in the light of all the circumstances of the case.<sup>49</sup> The Explanatory Report asserts, without further citation, that the provision on the irrelevance of consent “follows ECHR case law”. It

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<sup>45</sup> UNODC, *Model Law against Trafficking in Persons* (2009), pp. 33–34.

<sup>46</sup> 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 (European Trafficking Convention).

<sup>47</sup> Council of Europe, Explanatory Report on the Convention on Action against Trafficking in Human Beings, ETS 197, 16.V.2005, paras. 90–91.

<sup>48</sup> International Labour Organization (ILO) Convention Concerning Forced and Compulsory Labour, 39 UNTS 55, ILO No. 29, done 28 June 1930, entered into force 1 May 1932 (ILO Forced Labour Convention 1930 (No.29)), Art 2.

<sup>49</sup> *Van der Müsselle v. Belgium* (judgment of 23 November 1983, Series A, No.70), para. 37.

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further explains that consent given at a particular time and / or to a particular form of exploitation is not the same as consent to exploitation:

The question of consent is not simple and it is not easy to determine where free will ends and constraint begins. In trafficking, some people do not know what is in store for them while others are perfectly aware that, for example, they will be engaging in prostitution. However, while someone may wish employment, and possibly be willing to engage in prostitution, that does not mean that they consent to be subjected to abuse of all kinds. For that reason Article 4(b) provides that there is trafficking in human beings whether or not the victim consents to be exploited.<sup>50</sup>

It is elsewhere affirmed that “the consent of the victim does not alter the offenders’ criminal liability.”<sup>51</sup>

The implementation mechanisms established under the Convention have been operating since 2007. A number of State Party reports have referred to the issue of consent, generally affirming its irrelevance and noting the importance of promoting awareness on this point.

**EU Trafficking Directive 2011/36/EU**<sup>52</sup> also reproduces the definition of trafficking set out in the Protocol, while adding that the consent may relate to actual as well as intended exploitation: “the consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means ... has been used.”<sup>53</sup> In the context of a discussion on the exploitation of begging as a form of forced labour or services, the Directive’s recital flags the possible *relevance* of consent, noting that: “in the light of the relevant case law, the validity of any possible consent to perform such labour or services should be evaluated on a case-by-case basis. However, when a child is concerned, no possible consent should ever be considered valid.”<sup>54</sup> The invalidity of a child’s consent is ostensibly owing to his or her incapacity to consent; a notion that has been extended to some States to also include those who may have reached the age of majority, yet are mentally impaired.

In 2002, the South Asia Association for Regional Cooperation (SAARC) adopted a **Convention on Trafficking**.<sup>55</sup> This instrument has not been widely ratified or implemented and can be considered to have been largely supplanted by the Trafficking in Persons Protocol, to which most SAARC Member States are party. It is

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<sup>50</sup> Ibid, para. 97.

<sup>51</sup> Ibid, para. 226.

<sup>52</sup> European Union 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 Directive 2011/36/EU), Art. 2(1).

<sup>53</sup> Ibid, Art. 2(4).

<sup>54</sup> Ibid, preambular para. 11.

<sup>55</sup> South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (Done at Kathmandu on 5 January 2002, entered into force 1 December 2005).



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relevant here only for the reference to consent in the narrow definition of trafficking:

‘Trafficking’ means the moving, selling, or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking...<sup>56</sup>

The **Arab Charter on Human Rights**<sup>57</sup> addresses the issue of consent in relation to the use of organs and marriages. In particular, Article 9 states that no medical or scientific experimentation or the use of organs can be carried out without free consent and full awareness of the consequences. Further, Article 33 stipulates that no marriage can take place without the full and free consent of both parties. The **Arab Model Law for Combating Trafficking in Persons**<sup>58</sup> follows the Trafficking in Persons Protocol in linking consent with the means and provides for special rules regarding children and individuals lacking competence.

### 2.3 Supplementary sources of insight

This section moves beyond an examination of the specialist trafficking treaties and related interpretative guidance to consider supplementary sources that may shed light on the issue of consent in the specific context of trafficking in persons.

#### 2.3.1 *Consent in international criminal law*

Article 7 of the Statute of the International Criminal Court<sup>59</sup> identifies as crimes against humanity, (when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack), a range of offences potentially related to trafficking, including enslavement, sexual slavery, and enforced prostitution. The definition of enslavement in the Statute is identical to the one set out in the 1926 Slavery Convention – with the addition of a clause that specifically includes within that definition, the exercise of powers attaching to the right of ownership “in the course of trafficking in persons, in particular women and children.”<sup>60</sup> The Rules of Procedure and Evidence<sup>61</sup> attached to the Statute anticipate assertions of consent to the conduct proscribed in Article 7 and stipulate

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<sup>56</sup> Ibid, Art. 1(3).

<sup>57</sup> Council of the League of Arab States, Arab Charter on Human Rights, 22 May 2004.

<sup>58</sup> Article 2, The Arab Model Law for Combating Trafficking in Persons.

<sup>59</sup> Rome Statute of the International Criminal Court, 2187 UNTS 90, done 17 July 1998, entered into force 1 July 2002.

<sup>60</sup> Ibid, Art. 7(2)(c).

<sup>61</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, “Rules of Procedure and Evidence,” contained in the Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court: First Session, 3–10 Sept. 2002, Official Records, UN Doc. ICC-ASP/1/3. .

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the following principles of evidence in cases of sexual violence falling within that article:

- a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking an advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual offence;
- d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.<sup>62</sup>

A landmark case in the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Kunarac*, considered the issue of consent in relation to the charge of enslavement.<sup>63</sup> The Trial Chamber set out indicators of enslavement, affirming that in such situations, the means used to exercise control over the victim will make discussion of consent immaterial:

The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example: the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity; psychological oppression or socio-economic conditions.

The Trial Chamber's decision was the subject of appeal on grounds that included an assertion that the victims' lack of consent had not been proven, since the victims themselves had "testified that they had freedom of movement within and outside the apartment and could therefore have escaped or attempted to change their situation".<sup>64</sup> In addition to quoting a wider range of indicia of consent being rendered impossible or irrelevant including, but not limited to 'means', the Appeals Chamber rejected the appellants' contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention could be interpreted as a sign of consent:

Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from

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<sup>62</sup> Ibid, Rule 70. Note that the last element is reinforced by Rule 71 that prohibits the admission of evidence on the prior or subsequent sexual conduct of a victim or witness. Moreover, Rule 72 imparts a special procedure for the situation when the defence intends to introduce or elicit evidence of the victim's consent to acts of sexual violence. The Chamber shall conduct *in camera* proceedings to determine the relevance or admissibility of such evidence, weighing its probative value and the rights of the victim and those of the accused. In performing this task, the Chamber must be guided by the above principles.

<sup>63</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23, 22 Feb. 2001.

<sup>64</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23& IT-96-23/1-A [120], Appeals Chamber, 12 June 2002, para. 108.

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claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question, whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances, which render it impossible to express consent, may be sufficient to presume the absence of consent.”<sup>65</sup>

In summary, while the formulation of the proposition is somewhat different, international criminal law generally affirms the approach taken by the Trafficking in Persons Protocol: (i) assertions of consent may not be inferred where the victim is not in a position to give voluntary and genuine consent, given the existence of indicia which include, but are not limited to ‘means’; and (ii) where a lack of consent is not an element of the offence, the prosecution is not required to prove lack of consent. Particularly helpful to the subject of this study are the intimations, that consent may indeed be relevant to establishing that ownership has in fact been exercised.

### **2.3.2 Consent in the definition of forced labour**

During the drafting process for the Trafficking in Persons Protocol, several delegations pointed out that it was important to nuance any reference to consent, as no person can consent to slavery, servitude or forced labour.<sup>66</sup> This position reflects a long-standing principle of international human rights law: the intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which that personal freedom is taken away.<sup>67</sup>

Despite near-universal acceptance of this principle, the issue of consent has arisen in connection with a number of identified end-purposes of trafficking, most particularly and consistently ‘forced labour’, in relation to which involuntariness is

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<sup>65</sup> Ibid, para. 120.

<sup>66</sup> *Travaux Préparatoires*, p. 342.

<sup>67</sup> This issue came before the drafters of both the Supplementary Slavery Convention (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) and the ICCPR (International Covenant on Civil and Political Rights, 999 UNTS 171, done 16 December 1966, entered into force 3 March 1976) in the context of proposals to add the qualification ‘involuntary’ to the term ‘servitude’. The proposal was rejected in both instances on the grounds that “[i]t should not be possible for any person to contract himself into bondage”: F.G. Jacobs and R.C.A. White, *The European Convention on Human Rights* (1996), p. 78, citing “Annotations on the Text of the Draft International Covenants on Human Rights” UN GAOR, 10th Sess., Annexes, Agenda Item 28 pt. II, at 33, UN Doc. A/2929, 1 July 1955 (prepared by the UN Secretary-General). The European Commission on Human Rights has confirmed that “[p]ersonal liberty is an inalienable right which a person cannot voluntarily abandon”: *De Wilde, Ooms & Versyp v. Belgium*, 10 Eur. Ct. H.R. (ser. B) (1969), p. 91 (citing *De Wilde, Ooms & Versyp v. Belgium*, (1967) *Yearbook of the European Convention on Human Rights* 420 (Eur. Comm’n on H.R.)).

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“a fundamental, definitional feature”.<sup>68</sup> International law defines forced labour as work or service performed under the menace of any penalty for which the person has not offered himself or herself voluntarily.<sup>69</sup> The ILO Committee of Experts on the Application of Conventions and Recommendations has 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 evokes the protection of ILO Convention No. 29.

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.<sup>70</sup> Indirect coercion of that kind would only become relevant in conjunction with other factors for which the employer is responsible.<sup>71</sup> Work extracted through “menace of any penalty” is not voluntary and the Committee has further recognized, that when deceit and fraud are involved in the original work offer, the worker’s acceptance cannot be considered knowing and voluntary.<sup>72</sup> 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.

The ILO has noted that the Trafficking in Persons Protocol “has important implications for interpreting the concept of consent in a work or service relationship”, asserting that the ‘means’ (under Article 3(b)) each “definitely excludes voluntary offer or consent”.<sup>73</sup> The means of coercion prohibited under the Trafficking in Persons Protocol would interfere with a person’s freedom to offer him or herself voluntarily and therefore would render the consent of a victim of forced labour irrelevant under ILO Convention No. 29.<sup>74</sup>

Critically, the ILO has also acknowledged the practical dimension attached to consent and to the broader questions around what constitutes exploitation, including through trafficking: “these debates [are not] simply ‘intellectual’. What constitutes ‘coercion’, ‘consent’ or ultimately ‘forced labour’ is actually a question of who receives legal protection, in what form, under which circumstances, and

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<sup>68</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> ed, 2005), p. 201.

<sup>69</sup> ILO Forced Labour Convention 1930 (No.29), Art. 2.

<sup>70</sup> ILO, *Forced Labour and Human Trafficking: Casebook of Court Decisions* (2009), pp. 12–13.

<sup>71</sup> As noted by the ILO in the Forced Labour 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.” ILO, *Hard to See, Harder to Count: Survey guidelines to estimate forced labour of adults and children* (2012), p. 16 .

<sup>72</sup> See ILO, *The Cost of Coercion* (2009), p. 6.

<sup>73</sup> *Ibid*, p. 7.

<sup>74</sup> ILO, *General Survey on the fundamental Conventions* (2007), para. 271.

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from which authorities.”<sup>75</sup> In this way, debates over the concepts of coercion and consent are “an imperative moral, political and practical negotiation over which kinds of coercive pressures are considered legitimate and illegitimate in labour relations.”<sup>76</sup>

## 2.4 Conclusions on the concept of consent in international law and policy

Consent remains a troubled, complex and unresolved aspect of international law and policy around trafficking. The relevant clause in the Trafficking in Persons Protocol has provided some guidance on the general direction that States are to follow but has not eliminated conceptual confusion, diverse interpretations and practical hurdles. It is important to recognize that debates around consent are not limited to the issue of trafficking but are regularly raised, in all legal systems, in connection with a range of issues, reflecting fundamental tensions between overlapping and sometimes competing values and priorities.

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 consent in the international law and policy around trafficking:

***The Trafficking in Persons Protocol’s statement on consent reflects dangers foreseen by Member States:*** Member States were highly conscious of the danger that consent would become the first line of defence for those accused of trafficking offences, most particularly in cases where victims may have consented at some point (e.g. to migrate for work and / or to engage in prostitution). This danger was considered particularly acute because the Protocol sought to capture the more subtle means of control that could be masked by apparent consent, and therefore established the baseline, that the consent of an alleged adult victim to the intended exploitation is irrelevant, if one of the enumerated means has been used.

***The Protocol distinguishes between trafficking of adults and of children:*** Article 3 (c) of the Protocol unequivocally rejects the relevance of consent to the offence of trafficking in children, whether or not ‘means’ have been employed by the trafficker. The crime of child trafficking is established by the fact of an ‘act’ and exploitative ‘purpose’, without ‘means’ required as an element of the offence. On the other hand, as regards trafficking of adults, consent is irrelevant only if a ‘means’ has been used.

The references in the Protocol to the irrelevance of consent, when ‘means’ are used, has been repeated in all major instruments adopted after the Protocol that incorporate a definition of trafficking, and which has been affirmed in policy documents and interpretative texts.

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<sup>75</sup> ILO, *Combating Forced Labour and Trafficking in Africa: Current responses and a way forward* (2013), p. 5.

<sup>76</sup> *Ibid*, p. 7.

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***Consent is irrelevant to establishing trafficking in adults when means are used:***

The Trafficking in Persons Protocol's statement that consent is irrelevant when 'means' have been used, while clear in some respects, is unclear in others: The statement is clear in that consent is irrelevant, whether means like force or abduction are used or whether more subtle means like 'abuse of a position of vulnerability' are used. If no 'means' are employed, the consent of the victim may still be relevant to determining what type of crime, if any, has been committed, given that the crime of trafficking includes the element of 'means'. As discussed above, some experts are of the opinion that the Protocol is aimed at a certain level of severity, so as to be capable of negating, impairing or damaging the alleged victim's consent. They point to the risk, that an overly broad interpretation of the crime of trafficking in persons may have serious consequences for alleged perpetrators, and could dilute the offence. Others point to a different interpretation, stressing that it is not possible to meaningfully consent to certain violations of human dignity. They espouse the view that if such a requirement were imposed, the result would be to impede investigations and prosecutions of trafficking in persons. However, it is clear that the Protocol does not explicitly require that each 'means' in itself operates on the particular alleged victim so as to negate his consent. Nor does it explicitly require that each 'means', in itself, be of a level of severity, so as to vitiate or negate consent in general.

***The requirement to show 'means' affirms that, at least within the Trafficking in Persons Protocol, exploitative conditions alone are insufficient to establish trafficking of adults:*** An agreement to work in a situation or provide a service that may be considered exploitative will not constitute trafficking, if that agreement was secured and continues to operate without threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. While exploitation alone may involve offences, including human rights violations, 'means' must be used to constitute trafficking of adults within the confines of the Trafficking in Persons Protocol.

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## 3 National Law and Practice: Overview

This Part provides an overview of national law, policy and practice around the issue of consent in the 12 States formally surveyed. Its purpose is to lay the groundwork for a more detailed analysis of issues and trends in the following part. For analytical purposes, it has proven useful to divide surveyed States into three groups: (i) States that have explicitly affirmed, in their trafficking law, the irrelevance of consent; (ii) States that have omitted any reference to consent; and (iii) States that have omitted reference to consent, but nevertheless have clearly clarified the irrelevance of consent in case law.

The categorizations are imperfect. Most particularly, within each of these groupings 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 (to which the Protocol’s provision on consent is tied). Further, the amount and quality of information available on each country varies significantly. Some of those surveyed have substantial relevant case law while others were unable to provide any cases directly relevant to the subject of the study. In some instances, the authors relied on (necessarily incomplete) case summaries drawn from the UNODC Human Trafficking Case Law Database<sup>77</sup>. Practitioners surveyed also had very different capacities and experiences and these were reflected in the quality and depth of information obtained through the interview process.

The study was also able to benefit from information on law and practice from several States not formally included in the survey. Where such information has been considered useful to illustrate certain points, it is included in the following analytical section (Part 4).

The information provided in this section is a product of the country surveys, as supplemented by practitioner inputs during the expert group meeting.

### 3.1 States that have included explicit reference to consent in their definition of trafficking

Seven States of the 12 surveyed (Argentina, Australia, Indonesia, the Philippines, Serbia, Spain and Thailand) explicitly refer to consent in their legislated definition of trafficking.

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<sup>77</sup> UNODC Human Trafficking Case Law Database is available online at: [www.unodc.org/cld](http://www.unodc.org/cld).

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### 3.1.1 Argentina

**Summary:** Argentina's principal anti-trafficking statute, adopted in 2012, defines trafficking in relation to the elements of 'act' and 'purpose' and does not require the establishment of 'means'. In response to what were considered unjustifiable acquittals based on acceptance of assertions of victim consent, the new law explicitly affirms that the victim's consent does not absolve the perpetrators from civil or criminal liability. Relevant case law (which predates the legislative changes) is limited beyond explicit affirmation of the irrelevance of consent in relation to the trafficking of children. Practitioners expressed strong support for the new law's treatment of the consent issue. However they noted a widespread lack of understanding about how consent can be vitiated in practice and expect that consent will continue to be a highly relevant consideration in the criminal justice response to trafficking.

**Legal framework:** Argentina's 2008 trafficking law criminalized participating in the entrapment, recruitment, transportation, or reception of people for the purposes of sexual or labour exploitation or organ harvesting. The definition included the 'means' element as set out in the Protocol's definition. A new and more comprehensive law was enacted in December 2012, increasing penalties and effectively removing the 'means' element from the definition (while retaining 'means' as an aggravating circumstance attracting higher penalties). The new law also broadened the 'acts' element by introducing two new acts of the offering a person and the exploitation itself, and also included forced marriage and child pornography in the 'purpose' element. The amendments also explicitly affirm that the victim's consent does not absolve the perpetrators from civil or criminal liability. This amendment was prompted by prosecution failures, due to the impact of assertions of victim consent and because of a requirement arising in several cases, carried out under the previous law, that victims must prove they did not consent to sexual exploitation. There is no definition of consent in the law.

**Case law:** Surveyed case law (relating to the older version of the law and not to the new law which does not require 'means') does not explicitly address the issue of consent except in relation to minors, where it has been repeatedly affirmed that the presence of consent of any kind is irrelevant in establishing child trafficking.<sup>78</sup> However, a series of cases, principally involving trafficking related sexual exploitation, has affirmed the irrelevance of consent, owing to the abuse of the vulnerability of victims and use of other 'means'.<sup>79</sup> One case noted that improvements in the situation of the victim made possible by the exploitation were

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<sup>78</sup> See Brunelli et al, 2010, 2011; *Causa n° 12.967, Sala III de la Cámara Nacional de Casación Penal (3rd Chamber of the National Appeal Court) (2011); 1.2.10. Sentencia No. 55/11 Tribunal Oral en lo Criminal Federal de Santa Fe, 4 October 2011.*

<sup>79</sup> See for example Case No 2338 (2011) Federal Criminal Oral Court Mar del Plata 7/7/2011; Causa 2422, Oral Federal Criminal Court Mar del Plata (2011); Causa 2432 30 August 2012 Oral Federal Criminal Court Mar del Plata, Case N 28/09 (2010) Federal Criminal Court de la Pampa); Causa N. 2359 Federal Criminal Court of La Plata, 4 July 2011; Causa n° 1264-10 Federal Criminal Court of Resistencia (08/09/2011).



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not sufficient to displace abuse of vulnerability as a means of trafficking: “The vulnerability has nothing to do with that kind of ‘positional improvement’, but with the abuse in all those situations, where it is impossible for the victim to exercise autonomy fully, by the trafficker.”<sup>80</sup> The reference to the irrelevance of consent in the new law is yet to be examined in court.

### ***Understanding and application of the concept of consent***

**Values and assumptions:** Practitioners expressed the view that a person should be free to choose a life path that is legally tolerated, but that the value of human dignity places limits on this: where legally valid consent conflicts with human dignity, that consent should not be considered as valid. That principle appears to mean different things to different people: for some practitioners it means that “no one chooses to work in prostitution”. Practitioners also asserted that questions of consent are often wrongly addressed to the victim: it is the objective facts of the case that should be at issue. Lack of consent can often be adduced from an objective examination of those facts, even in the face of a victim’s assertion that she or he consented to the situation.

**On-going relevance of consent:** Discussions with practitioners confirmed that, despite the legislative reference to the irrelevance of consent, the issue was still a live one.

**Relationship with ‘means’:** Practitioners noted that while means are no longer a part of the definition of trafficking, they continue to be relevant for criminal justice officials in establishing how the act occurred and whether the exploitation actually took place. Overt force and violence will be presumed to have vitiated any alleged consent. Increasingly, conceptions of the abuse of a position of vulnerability are being used to explain how victims are moved into or maintained in situations of exploitation. It was also noted that ‘means’ are often involved with the exploitative purpose, which, in turn, raises the issue of consent. For example, guidance on the offence of forced labour makes clear that establishing this offence requires proof that the service was required under threat of punishment and that the service was not voluntarily rendered.<sup>81</sup> The explanation clarifies that the offence will be made out, even when the victim argues he or she was worse off before the exploitation.<sup>82</sup>

**Relationship with exploitative purpose including evidentiary considerations:** Practitioners speculated that establishing trafficking would likely be more difficult in relation to activities that were legal and capable of being consented to such as labour exploitation. They noted that the illegality of the *exploitation* of prostitution in Argentina facilitated an approach that considered consent irrelevant. Practitioners were of the view that the type of exploitation should not, in principle have a particular bearing on considerations of consent, but observed that the threshold does appear to be higher for labour exploitation than for sexual exploitation. This implies that relatively stronger indicators would be required to

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<sup>80</sup> *Causa 2432 30 August 2012 Oral Federal Criminal Court Mar del Plata; Causa n° 2537 Tribunal Oral en lo Criminal Federal de San Martin, 05/08/2011.*

<sup>81</sup> Resolution Pg.46/11, p. 4.

<sup>82</sup> *Id.*

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vitiates apparent consent to an activity that, absent consent, would be legal. More generally it was noted that the negation of consent is implicit in particular end purposes of trafficking such as slavery and forced labour.

**Importance of explicit reference to irrelevance of consent:** Practitioners were supportive of the 2012 amendment, explicitly affirming that consent could not absolve perpetrators from liability. One expressed the view that explicit reference to the irrelevance of consent was essential in ensuring judges understand that the presence of any ‘means’ trumps any argument that consent could be a defence – and conversely, that lack of ‘means’ makes consent relevant. (In this regard it should be reiterated that while not an element of the offence, ‘means’ are still considered in the context of establishing both ‘act’ and exploitative ‘purpose’). Practitioners indicated that the amendments have resulted in clearer consideration in decision-making concerning consent, with ‘abuse of a position of vulnerability’ the most commonly cited ‘means’ engaged in establishing its irrelevance. Though there have been few investigations under the new legislation so far, it is generally felt that the abolition of the ‘means’ element will facilitate prosecutions, particularly when ‘subtler’ means such as ‘abuse of a position of vulnerability’ and deception are alleged and where the ‘exploitation’ alleged is relatively less severe. All those interviewed expressed the view that certain values and assumptions are at play in relation to how the issue of consent is considered and dealt with. The 2012 amendments were considered to be very important in addressing judicial attitudes that fail to understand how consent can be manipulated and vitiated, most particularly in relation to trafficking for sexual exploitation. The view that “anyone can consent to anything” and patriarchal stereotyping of women working in prostitution was seen as behind unjustifiable acquittals for trafficking offences, particularly in cases where there is no overt force or violence.

**Statements at the fifth session of the Working Group and during the expert group meeting:** The Representatives of Argentina stated that, as a person cannot agree to an act of slavery, consent will always be irrelevant and the conviction of perpetrators should not be prevented through allegations of consent. This is an issue of human dignity and freedom.

### **3.1.2 Australia**

**Summary:** Recent amendments to Australia’s trafficking law explicitly affirm that a victim’s consent or acquiescence is not a defence to conduct that would otherwise constitute an element of any relevant offence (trafficking, slavery, deceptive recruitment, debt bondage, etc.). In practice, consent remains relevant for certain forms of exploitation, especially in light of current Australian jurisprudence around trafficking and slavery that, through the common law system, continues to be influential. Consent may also be relevant to decisions to investigate, refer or prosecute as the assertion of consent can complicate prosecutions. While noting these difficulties, practitioners were uniformly supportive of the legislative rejection of the consent defence, citing a need to move away from considering whether

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victims *think* they are free (subjective test) towards whether they *are* actually free (objective test).

**Legal framework:** Australia’s legislative framework around trafficking in persons and related offences is set out in the Commonwealth Criminal Code, Division 270 of which criminalizes slavery and slavery-like conditions, and Division 271 of which contains offences relating to trafficking in persons. The law as amended in 2013 criminalizes both slavery and trafficking: generally following the three-element structure of the Trafficking in Persons Protocol’s definition although certain offences (trafficking in children, related offences such as slavery, organ trafficking, and debt bondage) do not require the establishment of coercion, threat or deception. Through the concepts of slavery and trafficking, the definition addresses itself to most exploitative purposes set out in that instrument and adds debt bondage and forced marriage. In addition to expanding the range of end-purposes and recalibrating penalties, the 2013 amendments sought to address several issues that had obstructed prosecutions; specifically by: (i) capturing more subtle forms of coercion including **psychological oppression** and **abuse of power or a person’s vulnerability**; and (ii) allowing judges and juries to consider factors such as the economic relationship between the victim and the offender, and the personal circumstances of the victim in determining whether the victim was coerced, threatened or deceived, consented to organ removal or entered into debt bondage. The 2013 amendments explicitly refer to consent. Consent is not stated to be irrelevant; rather the provision makes clear that a victim’s consent or acquiescence is not a defence to conduct that would otherwise constitute an element of any relevant offence: *“To avoid doubt, it is not a defence in a proceeding for an offence ... that a person against whom the offence is alleged to have been committed consented to, or acquiesced in, conduct constituting an element of the offence”*. There is as yet no legislative guidance on the distinction between consent and acquiescence.

**Case law:** Consent has been raised as a major defence to both trafficking and slavery charges to date and while the courts have not accepted consent as a defence, they have accordingly been regularly engaged in discussions about consent.<sup>83</sup> Thus, in relation to slavery prosecutions, even when the Court expressly recognizes that non consent is not an element of the crime, the attitude of the victim has been considered relevant to establishing evidentially whether the powers of ownership have been exercised over him or her. Jury directions can and do include references to consent. In making its determination on whether a victim has been coerced, threatened or deceived, the law expressly provides that the court may have regard to non-exhaustive circumstances including the economic relationship between the victim and the offender; terms of any written or oral contracts or agreements between them; personal circumstances of the victim including his or her entitlement to be in Australia, including his or her ability to speak, write and understand English or other language; and the extent of his social and physical

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<sup>83</sup> See, for example, *R v Wei Tang* (2008) 237 CLR 1, 17-18, [32]; *Ho and Ho v the Queen*; *Ho and Leech v the Queen* [2011] VSCA 344 [80] and [83].

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dependence on the alleged offender.<sup>84</sup> In crimes of servitude and forced labour, it is not determinative whether or not escape is possible or whether or not a victim attempted to escape.<sup>85</sup>

### ***Understanding and application of the concept of consent***

**On-going relevance of consent:** While there have not yet been prosecutions under the amended law, practitioners affirmed the on-going relevance of consent. For example, while consent is now formally rejected as a defence, the prosecutor is still required to prove all elements of the offence beyond reasonable doubt, including, where relevant, the 'means' of coercion, threat and deception. It is at this point that consent issues will inevitably arise. This is reflected in case law, which has consistently raised and discussed issues around consent. For instance in *R v Wei Tang* the subtle means of 'psychological oppression' was used. Consent was a prominent feature of this case, in which five Thai women agreed to come to Australia to work in the sex industry. The case was tried before legislation was amended to explicitly make consent irrelevant. The defence pointed to their consent, the fact that 'severe' means were not used and the improvement that resulted in the women's lives by coming to live and work in Australia. While the court pointed to the irrelevance of consent in establishing the elements of crime and stressed that the victim's consent is no defence, the trial Judge considered consent evidentially relevant to the question of whether the women were slaves. On a Prosecution appeal to the High Court of Australia following the overturning of the convictions by the Victorian Court of Appeal, the resulting judgment which reinstated the convictions pointed to the fact that slavery can be voluntary or involuntary and that despite the initial voluntariness, the women did not retain their freedom to refuse.<sup>86</sup> Australia's common law system ensures this jurisprudence will continue to be influential and jury directions can and do include references to consent. Practitioners agreed that even with the new provision on consent, it would be hard to run the line that the state of mind of the victim is completely irrelevant.

Practitioners also noted that questions around whether alleged victims 'consented' to the situation are relevant for police in deciding which cases are referred for prosecution and for prosecutors in deciding which cases will proceed to court. Put simply cases involving victims who believe they have (or appear to have) consented to the exploitation will often be difficult to successfully prosecute given the high reliance on victim testimony in the absence of corroborating evidence. Such cases may not be advanced for that reason. Evidence of consent to some or all of the conduct by the accused is also often sought to be used by the defence to undermine the credibility of the victim or in an effort to turn the sympathy of the jury away from the victim and hence more in favour of the accused. It was also noted that cases where victim consent is at issue are often at the less serious end of

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<sup>84</sup> See Criminal Code, sections 270.10 regarding relevant evidence in slavery like offences and section 271.11A regarding relevant evidence in trafficking in persons and debt bondage.

<sup>85</sup> See section 270.6(3) in regard to forced labour and section and 270.4(3) in regard to servitude.

<sup>86</sup> *R v Wei Tang* (2008) 237 CLR 1, 17-18.

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the exploitation scale: severe exploitation seems to almost automatically make consent a non-issue – for police investigators, prosecutors and the courts. This is because the exploitation can be proved through an objective assessment of the facts or conditions. Less clear objective evidence means that consent may well become an issue, for example to distinguish between a victim of trafficking and a badly paid person in prostitution. In short: the more serious and objectively verifiable the exploitation, the less relevant is consent.

It was generally agreed that decisions about which cases to investigate, refer or prosecute are multi-factorial – considerations of resources, public interest, seriousness, and available evidence were all noted as relevant. Consent will often come up in ‘borderline’ cases and there may be multiple justifications for not pursuing such cases – justifications that are enhanced by the fact that questions can be (and are) raised about the victim’s state of mind.

**Relationship with 'means':** Australian legislation includes a cluster of offences related to trafficking, including, slavery, servitude, forced labour, deceptive recruiting for labour and services, and forced marriage offences. In addition, it includes a series of trafficking in persons offences and related offences of organ trafficking and offences relating to debt bondage. Only some of these offences require 'means'. Among those which do not require 'means', are slavery and some forms of trafficking<sup>87</sup>.

Among those which do require 'means', are servitude, forced labour, forced marriage (all of which require the use of *coercion, threat or deception*) and certain forms of trafficking (some of which require *coercion, threat or deception* and some of which require only *deception*).

Where 'means' are elements of the crime, the legislation recognizes the use of 'subtle means' in that the definition of 'coercion' includes "psychological oppression", "abuse of power" and "taking advantage of a person's vulnerability".

**Evidentiary and prosecutorial considerations:** A practitioner who participated in the expert group meeting alluded to a pattern, whereby traffickers have moved to concentrate on 'subtle means' rather than 'hard means', as reflected in legislation by the term "psychological oppression". She stressed that these situations present challenges for prosecutors and courts which must be met by "meeting the topic of consent head on" and amassing as much information as much as possible about the circumstances under which consent was seemingly given. Australian legislation is particularly friendly to this approach in that it explicitly allows the court to consider a non- exhaustive constellation of circumstances.<sup>88</sup>

**Consent in forms of exploitation which include ‘means’:** In relation to certain forms of exploitation consent is directly relevant and will be a defence because of how the offence is worded. For example, establishing a crime of forced marriage is

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<sup>87</sup> Trafficking offences which do not require 'means' are in sections 271.2 (1B) and (1C) of the Criminal Code.

<sup>88</sup> See sections 270.10(2) and 271.11A(2) of the Criminal Code.

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dependent on establishing lack of consent to the marriage. The issue then becomes working out whether apparent ‘consent’ is genuine. In relation to forms of exploitation such as forced labour, issues around consent will also arise: if an alleged victim is genuinely satisfied with what are objectively exploitative conditions of employment and does not agree to cooperate then it will be difficult to put together a credible brief of evidence. Consent is also relevant to establishing the crime of deceptive recruitment because it is necessary to show that the conditions of the recruitment were not ones to which the alleged victim agreed. However consent would not be a defence to certain conduct (such as that involving severe restrictions on freedom) as the criminal law holds those committing human rights abuses to a standard that repudiates such conduct irrespective of the victim’s state of mind.

The way in which certain forms of exploitation are defined has also helped to deflect discussions around consent by introducing an element of objectivity: specifically, servitude and forced labour are established through showing that “a reasonable person in the position of the victim would not consider himself or herself to be free”.

**Looking ahead:** There was a high level of agreement among practitioners of the value of a robust (but flexible) prosecution policy, and criminal offence provisions that embody an objective test and that promotes a move away from consideration of the victim’s subjective frame of mind. It is of course important to be mindful of the risk of paternalism by taking away individual capacity to exercise judgment and ignoring substantial differences in what people believe are ‘acceptable’ living and working conditions. However in a sense this also justifies the “consent is not a defence” approach: offenders should be held to an appropriate standard of behaviour that is relevant to Australia’s socio-economic context – the victim’s views on what is an appropriate standard should not be the yardstick against which to measure whether criminal exploitation has indeed occurred.

### **3.1.3 Indonesia**

**Summary:** Indonesia’s trafficking law generally defines trafficking in accordance with the Protocol’s three elements. The irrelevance of consent is affirmed with reference to a list of acts “with or without the consent of the victim”. The law also separately and explicitly affirms that a victim’s consent does not eliminate the right to prosecute. There is no relevant case law available. Practitioners agree that upholding the irrelevance of consent is critical to ensuring that exploitation is effectively identified and prosecuted and that victims are encouraged to come forward. However it was noted that in practice consent can become an obstacle to prosecution, especially when victims refuse to testify because they assert consent to the exploitative arrangement.

**Legal framework:** The centrepiece of Indonesia’s legislative framework around trafficking in persons is a 2007 law that prohibits all forms of trafficking in persons, generally defined in accordance with the Trafficking in Persons Protocol to include

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the three elements of act, means and purpose. The legal framework comprises a number of other laws and regulations, most importantly, the Penal Code (in relation to crimes against personal liberty and crimes against morals including a narrower definition of trafficking in persons) but the majority of prosecutions are brought under the specialized law. It was noted that cases of trafficking for labour exploitation may involve immigration, taxation and labour laws. The 2007 law contains two references to consent: the element of exploitation is defined with reference to a list of acts “with or without the consent of the victim”. In addition, Article 26 explicitly states that: “Consent [of victims of trafficking] shall not eliminate [the] right to prosecute the criminal act of human trafficking.” Thus, unlike the Protocol, the irrelevance of consent is not tied to the use of ‘means’ although ‘means’ remains an element of the definition. Interestingly, the preamble to the law, explicitly mentions that trafficking in persons violates values like human dignity and human rights.

**Case law:** Practitioners interviewed for this study did not point to particular case law on consent. While several cases in the UNODC Human Trafficking Case Law Database touched on the issue, none provide clarity or insight into key questions addressed in this study.<sup>89</sup> Practitioners were firm on the point that consent is considered irrelevant in practice and plays no role in establishing the offence or in sentencing.

#### ***Understanding and application of the concept of consent***

**Understanding of the legislative reference to consent:** Available guidance on the 2007 law does not provide any insight into the two references to consent. However government officials confirmed that the intention was to ensure criminal liability of exploiters even when the victim was willing to be exploited through trafficking because of financial or other pressures. In this view the victim’s state of mind should be irrelevant to the responsibility of perpetrators for their crimes.

**Importance of specific reference to consent:** Police practitioners interviewed for this study affirmed the practical importance of this provision, noting that many victims are highly vulnerable to economic pressures and thereby easily persuaded to ‘consent’ to exploitation. In their view, an explicit assertion of the irrelevance of consent helps both investigations and prosecutions by avoiding the need to show force and other “visible criminal acts”. In terms of practical results it was noted that the provision means that victims are never asked whether or not she or he agreed to the situation because doing so would detract from an understanding of exploitation. It was not explained how this approach worked in situations where objective evidence of ‘means’ or of exploitation was not readily available.

Practitioners saw the explicit irrelevance of consent – and the untying of this provision from the ‘means’ element – as a key strength of Indonesia’s legislative framework. Practitioners expressed the view that illegality of prostitution facilitated

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<sup>89</sup> Note however a reported successful prosecution for sexual exploitation in circumstances where it appeared the individuals concerned were consenting to the conditions of their employment and were not under any apparent coercion. 3.2.1. No 1230 K/PID SUS/2009.

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anti-trafficking efforts in Indonesia. The fact that a person is receiving or is promised payment for sexual services poses no barrier to prosecution for trafficking or to protection of assumed 'victims' as was speculated would be the case in jurisdictions where prostitution is legal. The role of criminal justice practitioners in the context of the irrelevance of consent was emphasised as being to uncover exploitation, including in situations where a person does not feel exploited. Even where a person considers that she is empowered by her situation, as a victim, that person should be treated as though she is exploited and have access to restitution, and those involved in her exploitation should be prosecuted.

**Irrelevance of consent in practice:** It was generally asserted that consent is not relevant to establishing the charges laid against the perpetrator but that it may still be relevant in practice to the provision of reintegration services and the availability of restitution. (In relation to the latter it appears that while assertions of consent do not prevent a victim from being identified as such, in practice such persons may avoid or decline offers of assistance). Practitioners were unanimously of the view that consent is irrelevant in sentencing and has no impact either in aggravating or mitigating sentences handed down. Rather, the emphasis is on harm, as reflected in the legal definition of a victim as "a person suffering from psychological, mental, physical, sexual, economic, and / or social trauma caused by the criminal act of trafficking in persons." The implication of this provision (not discussed during the interviews) is that a person who consents to his or her exploitation and suffers no trauma as a result may not be accorded the status of victim and indeed, that the absence of visible or documented harm could be a barrier to prosecution.

**Relationship with 'means':** The 2007 law does not link irrelevance of consent to the 'means' of trafficking: practitioners explained that while the three elements must be established (an act, a means and an exploitative purpose), the 'means' do not have to be shown to have vitiated consent. In this sense, consent and evidence of consent is therefore considered truly irrelevant: the elements need to be proven but it need not be explicitly shown that the 'means' were deployed to vitiate the consent of the victim. However, the lack of case law makes it difficult to establish how this principle operates in practice. For example, how does this approach impact on more subtle 'means' such as abuse of a position of vulnerability?

**Relationship with the end purposes (exploitation):** The irrelevance of consent is considered to be further strengthened by the explicit reference to the end purposes being "with or without the consent of the victim".

**Evidentiary and Prosecutorial Considerations:** An expert practitioner who participated in the expert group meeting stressed that the best way of tackling consent in court cases is for the prosecutor and court to know as much as possible about the circumstances under which consent was seemingly given and called this "digging behind consent" – in order to reveal the full constellation of circumstances-before, during and after the trafficking process.



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### 3.1.4 The Philippines

**Summary:** The anti-trafficking law of the Philippines closely tracks the definition of trafficking set out in the Protocol. The law contains several references to consent: the act element is established “with or without the victim’s consent or knowledge” and a 2013 amendment reproduces the Protocol’s assertion of irrelevance of consent when means are used. Further references to the irrelevance or inadmissibility of consent are attached to the Act’s provision on non-penalization of victims and to its evidentiary rules. The limited available case law on the topic of consent, indicates that consent will be rejected as a defence in trafficking for sexual exploitation – even where the apparent existence of consent may appear to call into question the use of ‘means’. Discussions with practitioners confirmed that the principle of the irrelevance of consent is sometimes rigidly adhered to – even where it is not at all apparent that any ‘means’ have been used. However it is also clear that consent continues to be relevant in practice: for example, prosecutions are difficult where there are strong indications of consent or the alleged victim does not identify as such.

**Legal Framework:** The legal framework around trafficking in persons and related offences in the Philippines is set out in several pieces of legislation, most significantly Republic Act 10364, expanding on Republic Act 9208. In February 2013 the Government enacted amendments to define additional acts as constituting trafficking in persons (including the act of ‘maintaining’ which is broadly construed and therefore widely used); to mandate special treatment for children and vulnerable persons;<sup>90</sup> to include provisions for the prosecution of attempted trafficking; to expand the extraterritorial reach of the instrument; to define allied offences which promote trafficking; and to affirm the irrelevance of consent.<sup>91</sup> The definition of trafficking in the Act is almost identical to that set out in the Protocol, with the exception that the phrase “with or without the victim’s consent or knowledge” is attached to the act element. A separate provision of the Act affirms the position of trafficked persons as victims and the principle of non-penalization for offences that may be committed by the victim in the course of being trafficked. It concludes: “[i]n this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant”. The 2013 amendments resulted in a new provision contained within evidentiary rules, which further affirms the irrelevance of consent, if means are established, and states that past sexual behaviour or the sexual predisposition of a trafficked person shall be considered inadmissible in evidence for the purpose of proving consent of the victim to engage in sexual behaviour. The effect of these different provisions is unclear. For example, what does it mean to tie the irrelevance of consent to the provision on victim status and non-penalization of victims for offences committed in the course of being

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<sup>90</sup> Section 3(b) of the Republic Act 10364 from 2012 which includes alongside children, a person who is over 18 years “but is unable to fully take care of or protect himself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.”

<sup>91</sup> United States of America, Department of State, *Trafficking in Persons Report: June 2013* (2012), Philippines (pp. 300–303).

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trafficked? What is the impact of linking consent to the ‘act’ element of trafficking and the intended exploitative purpose?

**Case law:** Despite a high number of reported prosecutions, available case law on the topic of consent is limited and concerns only trafficking for sexual exploitation. Consent has been rejected as a defence in a number of cases involving the ‘sale’ of sexual services by women and girls,<sup>92</sup> with courts explicitly upholding the irrelevance of consent and emphasising that the victims’ consent or knowledge is immaterial. Relevant jurisprudence appears to affirm that claims of victim consent neither exempt nor mitigate the offenders’ criminal liability and an accused person cannot capitalise on the fact that the victims were recruited freely and voluntarily.<sup>93</sup> This reasoning appears to explain the successful prosecution of a number of trafficking cases that may formerly have been prosecuted as pimping. It is unclear whether this same position on the irrelevance of victim consent or knowledge would be taken in relation to trafficking for forced or exploitative labour.

### ***Understanding and application of the concept of consent***

**Importance of consent and its link with victim empowerment:** Practitioners explained that the irrelevance of consent was directly tied to protection, as an important way of empowering victims to come forward. It was also explained that the provisions on consent were made necessary by general criminal law, which would normally require consideration of whether consent is void (there being no consent at all) or voidable (there is consent but it is vitiated).

**Relationship with means:** Practitioners asserted that even in the absence of force and fraud, trafficking could be established through taking advantage of a victim’s vulnerability, further reinforcing the irrelevance of consent. Practitioners did not otherwise address the relevance of consent to proving means – although some expressed the view that prosecutions would be easier to achieve if no means element was required. There is some indication, including from the cases cited above, that while means are included in the definition of the trafficking offence, at least in relation to sexual exploitation (the only cases available), there is no need to point to and prove any specific means in securing a prosecution for trafficking. Taking advantage of a position of vulnerability is often implied, by explaining the alleged victims’ need for money, though generally as an explanation of why the victim entered prostitution, rather than how the alleged trafficker took advantage of that vulnerability. Ultimately, the means element was not considered to be problematic or a barrier to achieving a conviction, ostensibly because it is not a key requirement in practice.

**Relationship with end purpose (exploitation):** The element of “exploitation” was identified as a difficult one for criminal justice practitioners. Many of the cases examined indicated a blurring of the distinction between trafficking for the purpose

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<sup>92</sup> See among others, *Crim. Case No. CBU-81474 (UN Ref PHL045)*, *Crim. Case No. R-LLP-08-2900-CR (UN Ref PHL039)*, *Case No. CR-HC No.04882 (UN Ref PHL033)*, *Crim. Case No. 111-286939 (UN Ref PHL034)*, *Crim. Case No. 132048 (UN Ref PHL021)* and *Crime Case No. 81474 (UN Ref PHL045)*.

<sup>93</sup> For example, *Crim Case No. 2009-37 (UN Case No PHL007)*.

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of sexual exploitation and other (typically much less serious) offences such as exploitation of the prostitution of others and pimping.<sup>94</sup> Practitioners confirmed that pimping cases are indeed often prosecuted under trafficking provisions, resulting in much higher sentences than would otherwise be available.

**On-going practical relevance of consent:** In practice, it is apparent that consent is not – and is not considered – completely irrelevant. This is particularly the case because of the heavy reliance on victim testimony in prosecutions. For example, practitioners noted that victims who travel overseas and are able to send money home to their families will rarely testify that they did not consent to the arrangement. Whoever alleges that the consent was vitiated has the burden of proof. The lack of willingness of victims to testify (particularly those who had consented to the work undertaken, even if they had not consented to the conditions of that work including the level of remuneration) was cited as significant problem that was exacerbated by the over-reliance on victim testimony.

**Looking ahead:** Practitioners were unanimously of the view that an explicit affirmation of the irrelevance of consent in the legislation was both important in principle and of great practical value to the criminal justice response. The irrelevance of consent was seen to be an expression of several core values: (i) that consent is situational, cultural and historical and may depend on the background of the person who is giving it; and (ii) that genuine consent can only be given by those who are free and in a position of equality with the other party.<sup>95</sup>

### **3.1.5 Serbia**

**Summary:** The relevant law generally defines trafficking in accordance with the Protocol's definition and includes an explicit assertion of the irrelevance of consent. Available case law is very limited. Practitioners supported the principle of the irrelevance of consent, but there was disagreement between police, prosecutors and victim support agencies as to the role that consent plays (or does not play) in practice. It was noted by the victim support agencies for example, that perception of consent was a significant barrier to official and self-identification. Questions of

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<sup>94</sup> For example, Case No. CR-HC NO. 04882 (UN Ref PHL033) and 5.2.6. Crime Case No. 81474 (UN Ref PHL045).

<sup>95</sup> Interestingly, this view accords with the "declaration of policy" in section 2 of the Act where it is stated that the State values the dignity of every human person and guarantees the respect of individual rights. In pursuit of this policy it is said that the state will prioritize programs that promote human dignity and protect the people from any threat of violence and exploitation.

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consent have been raised in cases where victims appear to have some freedom of action and movement. The more severe the means, the easier it is to reject any assertions of consent. In the view of practitioners, it is likely that consent would be much more of an issue in relation to labour exploitation as compared to trafficking for sexual exploitation.

**Legal framework:** Serbian legislation on trafficking is located within the Criminal Code, as amended in 2009. The law criminalizes a range of trafficking and trafficking-related offences, generally following the Protocol's three-part definition with a different list of 'acts, only partially overlapping that of the Protocol'<sup>96</sup>, a slightly different list of 'means'<sup>97</sup>, and an expanded list of purposes of exploitation.<sup>98</sup> The Code specifically provides that "[t]he consent to exploitation or to the establishment of slavery or slavery-like relation ... has no bearing on the existence of [relevant] criminal offences".

**Case law:** Available case law is limited. The study examined several cases from the UNODC Human Trafficking Case Law Database that appeared to confirm that apparent consent was not a valid defence or otherwise a barrier to prosecution where means (including abuse of a position of vulnerability) could be established. Most of the cases studied and discussed related to sexual exploitation. However one case involved trafficking for purposes of begging.

### ***Understanding and application of the concept of consent***

**Consent in practice – differing views:** All practitioners interviewed were in agreement that an explicit assertion of the irrelevance of consent in the law was highly beneficial. However there were differing opinions on the role of consent in practice, particularly between criminal justice officials and those working to support and assist victims. Police and prosecutors generally insisted on the practical irrelevance of consent in relation to identification, investigation and prosecution. One practitioner explained that from an investigative point of view, any consent given is cancelled out by the fact of exploitation. It was further noted that witness references to consent could even be removed from court records and instructions given to disregard such references. This 'ideal' practice was however acknowledged as being largely dependent on the presiding judge, meaning there are no guarantees that this will happen and no specific examples were provided. Prosecutors noted that even if the Penal Code did not make consent irrelevant, the general rules of criminal law would have the same effect. These laws do recognize that consent of the harmed party can nullify criminal liability, but only in relation

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<sup>96</sup> Including in addition- selling, buying, acting as an intermediary in sale, hiding or holding, but not including explicitly harbouring or receipt.

<sup>97</sup> Including "abuse of authority, trust, dependency relationship, difficult circumstances of another" instead of the Protocol's abuse of power or of a position of vulnerability, and also including "retaining identity papers, giving or accepting money or other benefit (instead of the Protocol's language of "giving or receiving of payments or benefits". Lacking are the 'means' of "other forms of coercion", "abduction", "fraud" (only "deception or maintaining deception" appears).

<sup>98</sup> Including in addition, labour, commission of offences, mendacity, pornography, service in armed conflicts.

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to certain less serious categories of crime. Given its seriousness and the status of the prohibition in international law, the consent of an individual to trafficking is irrelevant because of the societal value placed on protecting these values.

Those practitioners working with victims considered that consent was not wholly irrelevant in practice: noting that some victims do not identify as such because they feel they have consented to the situation, and that apparent consent could be a significant barrier to official identification. (Investigators affirmed that victims who have clearly not consented may be more readily identified as such in comparison with those who appear to have consented). Those working with victims further noted that the appearance of consent can result in trafficking cases being treated less seriously and even mediated as pimping offences. Some judges do allow evidence concerning consent, although this does not necessarily translate into consent being considered in the judgment or sentencing. Those working with victims felt that the lack of proactive investigation (partly the result of trafficking not falling within the specialized court system) contributed to heavy reliance on victim testimony and the inevitable examination of consent issues.

**Relationship with means:** Criminal justice officials explained that in practice, evidence of one or more means used (a broader list than set out in the Trafficking in Persons Protocol, including, for example, abuse of trust, relationship of dependency or difficult circumstances of another) serves to vitiate consent without further inquiry. A victim is more likely to maintain that she or he continued to consent where the more 'subtle' means have been used. In relation to sentencing, the more severe the means used, the higher the sentence is likely to be. Therefore, the link between consent and sentencing is incidental, depending on the means used to render the consent irrelevant with force or violence being considered particularly harsh ones.

Discussions affirmed that consent was indeed relevant when considering whether particular means had been used. Subjective and objective considerations would be brought by the prosecutor to show that any consent was vitiated; for consent to be valid it must pertain to every element of the situation including the conditions of work (in sexual contexts for instance, including number of clients, freedom of movement, money received for services). There have been cases where the court will, for instance, consider that a person's freedom of movement is evidence of willingness; it is then up to the prosecutor to show that other means are relevant. In one case mentioned, the defendant had allegedly threatened to inform the victim's parents that she was a prostitute in order to make her continue prostituting herself, although she wanted to stop doing so. In the first instance, the defendant was given a sentence of three years, which was subsequently reduced to one year on appeal. One prosecutor interviewed interpreted this outcome as being that in the first instance, the court was unsure, as to whether the crime was one of trafficking or pimping and imposed a "high-range pimping" sentence as a compromise, while the appeal court's reduction of the sentence implies that it considered the case to be one of pimping.

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**Relevance of exploitative purpose:** When prompted to discuss non-sexual forms of exploitation, practitioners were emphatic that labour exploitation is not as high a priority in Serbia, given that the threshold to establish it would capture many people employed in Serbia. Practitioners expressed the view that in comparison to trafficking for sexual exploitation, consent would indeed be relevant in such cases – or at least that more severe exploitation would be required to convince courts that a situation is potentially one of trafficking. It was also noted that establishing means capable of vitiating consent would be more difficult for labour exploitation. Subtle means such as abuse of a position or vulnerability or even deception were speculated as being inadequate to explain consent, whereas more overt means such as force and violence could strengthen a case. The general point was made that in the non-sexual context, ‘exploitation’ was a value-laden term that would naturally need to be considered differently depending on the national context.

On the issue **of trafficking for exploitation in criminal activities** one case was cited. While the facts in this instance were unclear, it appears that the Court affirmed the victim’s status, but decided that the means that made his victimhood possible were not sufficient to absolve him from criminal responsibility. Practitioners noted that these cases would inevitably present obstacles. For example, victims could realistically only be identified in the course of a criminal investigation of them as offenders, at which point it would be difficult to change course. Prosecutors stressed that there is no criminal liability for acts that are done under the influence of power or threats or force in the general criminal law, but that there is no threshold determined as to when that influence is significant enough to absolve a person from responsibility for the crimes he or she commits. The seriousness of the offence in question was considered to be relevant, potentially increasing the burden on the individual to show he or she had not genuinely consented. Some practitioners raised concerns that criminals could abuse the general criminal law principle of duress (there being no specific non-criminalisation provision applicable to victims of trafficking) to escape responsibility for their actions.

**Evidentiary issues:** All practitioners noted that many victims do not identify as such. Men are particularly unwilling to acknowledge that they have been duped and are victims of a serious crime. An insistence by victims on the consent to a particular work arrangement inevitably hampers prosecution of exploiters because it can make the ‘means’ element very difficult to establish. It may also impact on sentencing.

Further inconsistencies between the legislated irrelevance of consent and its application in practice are revealed in relation to the use of expert witnesses. Interviewees noted that expert psychiatric witnesses may be unaware of the use of subtler means to nullify a victim’s consent and confirm misconceptions about trafficking requiring the use of physical force or a victim’s inability to physically leave a place. In the absence of physical evidence that consent was not present or was clearly vitiated, a psychiatrist’s testimony that a victim was of sound mind when she gave her consent can be fatal to a prosecution.

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**Looking ahead:** Several practitioners expressed the view that in the prosecution process, the focus must shift away from the victim and towards the intentions and actions of the alleged offender: It is the perpetrator's actions and state of mind that are relevant to establishing criminal liability; the victim's actions and state of mind should be irrelevant. All practitioners asserted the importance of explicit reference to the irrelevance of consent in domestic legislation. Beyond this, some practitioners issued the caution that any general guidance may not be useful in individual cases except in relation to sentencing.

### **3.1.6 Spain**

**Summary:** The Spanish criminal code criminalizes trafficking in line with the Protocol's definition and includes its provision on the irrelevance of consent. Other trafficking related crimes include slavery and coerced prostitution. Practitioners were supportive of the explicit reference to consent in the legislation although some felt it was unnecessary, as the principle was well understood and did not cause problems for criminal justice practitioners. However, the limited available case law meant that the application of the non-relevance of the consent clause by Spanish Courts could not be verified. Opinions on the relationship between consent and means and consent and exploitation varied. However it does appear that consent is indeed relevant to differentiating between non-exploitative prostitution, and sexual exploitation in prostitution (which can be both trafficking and coerced prostitution). For labour exploitation consent is always irrelevant as labour exploitation is equated with slavery.

**Legal framework:** Spain prohibits all forms of human trafficking through amendments to its criminal code, which entered into force in December 2010. Trafficking is defined generally in accordance with the Protocol's three-part definition including its clause on consent: "[t]he consent of a victim of human trafficking shall be irrelevant when any of the [stated] means ... has been resorted to". (The listed means include all those set out in the Protocol with the exception of abduction and "giving or receiving of payments or benefits to achieve the consent of a person having control over another person"). The Penal Code does not prohibit nor regulate prostitution, but sanctions whoever "makes a profit from the prostitution of another person, even with the latter's consent." Despite the wording of the law, practitioners point to the fact that profiting from prostitution is *de facto* legal in Spain owing to Supreme Court case law on this issue. The Supreme Court has taken the view that profiting from prostitution is not legally acceptable where four conditions are met. Firstly, the person engaged in prostitution is forced, secondly, the one who profits is not the person who is prostituted and this person is aware of the coercive situation the person is in, thirdly, the profit is not an isolated profit, and fourthly, the profit is taken directly from the person prostituted. Where these requirements are *not* fulfilled, profiting from prostitution would not be considered illegal. In distinguishing between trafficking in persons for sexual exploitation and the crime of coerced prostitution, the trafficking offence is considered completed at an early stage, such that exploitation need not take place.

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Where exploitation has taken place so that the victim has, for instance, been forced into prostitution or into labour, human trafficking as well as the specific exploitation are punishable.

**Case law:** Available case law is limited to four cases from the UNODC Human Trafficking Case Law Database, all of which concern trafficking for purposes of sexual exploitation, but do not specifically address the issue of consent.<sup>99</sup> Practitioners confirmed that a number of additional cases are currently under investigation but indicated that these could not be shared.

### ***Understanding and application of the concept of consent***

**Understanding of the purpose of the provision on irrelevance of consent:** Practitioners explained that in Spanish criminal law there is no general criminal law principle addressing consent and the issue would be treated differently depending on the crime type: consent can make an act that would otherwise be an offence, not an offence and it can also be irrelevant to the crime. The specific references to consent in legislation around trafficking were generally thought to be superfluous, given that the use of means makes consent irrelevant in any case. However it was noted that the reference is useful to ensure that the more subtle means are not overlooked. Practitioners were unanimous in their view that consent should always be irrelevant. Several criticized the wording of the Protocol as potentially implying that consent *is* relevant in some cases: in their view it may have been more useful to affirm the irrelevance of consent as a logical result of the definition itself.

In a report issued by the public prosecutor's office, the Spanish law's position on consent in the context of trafficking is explained as follows: "consent of the victim becomes irrelevant when it is shown that it was obtained by unlawful means."<sup>100</sup> In the same report the EU Directive's provision on consent is explained in a way that implies consent will be considered valid unless it is obtained by unlawful means.<sup>101</sup> The report also identifies, as a barrier to protection (but not to prosecution): "[t]he mistaken assumption that trafficking victims may have consented to their exploitation, especially when they are engaged in sex work and other activities that meet with the general disapproval of society."<sup>102</sup> From the examples given it appears that situations in which women are working as prostitutes in apparently consensual arrangements with no evidence of illicit means and no apparent 'exploitation', could nevertheless still be prosecuted as trafficking cases, as well as profiting from prostitution.

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<sup>99</sup> It is relevant to note however that consent was raised in one case involving irregular migrants who had travelled to Spain to work in prostitution. The case resulted in convictions under the offence (since repealed) of migrant smuggling for purposes of sexual exploitation. *Jose and Florencia*, Case 196/2011 of TS Sala 2» de lo Penal March 23, 2011.

<sup>100</sup> *Human Trafficking in Spain: Invisible Victims* (Defensor del Pueblo, 2012), p. 10.

<sup>101</sup> "Regarding the validity of potential consent to perform such work or service, the Directive states that each case should be evaluated, except for cases of minors in which consent cannot be considered valid." *Ibid*, p. 35.

<sup>102</sup> *Human Trafficking in Spain: Invisible Victims* (Defensor del Pueblo, 2012), p. 118.



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**Relationship with means:** Means were explained by practitioners as being essential to the understanding of trafficking and how consent is rendered irrelevant throughout the process of trafficking. Evidence of the more overt means (e.g. use of force or violence) would generally be sufficient to make consent a non-issue. However, in relation to abuse of a position of vulnerability, it is more challenging to show that the means were used in a way that vitiated the consent: that a person actually has no real or acceptable alternative other than to submit. An explicit statement on the irrelevance of consent is therefore important in such cases, particularly given low levels of understanding around how victims' vulnerability can be abused in order to secure their apparent consent.

Practitioners noted that the means are particularly significant in differentiating between the crime of profiting from prostitution and the crime of trafficking for the purpose of sexual exploitation. However it is unclear how this distinction operates in practice, particularly given that consent is explicitly made irrelevant in relation to both offences.

**Relationship with exploitation:** In discussions around exploitation, practitioners noted that the type of exploitation has significant bearing on the irrelevance of consent. The example of women migrating to Spain to engage in prostitution was given. A person can meaningfully consent to work as a prostitute, but cannot consent to certain exploitative conditions. In relation to labour exploitation the situation is slightly different. Spanish law equates labour exploitation with slavery, which cannot be consented to, making any consent given *ipso facto* irrelevant. Proposed legislative reforms seek to address this distinction so that consent will be made irrelevant in both labour and sexual contexts. While slavery is not defined in the Criminal Code, its article 312-2 punishes persons who employ migrants without permission to work in situations that undermine rights recognised by statutory provisions, collective agreements or individual contracts. The Spanish Supreme Court considers that this article protects rights of workers including those paid to provide services. Practitioners report that several judgments have established that offences against labour rights should be considered in prostitution-related cases, although prostitution is not formally regulated as a form of labour. The reasoning behind including situations in which persons work in activities that are not regular as well as those that are, is to ensure that protections reach persons in situations of particular vulnerability.

**Status offences and exploitation in criminal activities:** The law includes a general non-penalization clause that requires a direct link between the means and the offence as well as "adequate proportionality between that situation and the criminal act perpetrated." The Prosecution Service has affirmed that the provision could potentially apply beyond pure status offences (e.g. unlawful entry, unlawful work) to cases where the victim was exploited to commit certain offences (such as pickpocketing, shoplifting or drug trafficking) and where victims contribute to the victimisation of other persons at the request of traffickers (for instance involvement in recruitment). The issue of consent of the victim was not raised or discussed in case law. Practitioners asserted that even in cases that may not be considered

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trafficking (such as movement of persons into exploitative employment for purposes of drug cultivation) the principle of non-punishment may still be applied.

**Evidentiary and prosecutorial considerations:** Practitioners stressed that a victim's insistence in testimony that he or she consented to his or her exploitation poses no legal or practical barrier to achieving a conviction. Other evidence (e.g. corroboration through use of special investigative techniques) is brought, as well as expert witness testimonies from specialised police and non-governmental organisation workers and psychologists who can contextualise victim testimonies. Consent was further considered irrelevant to sentencing, although it was noted that the use of certain means could comprise aggravating circumstances.

### **3.1.7 Thailand**

**Summary:** The Thai trafficking law generally follows the Protocol's definition although the reference to the irrelevance of consent is linked not to the means but to the 'purpose' element through the definition of exploitation. Case law was not made available. Practitioners evidenced a nuanced understanding of how consent is manipulated in trafficking cases and were in agreement that the explicit reference to its irrelevance was an important guide for investigators, prosecutors and the Courts.

**Legal framework:** Thailand's law on trafficking was adopted in 2008, amending previous legislation on the subject. Section 6(1) of the *Anti-Trafficking in Persons Act* adopts the three-element definition of trafficking set out in the Protocol, including all the listed means except for abuse of a position of vulnerability and expanding slightly the forms of exploitation for which one may be trafficked (to include, for example, production or distribution of pornographic materials or causing another to be a beggar). The law does not state that consent of the victims is to be irrelevant when any of the listed means are used. Rather, reference to consent is tied to the element of exploitation. The definition of exploitation sets out a list of exploitative purposes and concludes with the phrase "*regardless of such person's consent*".

**Case law:** While practitioners interviewed for the study cited a number of cases, no judgments or related documents were provided. However, twelve trafficking cases had been analysed and put in the UNODC format and were published in the UNODC Human Trafficking Case Law Database.

#### ***Understanding and application of the concept of consent***

**Understanding of how 'consent' operates in practice:** Practitioners interviewed for the study confirmed that many victims of trafficking in Thailand are in situations where they are induced to tolerate the traffickers' cruel treatment such as threat, use of physical force, or fraud. Many victims do in fact 'consent' to exploitation in the sense that they agree to engage in work that is either inherently exploitative (such as prostitution or very lowly paid employment) or work that quickly becomes exploitative (such as labour in the fishing industry). Often the initial consent relates to the nature of the work but victims are deceived as to conditions so the consent is

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no longer valid. An illustrative example concerns a victim who agrees to engage in prostitution in a brothel disguised as a karaoke bar on the condition that she may select her own 'customers', but the agreement is breached and the victim is forced to receive many 'customers' per day against her will. In such a case, the initial consent would not be an impediment to prosecution.

**Judicial treatment of the consent defence:** In a number of cases brought to court, attempts to raise the issue of the victim's apparent consent as a defence have been unsuccessful and perpetrators have been convicted. Practitioners used these case examples to affirm that in practice, as well as in law, consent of the victims to some part of the trafficking act is not a bar to prosecution: that traffickers will be charged and prosecuted even if victims consented, provided the means used led to the exploitation of the victims. Whether the principle would operate the same way in cases of intended exploitation was unclear – although practitioners noted that cases of trafficking typically only come to light once exploitation has actually occurred. Practitioners emphasised the critical importance of focusing on the facts of exploitation, rather than the victim's consent.

**Practitioners' Approaches:** In general discussions around the role of consent, practitioners noted that apparent 'consent' is inevitably the result of victims' desperation and their vulnerability. In the context of exploitation it is never genuine and should not be permitted to become part of the discussion around a perpetrators' criminal responsibility. In that regard it is essential to acknowledge the unequal bargaining power that inevitably exists between traffickers and victims.

**Looking ahead:** Those interviewed were generally supportive of the Protocol's explicit affirmation of the irrelevance of consent and of Thailand's adoption of that principle. In their view this has the effect of preventing offenders from using apparent consent as an excuse to escape from justice. Practitioners did not see a significant difference between Thailand's approach of tying consent to the exploitative purpose and that of the Protocol where consent is tied to means. Practitioners stressed the importance of focusing on the perpetrator's conduct rather than that of the victim.

### 3.2 States that do not have explicit reference to consent in their definition of trafficking

Five States of the 12 surveyed (Belarus, Israel, Norway, the United Kingdom of Great Britain and Northern Ireland and the United States of America) do not refer to consent in their legislated definition of trafficking. Three of those States are considered below and two, that have specific case law on consent, are considered in the following sub-section.

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### 3.2.1 Belarus

**Summary:** The definition of trafficking in Belarus requires only the two elements of 'act' and 'purpose'<sup>103</sup> with 'means' being considered aggravating circumstances. However a Note explaining the term of "exploitation" appears to indicate that means would be required to establish "a situation whereby the person is not able to refuse". The law contains no explicit reference to consent. Limited case law appears to indicate that apparent consent is no bar to prosecution at least in relation to cases of alleged sexual exploitation. Practitioners noted that the victim's consent may be relevant to determining whether a particular situation was indeed one of trafficking or whether it suited an alternative charge. They also affirmed that 'means' were indeed considered and the existence of only subtle means may make prosecutions difficult.

**Legal framework:** The legal framework around trafficking in Belarus comprises a 2001 criminal code provision, a 2005 legislative amendment and several presidential decrees. The definition of trafficking set out in the criminal code contains only two elements: an act that is "committed for exploitation purposes". Exploitation is not defined but is explained in an accompanying Note to the Code as meaning illegal coercion of a person to work or provide certain services in a situation whereby the person is not able to refuse. There is no 'means' element to the definition, although commission of the offence through certain means (generally corresponding to those set out in the Protocol) attract a harsher penalty. Certain forms of exploitation (including sexual exploitation and removal of organs or tissues) are also identified as aggravated offences carrying a relatively harsher penalty. The law contains no explicit reference to consent.

**Case law:** Several cases drawn from the UNODC Human Trafficking Case Law Database were examined. While none was directly relevant to consent, they provided some indication that consent to prostitution is not a bar to prosecution of trafficking for purposes of sexual exploitation. Prosecutors also cited a number of cases in which convictions were achieved despite the victim's apparent consent, because it could be proven that the trafficker vitiated the consent, rendering it meaningless. Additional detail was not provided on these cases.

#### ***Understanding and application of the concept of consent***

**Practitioner understanding:** While Belarusian legislation is silent on consent, practitioners interviewed insisted that judges and prosecutors understand and apply the principle of irrelevance as set out in the Protocol. Accordingly, the lack of a specific provision on consent was not seen to be a weakness.

**On-going practical relevance of consent:** While strongly affirming the irrelevance of consent, practitioners noted that the victim's consent may still be relevant to determining whether a particular situation was indeed one of trafficking or whether it suited an alternative charge. For example, in relation to sexual exploitation, the

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<sup>103</sup> The Belarus 'acts' include, beyond those enumerated in the Protocol in addition "the buying/selling of a person or other transaction committed against a person". While a purpose of exploitation appears, no examples are enumerated.

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consent of a victim may result in a charge of ‘involvement in prostitution activities’ rather than trafficking.

**Relationship with means and acts:** As noted above, ‘means’ are not required elements of the offence but rather considered aggravating circumstances giving rise to higher penalties. Practitioners asserted that consent is indeed irrelevant where any of the means have been used. However, they explained that consent considerations may arise in situations where subtle means have been used. Further, sentencing may differ depending on the type and extent of means used in the commission of trafficking. In this regard practitioners emphasised that the focus of the criminal law is rightly on the actions of the criminal, not the state of mind or otherwise of the victim. This being the case, where the criminal ‘act’ consists in buying and selling a person, there is no question that this is a situation of trafficking. However, where this is not what transpires, other considerations are entered into and consent may indeed play a secondary role.

**Relationship with exploitation:** Practitioners affirmed that their understanding of exploitation corresponded to the note in the legislation: the lack of ability to refuse. Trafficking is therefore established where there is an act perpetrated for an exploitative purpose that has the result of preventing the victim from refusing. It was considered that there is no difference in approaching consent in labour trafficking cases and sexual exploitation trafficking cases. However practitioners did express the view that in many cases of labour exploitation the persons involved “go voluntarily” into such situations, making prosecutions more difficult. It was noted that the line between labour exploitation and mere breaches of civil employment regulations can sometimes be blurred. The acts of ‘buying’ and ‘selling’ can be particularly important in establishing that a particular case is indeed one of trafficking for labour exploitation. In summary, the discussion on this point identified a relatively greater challenge in putting aside consent in labour trafficking cases and indicated that a relatively higher level of exploitation – or more aggressive means – would be required to show that consent had indeed been vitiated in such cases.

**Evidentiary and prosecutorial considerations:** Practitioners reaffirmed their position that initial consent or consent at some point could not be construed to infer consent to the fact of exploitation. It was noted that legislation allows a range of evidence to be brought to show that a victim’s consent was not truly given or was vitiated and that the accused person had some role or knowledge of this. Where witness testimonies insist upon consent, or change during the course of a hearing to assert consent (owing, according to practitioners, to threats by traffickers) the result can be that the court requalifies a charge from trafficking to exploitation of prostitution if the case is one of sexual exploitation.

One practitioner noted that consent should not be relevant to the identification process as many victims refuse to self-identify for reasons explained by their situation.

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### 3.2.2 The United Kingdom of Great Britain and Northern Ireland

**Summary:** The law of the United Kingdom around trafficking is complex, being set out in a number of different pieces of legislation. Trafficking related offences generally replicate the Protocol's three-element structure but contain no reference to consent except in relation to young and vulnerable people. Available case law appears to indicate that consent can be disregarded when means are established but this is generally done through a consideration of the broad circumstances of the case. Official Home Office Guidance supports this approach. A series of recent cases have dealt with the narrower question of how consent plays out in relation to situations where trafficked persons are recruited into criminal activities. Practitioners were generally supportive of the principle of the irrelevance of consent when means are used in cases of trafficking as well as cases of criminal exploitation through trafficking where the victim's culpability is at issue. They noted that consent nevertheless continues to be relevant throughout the criminal justice process: from decisions about which cases to prioritise to jury views on the credibility and 'worth' of victim witnesses.

**Legal framework:** United Kingdom legislation around trafficking is currently under review with an anti-slavery bill presently before Parliament. The existing legislative framework is complex and contains no specific definition of 'trafficking in persons'.<sup>104</sup> Trafficking and related offences are addressed through various Acts, the key ones of which are the Sexual Offence Act 2003 which is used to prosecute trafficking to, within and from the United Kingdom or another country for the purposes of sexual exploitation (as amended by the 2012 Protection of Freedom Act), and the Asylum and Immigration Act 2004 (as amended under the same 2012 Act) which criminalizes trafficking for all other forms of exploitation.<sup>105</sup> Also relevant are the Coroners and Justice Act 2009 (Article 71, Slavery, servitude and forced or compulsory labour)<sup>106</sup>; the Nationality, Immigration and Asylum Act 2002; and the Gangmasters Licensing Act 2004 as well as Scottish legislation criminalizing slavery, servitude and forced or compulsory labour.

Exploitation is defined with reference to slavery and forced labour as well as organ transplant. Importantly, the concept of exploitation also includes:

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<sup>104</sup> However, the crime is described by the Crown Prosecution Service in terms very similar to the Trafficking in Persons Protocol definition, as follows: "Trafficking involves the transportation of persons in the United Kingdom in order to exploit them by the use of force, violence, deception, intimidation or coercion. The form of exploitation includes commercial sexual and bonded labour exploitation. The persons who are trafficked have little choice in what happens to them and usually suffer abuse due to the threats and use of violence against them and/or their family." Crown Prosecution Service, [www.cps.gov.uk/legal/h\\_to\\_k/human\\_trafficking\\_and\\_smuggling/#a19](http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a19).

<sup>105</sup> Note that the 2012 *Protection of Freedoms Act* amends trafficking in persons legislation to bring consistency to the wording of the *Sex Offences Act 2003* and the *Asylum and Immigration (Treatment and Claimants) Act 2004* and to extend jurisdiction in both.

<sup>106</sup> The 2011 US Trafficking in Persons Report notes that section 71 of the 2009 *Coroners and Justice Act* has not yet been used to prosecute trafficking in persons. United States of America, Department of State, *Trafficking in Persons Report: June 2011* (2010), p. 370.

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- Subjecting a person to force, threats or deception designed to induce him (i) to provide services of any kind; (ii) to provide another person with benefits of any kind, or (iii) to enable another person to acquire benefits of any kind,<sup>107</sup> or
  - Requesting or inducing a person to undertake any activity, having been chosen as the subject of the request or inducement on the grounds that (i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person; (ii) and a person without the illness, disability, youth or family relationship would be likely to refuse the request or resist the inducement.<sup>108</sup>

These provisions have the effect of introducing a means element into the concept of exploitation and thereby trafficking (force, threats, deception, abuse of vulnerability on the grounds of age, mental or physical illness, disability or family relationship). They also appear to expand the concept of “exploitation” to include “services or benefits of any kind” and “any activity” provided it relates to one of the means immediately noted above.

Sections 57, 58 and 59 of the Sexual Offences Act 2003, which came into force on 1st May 2004, were repealed and amended by the 2012 Protection of Freedoms Act which inserted section 59A criminalises trafficking into, trafficking within, and trafficking out of the United Kingdom or another country for sexual exploitation. Relevant offences are defined under Part 1 of the Sexual Offences Act 2003 and section 1(1)(a) of the Protection of Children Act 1978 and cover a range of crimes including rape, sexual assault, child sex offences, abuse of children through prostitution or pornography, etc.

Legislation makes no reference to consent. Considerable case law was made available to the study and discussed by practitioners during interviews. Much of that material dealt only with the narrow question of how consent plays out in relation to situations where trafficked persons are recruited into criminal activities. At the time of signing the Trafficking in Persons Protocol, the United Kingdom reserved the right to make an interpretative statement regarding article 3(b) regarding consent. That right has not yet been exercised.

**Case law:** The major relevant points of available case law can be summarised as follows:

- The apparently consensual return of workers to a situation of exploitation “does not constitute evidence that the conditions to which the workers were subjected were acceptable but, in the circumstances of the present case, is evidence of further exploitation by the offenders of personal circumstances of which they knew they could take advantage.”<sup>109</sup>
- The fact that victims chose to stay in a situation of exploitation or, after leaving, chose to return, could be a mitigating factor in sentencing.<sup>110</sup>

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<sup>107</sup> *Asylum and Immigration (Treatment of Claimants) Act 2004*, Section 4(4)c.

<sup>108</sup> *Ibid*, Section 4(4)d.

<sup>109</sup> *R v Khan, Khan and Khan* [2010] EWCA Crim 2880, para. 18.

<sup>110</sup> *R v Connors* [2013] EWCA Crim 324 (14 February 2013).

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- Apparent consent to engage in prostitution, along with evidence that the individual concerned received remuneration, may prevent a prosecution for trafficking.<sup>111</sup>
  - It is indeed possible for a person or child to consent to exploitation that does not reach a particular threshold (e.g. forced labour).<sup>112</sup>
  - Questions around consent arise in relation to prosecution of victims of trafficking for involvement in criminal activities. Courts have sometimes (but not uniformly) acknowledged that apparent consent will be rendered irrelevant through the means by which the trafficking was made possible (force, fraud, coercion, abuse of vulnerability).<sup>113</sup>

### ***Understanding and application of the concept of consent***

**Practitioner understanding:** Practitioners unanimously stressed the importance of the irrelevance of consent, noting that while this is not made explicit in the legislation of the United Kingdom (except with respect to young and vulnerable people) it is nevertheless clear through Home Office guidance for Its National Referral Mechanism on establishing whether a person is a victim of trafficking. Certain court decisions have also been helpful in this regard, for example identifying the return to a situation of exploitation as evidence of vulnerability rather than as raising questions of consent.

**Practical relevance of consent:** Despite some judicial support, there remains a discrepancy between the ‘theory’ of the irrelevance of consent and the situation in practice. Practitioners noted that some element of ‘consent’ was present in most cases and that, in principle, this should not present an obstacle to prosecution. However cases involving clear consent may not succeed because of evidential reasons and / or jury perceptions around “undeserving victims” and may not be brought for that reason. Consent may also play a role in determining which cases are prioritised for prosecution. All practitioners were able to point to cases in which consent has been at issue. In some cases this was due to a lack of understanding about the law, in other cases discussions around consent reflected real concerns about the criminal responsibility of the defendant. Juries were in particular reported to find the apparent consent of the victim relevant to their deliberations. It is also likely to be a significant factor raised in cross-examination of victims by those representing defendants.

It was further noted that consent can also be an issue in the identification process: that persons who agreed to come to the United Kingdom for work are not being

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<sup>111</sup> See for example *R v Besmir Ramaj and Hasan Atesogullari [2006] EWCA Crim 448*; *R v Makai (Atilla) [2008] 1 Cr.App.R.(S.) 73*.

<sup>112</sup> *R v N and R v LE [2012] EWCA Crim 189* (20 February 2012), now pending before the European Court of Human Rights to be cited as *A.N. v the United Kingdom*, Application No 74603/12.

<sup>113</sup> See for example a series of cases examining the criminal liability of Vietnamese minors and young adults involved in the production of cannabis, asserted or confirmed to be victims of trafficking, *R v L [2013] EWCA Crim 991* (21/06/2013); *R v N and R v LE [2012] EWCA Crim 189* (20 February 2012); *R v HTB [2012] EWCA Crim 211* (24 January 2012); and *Vinh van Dao, Hoang Mai and Muoi Thi Nguyen v R [2012] EWCA Crim 1717* (31 July 2012).



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identified as victims, despite evidence of deception, coercion and abuse.<sup>114</sup>

**Relationship between consent and means:** The link between consent and means is complicated by the structure of the legislation. It was generally agreed, however, that being able to establish particular means such as coercion or abuse makes, it easier to show how consent was nullified. It was also agreed that ‘means’ are especially important for judges to use in explaining to the jury how a person was drawn into exploitation and how apparent consent may not be genuine, particularly in cases where less extreme ‘means’, such as abuse of a position of vulnerability, are involved.

**Relevance of end-purpose (exploitation):** The type of exploitation was considered to be relevant to consent considerations: evidence of apparent consent may be entertained more readily in labour trafficking cases than sex trafficking cases. The perceived seriousness of the exploitation is also a factor here: labour trafficking cases that do not involve the most severe exploitation, particularly those where there is an indication of some ‘consent’ will be more difficult to present to a jury. There is also the question of the threshold of the offence of forced labour. Many victims in such cases do not consider themselves exploited and indeed their situation may well have improved. There is sometimes pressure on authorities to prosecute certain cases as trafficking, though they may be more appropriately dealt with under labour or other laws: consent may be relevant to distinguishing between situations of poor conditions of employment in the free market (consent present), and situations in which a person is a victim of labour exploitation (consent absent, vitiated or impaired). Similarly, consent may be relevant to distinguishing between forced marriage (where consent is not given, or the means of ‘force’ is used to achieve consent) and “arranged marriage” (where the individuals involved did indeed appear to consent in the absence of force).

**Exploitation in criminal activities and non-criminalization:** The limits of the principle of irrelevance of consent become apparent in relation to a series of cases examining whether victims of trafficking should be prosecuted or penalized for their (apparently consensual) involvement<sup>115</sup> in criminal activities. The key question in recent cases appears to be, whether the facts show that the victim “was under levels of compulsion, which mean that, in reality, culpability was extinguished” and whether the criminal act was “integral to or consequent on the exploitation” of which he/she was the victim.<sup>116</sup>

**Evidentiary and prosecutorial considerations:** The following points, (not all of which are consistent with each other), were made:

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<sup>114</sup> “Report Concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, First Evaluation Round” Strasbourg, 12 September 2012, GRETA(2012)6, p. 52 [223]. Available at: [www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA\\_2012\\_6\\_FGR\\_GBR\\_en.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2012_6_FGR_GBR_en.pdf).

<sup>115</sup> It should be noted that in one of the cases explored in *R. v. L* [2013] EWCA Crim. 991 (21/06/2013) [33], notably that of *HVN*, neighbors testified that the boy was removed from the premises with his hands bound, which seems to point to lack of voluntariness.

<sup>116</sup> *R v L and Others* [2013] EWCA Crim 991 (21/06/2013) [33]. See also Victims of Human Trafficking, Competent Authority Guidance, v. 1.0 Home Office 24 October 2013.

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- There is a presumption that a person in circumstances of exploitation could not have consented: it is only if that presumption is rebutted that a prosecution should fail.
  - Although consent is irrelevant, it must be *shown* to be irrelevant, typically with reference to means such as coercion or debt bondage but perhaps also with reference to the nature and type of exploitation.
  - While indications of consent in victim testimony should not be an issue, problems may arise in jury trials. It may be useful to try and avoid raising the issue of consent at all, rather focusing on the means by which exploitation was made possible.
  - While it is generally accepted that consent is irrelevant in cases of trafficking, practically, it is often a problem which must be met head on by presenting the fullest picture of the victim's circumstances in order to promote understanding of the circumstances which led to apparent consent.
  - Subtle 'means' present particular challenges to the principle by which consent is irrelevant, but in view of the trend by which they have become "the business model of traffickers", prosecutors should not refrain from bringing cases with such 'means'.
  - The approach taken to consent in relation to other offences may provide guidance. For example, the offence of "controlling prostitution for gain" does not require consideration of consent.
  - Consent is relevant in proving the means required to vitiate that consent: for example, evidence of consent to a particular act or situation would make it difficult to establish force or coercion in relation to that apparently consensual situation.
  - In sentencing, guidelines on cases of trafficking for sexual exploitation, the extent to which a person was coerced, is highly relevant. The relevance of consent in sentencing has also been borne out in jurisprudence; a conviction for trafficking for purposes of sexual exploitation was upheld, but the sentence was reduced on the basis that while the victims were exploited, they were not forced, deceived or coerced.<sup>117</sup>

### **3.2.3 The United States of America**

**Summary:** The law of the United States generally follows the structure of the Trafficking in Persons Protocol, but contains no explicit reference to consent. A review of legislation, relevant case law and discussions with practitioners appears to confirm that the state of mind of the victim (i.e. whether the victim believed that he or she had consented or expressed satisfaction with the arrangements) is not at issue. Instead, the focus is on the intent of, and the means used by, the accused. However as explained below, consent is addressed indirectly through the means element of the relevant offences, which establish that the victim was indeed "compelled to serve". Discussions with practitioners and others indicated that while

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<sup>117</sup> Referring to *Fernandez and Zammit* [2007] 2 Cr.App. R. (S.) 85.

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consent is considered irrelevant in law, considerations of consent may nevertheless arise in connection to investigation and prosecution decisions as well as during the trial process. Clear evidence that a victim consented to his or her exploitation may present an obstacle to successful prosecution and such cases may not be pursued for that reason, particularly if the exploitation is at the less severe end of the scale.

**Legal Framework:** The 2000 Trafficking Victims Protection Act (TVPA) is the major legislative instrument on trafficking in persons in the United States. While there are some distinctions between the definition of trafficking set out in the TVPA and that contained in the Protocol, the former adopts the Protocol's three-element approach: requiring an "action" (recruiting, harbouring, transporting, maintaining, providing, or obtaining) through a 'means' (force, fraud, or coercion) for a specified "purpose" (forced labour, sex trafficking, involuntary servitude or peonage). In the case of sex trafficking of children, it is not required to prove the 'means' if it can be proved that the trafficker knew of the child's age or recklessly disregarded evidence of the child's age. In the case of trafficking for the purpose of forced labour, the statute is silent as to the age of a victim and the 'means' need to be proved whether the victim is an adult or a minor. The legislation contains no reference to consent.

**Case law:** Substantial case law was made available to the study and this generally confirmed that assertions of victim consent will not be relevant or will be rejected as a defence to a prosecution for trafficking where the means of force, fraud or coercion are established. In this regard, it should be noted that case law affirms a broad understanding of coercion to include means, that would fall under the Protocol's conception of "abuse of a position of vulnerability". Court rulings have also affirmed that the sexual past of the victim is irrelevant.

**Parental consent / minors:** "When parents explicitly renounce their parental relationship – by selling a child into slavery or abandoning [her] to involuntary servitude – parental consent cannot provide a subsequent defence for the third party."<sup>118</sup> Jurisprudence is clear on the point that consent is irrelevant in relation to the exploitation of children including through trafficking.<sup>119</sup>

**Consent and means:** Under the law of the United States the means element is **interpreted** in terms of its intended impact from the perspective of a reasonable person in a position similar to the victim. For instance, the term "coercion" is defined to include "any scheme...intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person..." (18 USC 1591 (2)(B)) or, as the Department of Justice has further explained: "*whether the defendants' conduct would intimidate and coerce a reasonable person in the victim's situation to believe he or she must remain in the defendants' service*".

Similarly, "serious harm" is defined as, "any harm...that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same

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<sup>118</sup> *United States v. King*, 840 F.2d 1276, 1283 (6th Cir.1988).

<sup>119</sup> *United States v. Abad*, 350 F.3d 793, 797 (8th Cir.2003) (" '[W]hen sexual assaults are committed upon children ..., consent is not a defense.' " (quoting *Guarro v. United States*, 237 F.2d 578, 581 (D.C.Cir.1956))).

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background and in the same circumstances [as the victim] to perform...[the] activity in order to avoid incurring that harm.” The 'means' element is thereby tied to consent but in a way that, according to practitioners, avoids the trap of mechanically linking them by putting the spotlight on the trafficker’s actions and intent rather than on a specific victim’s state of mind. At the same time this approach provides an important measure of flexibility: allowing the parties and the court to take into consideration a variety of factors on a case by case basis to better determine whether a trafficking crime has in fact occurred.

The United States understanding of the concept of coercion is also relevant to the issue of consent because it allows courts to consider a wide range of vulnerability factors in understanding, for example,, why victims “felt compelled to work or to serve – and why they did not leave a situation of exploitation.”<sup>120</sup> Relevant considerations identified by courts include victims’ background, experience, education, socioeconomic status, and inequalities vis-à-vis the defendants<sup>121</sup> as well as age, status as an illegal alien, physical and mental condition and lack of contact with anyone other than the defendant.<sup>122</sup>

In cases of trafficking for sexual exploitation, courts have held that evidence of prior prostitution is irrelevant as to whether victims consented to work as prostitutes and that even if victims *had* consented at some point, the fact of trafficking was established by the appellants’ use of force, fraud or coercion (or threats thereof) to harbour or maintain the victims for the purpose of compelling them to engage in commercial sex.<sup>123</sup>

**Practical / evidentiary constraints:** As in other country studies, there are disagreements among practitioners regarding the place of consent in wielding prosecutorial discretion and in handling cases before juries. Some practitioners noted that consent could be relevant when establishing the intent of the accused to exploit. They were also emphatic on the point that, when a victim does not testify that his or her free will was overcome by the actions of the trafficker, securing a conviction may be difficult, if not impossible. Under the law of the United States, for example, even though a victim’s consent is not directly in issue, the victim’s testimony as to how he or she reacted to the actions of the accused is nevertheless highly relevant to establish the trafficker’s intent to coerce. And in any event, without strong and persuasive evidence from the victim, it is unlikely that the prosecution will be able to persuade effectively a jury to convict. By way of example (shared anecdotally), in a case involving the exploitation of several people

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<sup>120</sup> See for example *United States v. Djoumessi*, 538 F.3d 547, 552 (6th Cir. 2008).

<sup>121</sup> *Kozminski*, 487 U.S. at 948 (interpreting 18 U.S.C. § 1584).

<sup>122</sup> *United States v. Djoumessi*, 538 F.3d 547, 552 (6th Cir. 2008) (applying 18 U.S.C. § 1584); Bradley, 390 F.3d at 152–53. Also Veerapol, 312 F.3d 1128, 1132 (9th Cir. 2002) (discussing the vulnerability sentencing enhancement under 18 U.S.C. § 1584); H.R. Rep. No. 106-939, at 101 (2000) (Conf. Rep.) (“[S]ection 1589’s terms and provisions are to be construed with respect to the individual circumstances of victims that are relevant in determining whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain the victim’s labour or services, including the age and background of the victims”).

<sup>123</sup> *United States v. Cephus*, 684 F.3d 703 (7th Cir.2012).

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in forced labour in the United States, the defence called witnesses to testify that they had seen the victims working for a number of years, seemingly willingly. The prosecution successfully responded by cross-examining those witnesses on their knowledge of the beatings and rapes the victims had been subjected to, thereby introducing the use of means to defeat the seeming consent given by the victims.

One practitioner, who participated in the expert group meeting, maintained that all trafficking cases are difficult, at least partially, due to issues related to consent, but that this should not deter prosecutors from pursuing them. Examples given of endemic weaknesses were: victims who believe they consented often do not self-identify or cooperate with law enforcement, which can mean the case is never uncovered. Even if it is, the victim may be deemed non-credible because he did not come forth immediately; victims' testimony is usually weak or even tainted; implicit consent often impacts negatively on victim credibility; victims' consent to illegal activities like illegal entry may be understood as consent to the trafficking; stereotypes among practitioners may play a central role in cases where victims assert they consented, with the potential of leading to false negatives of the first responder police officer, and influencing other police, prosecutors, judges and juries. Given that most trafficking cases include such evidentiary challenges, this practitioner expressed an opinion, that, while in most criminal cases, prosecutors must work to uncover the weaknesses in the case, in cases of trafficking, they must work to "uncover the case from amid the weaknesses".

This practitioner pointed out a pattern, whereby traffickers often choose subtle means, because they require less effort, leading to the conclusion, that this alone, should not deter prosecutors from pursuing a case.

### 3.3 States that have no legislative reference but explicit case law on the role of consent

Of the five States surveyed with no reference to consent in their definition of trafficking, two have specific and significant case law on consent (Israel and Norway).

#### **3.3.1 Israel**

**Summary:** Israeli law criminalizes trafficking and a range of related offences including slavery and forced labour. Certain key offences do not require the 'means' element. The law makes no explicit reference to consent. However the Israeli Supreme Court has affirmed the irrelevance of consent in relation to trafficking for prostitution and lower courts have subsequently affirmed the irrelevance of consent in two convictions on slavery. Practitioners affirmed the importance of upholding the irrelevance of consent while noting that consent remains a strong "undercurrent". They explained that, even where means were not formally required, establishing trafficking crimes usually requires consideration of a

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“constellation of circumstances”, which will often demonstrate that the victim’s consent was impaired. Cases where overt means were not used, involving victims without readily apparent vulnerabilities, and where consent is asserted or shown, will be harder to prosecute.

**Legal framework:** The legal framework around trafficking in Israel recognizes five separate crimes: trafficking in persons (section 377A(a) of the Criminal Law); holding a person under conditions of slavery (section 375A of the Criminal Law); forced labour (section 376 of the Criminal Law); abduction for purposes of trafficking in persons (section 374A of the Criminal Law); and causing a person to leave a State for purposes of prostitution or slavery (section 376B of the Criminal Law). Exploitation [undefined] of vulnerable populations is also a criminal offence (section 431 of the Criminal Law). There are important differences between the definition of trafficking set out in the Trafficking in Persons Protocol and how the various trafficking-related crimes are defined in Israeli law. Most significantly, while the crime of “abduction for the purposes of trafficking” follows the Protocol’s three-element structure, the crimes of “trafficking” and “slavery” require only that the ‘act’ and ‘purpose’ elements be established. In addition, the sections on trafficking and slavery do not use the term “exploitation” but rather enumerate various purposes such as sexual crimes, slavery and forced labour. Finally the *actus reus* of trafficking is very different to that which appears in the Protocol; it is “a transaction in a human being”. There is no explicit reference to consent in the law.

**Case law:** The Israeli Supreme Court has ruled that the victim’s consent is irrelevant to establishing the crime of trafficking for prostitution.<sup>124</sup> The Court affirmed that the law does not require the prosecution to establish the victim’s lack of consent. It further justified its position with reference to “fundamental values”.<sup>125</sup> It is generally assumed that the ruling would apply *mutatis mutandis* to other

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<sup>124</sup> Criminal Appeal 10545/04 *State of Israel v. Felix Aldenko* – consent addressed in context of trafficking for prostitution; Criminal Appeal 5863/10 *Angelique Sabag Gatier v. State of Israel* – consent addressed in context of trafficking for prostitution; Criminal Appeal 3204/03 *State of Israel v. Yaish Ben David* – case with no violence or overt threats in which the Supreme Court ruled on a more severe sentence (8 years of incarceration) than was imposed by the District Court (5 years of incarceration) because the crime of trafficking violates the fundamental rights of a human being in that it denies a person’s freedom and violates his dignity; Criminal Case (Haifa) 290/01 *State of Israel v. Fisher* – addresses consent in trafficking for prostitution; Misc. Criminal Request 291/01 *Reuben Reviei v. State of Israel* – addresses consent in context of trafficking for prostitution in a request for bail; Misc. Criminal Request 7502/01 *Shlomo Shmuelov v. State of Israel* – addresses consent in context of trafficking for prostitution in an appeal over decision of district court to detain defendant until conclusion of criminal proceedings; Misc. Criminal Request 9190/02 *Yaish Ben David v. State of Israel* – addresses consent in context of trafficking for prostitution in an appeal over decision of district court to detain defendant until conclusion of criminal proceedings; Misc. Criminal Request 11367/03 *Vitali Morskovitz v. State of Israel* – Denial of appeal over detention until the conclusion of the criminal proceedings even though the alleged crime of trafficking for prostitution was not accompanied by violence or coercion and even if as claimed the victims wished the transactions which were performed; Serious Felony 910/02 *State of Israel v. Dushkar and Borisov* (Beer-Sheva District Court).

<sup>125</sup> The Court held that since trafficking violates fundamental values of freedom and autonomy, a woman’s consent to be trafficked for prostitution cannot be accepted by a society that is based on human rights See *Gatier* *ibid*.

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trafficking-related offences. Additional case law (in lower courts) has affirmed that consent is not relevant to the crime of holding a person under conditions of slavery.<sup>126</sup>

### ***Understanding and application of the concept of consent***

**Relationship with means:** Practitioners characterised consent as irrelevant to those crimes that are defined without a means (including trafficking in persons); and as “a lynchpin” in relation to those trafficking-related crimes that do indeed require means. In relation to the latter group of offences (forced labour and abduction for the purpose of trafficking), the import of the legislation is that any apparent consent of the victim is impaired through the use of means. It was, nevertheless, observed that even when not formally required as an element of the offence (including trafficking in persons), ‘means’ will often still be important as a subtext, both in court and in the use of prosecutorial discretion such that if there are no means present, conviction will be more difficult and prosecutors may hesitate to submit indictments. In that regard however, it is important to note that the courts have recognized various ‘subtler’ forms of coercion and pressure that can be described as “abuse of a position of vulnerability”, which has operated to expand the range of situations that will fall within the ambit of trafficking-related offences.

**Trafficking offences require a “constellation of circumstances”:** Practitioners repeatedly referred to what they conceived of as the “constellation of circumstances” that must be taken into account in determining whether the offence has been made out: “one circumstance is not enough to be considered trafficking”. For example, even if the level of remuneration was adequate, a person, whose freedom of movement and communication is highly restricted and who is vulnerable because of their migration status, might still be considered as a victim of trafficking or a related crime. A different decision might be reached in respect of a person without apparent vulnerabilities who was working under reasonable conditions for some compensation, without restrictions on movements or communications and with freedom to leave the premises or situation.

**Relationship with end-purpose:** All practitioners agreed that the more severe the end purpose, the less relevant any assertion of consent. It was noted that *severity* is the issue here: not the type of exploitation – although one practitioner did assert that consent would be less relevant in relation to trafficking for sexual exploitation.

**Continuing relevance of consent and the issue of competing values:** Practitioners generally affirmed that, while consent is not relevant legally, it may work on the court, at a psychological level, so that when the victim consents, the court will probably find more difficulty in convicting. The known evidentiary hurdles in such cases can result in greater use of plea-bargaining, or alleged offenders may be prosecuted for the lesser offence of “exploitation of a vulnerable population”.

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<sup>126</sup> Criminal Case 13646-11-10 *State of Israel v. Giuliani* (District Court of Jerusalem) – addresses consent in the crime of holding a person under conditions of slavery. **Note** that this case did not include physical means of control. Criminal Cases 6749-08-11 and 6774-08-11 *State of Israel v. D.A. and A.M* – addresses consent in crime of holding a person under conditions of slavery. This case involved extreme physical violence and humiliation.

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Practitioners expressed the view that the language of the trafficking law reflects the underlying value of freedom and autonomy. The undercurrent of the relevance of consent may reflect certain values as well, such as the recognition of an individual's right to personal autonomy. However, those values must be reconciled with others, such as human dignity, which are protected through making consent truly irrelevant.

**Looking ahead:** Practitioners were divided on whether the lack of express reference to the irrelevance of consent in the law is problematic. They noted that, as consent, understandably remains an undercurrent in the criminal justice response to trafficking, training to raise awareness of how victims are manipulated would be important remove it from the equation. Central to practitioners' understanding of the place of consent is the discourse regarding the fundamental values of society; given that trafficking violates fundamental values of freedom and autonomy, consent to it should be irrelevant.

### **3.3.2 Norway**

**Summary:** The legal framework around trafficking in Norway is silent on consent. However courts and legislators have explicitly affirmed the irrelevance of consent in respect of trafficking. National criminal justice agencies have further confirmed that consent is "without significance" in relation to a child or where means including coercion, fraud and abuse of vulnerability have been used,<sup>127</sup> However practitioners indicated that there are challenges in setting aside the relevance of consent in practice.

**Legal framework:** Norway prohibits all forms of trafficking in persons through Section 224 of its Criminal Code. The Section contains all three elements of the international legal definition of trafficking but they are split into two paragraphs of Section 224. The first paragraph identifies as "human trafficking" a two part offence involving both means and purpose – but no act such as recruitment or harbouring. The second paragraph criminalizes the actions of those who "make arrangements for" or who "aid and abet" the conduct of human trafficking. The requirement of means is waived in relation to minors. Gross violence or coercion as well as offences against minors are aggravated offences. The legislation makes no reference to consent. It is relevant to note that that pimping and buying sex are illegal in Norway and these provisions may also be used to prosecute trafficking cases.

**Case law:** In 2006 the Supreme Court upheld a lower court ruling in relation to a case of trafficking for sexual exploitation, stating that any consent to prostitution is irrelevant if there is evidence that such consent was procured through the means set out in the relevant provision of the Criminal Code. The Court justified this finding on the basis of both the preparatory works of the Criminal Code and Article 4(b) of the European Trafficking Convention. It also referred to the Trafficking in

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<sup>127</sup> *Guide To – Identification of Possible Victims of Trafficking* (KOM, 2008), p. 5. Available at: [www.politi.no/vedlegg/rapport/Vedlegg\\_41.pdf](http://www.politi.no/vedlegg/rapport/Vedlegg_41.pdf).



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Persons Protocol, noting that instrument's affirmation of the irrelevance of consent.<sup>128</sup> The Court's reasoning is further explained in the following extract:

In this case that we have heard the term voluntary prostitution being mentioned, the law however does not operate with such a term. In the daily language it could be used where it is not a case of violence or threats or similar situations but in the law it is wrong to use the term if there is misuse of vulnerable situation or improper conduct. A legislator has decided that a woman may not continue to be in a voluntary situation when someone by use of these means exploits her. The important factor in the situation of misuse of vulnerability is that a person exploits a situation [and] here a woman does not have an acceptable choice other than in this case to involve herself in prostitution. The alternative choices in such a situation where [a] woman [is] offered to prostitute herself in reality would be limited. It is this right to make free choices that is primarily protected so it is not required that the woman is persuaded or pressured or manipulated it is sufficient that the prostitution is a consequence of her vulnerable situation and that the participation in the prostitution [is not possible to] explain without the vulnerable situation. (Unofficial translation)

The issue of consent was further considered by the courts in 2008 in the context of a case of trafficking for forced labour involving abuse of vulnerability as well as physical coercion, threats and deception.<sup>129</sup> Evidence of victim consent to travel and work was brought forward as a defence. In rejecting this defence the Court affirmed the means of abuse of a position of vulnerability and explained that if a person is actually exploited, it ought not to make a difference how he or she arrived in that situation. If exploitation can be established then there can be no real consent to the acts to which they have been subjected; "that is, in such a situation consent is irrelevant to an evaluation of culpability."<sup>130</sup> In relation to the victims' agreement to certain aspects of the arrangement, the Court stated:

These consents must, however, be regarded as irrelevant if the situation continued as an abuse of a vulnerable situation. Merely the conditions of work that the accused has admitted mean that there exists an 'exploitation', and key topics in any evaluation of whether this occurred in abuse of a vulnerable situation or not will be what their life situation was prior to the exploitation, and the situation in which they were exploited.<sup>131</sup>

The Court did not doubt that the victims voluntarily agreed to the working conditions, meaning that the question before it was *whether they were free to voluntarily leave it*, which they could not. The vulnerability of the victims and their employment relationship with the accused was such that they could not be considered to be capable of quitting it voluntarily.

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<sup>128</sup> Rt-2006-111, *Frostating Appeals Court, endorsed by Supreme Court decision HR-2006-222-A*.

<sup>129</sup> *Public Prosecution Authority v Daniel Dundon*, Jaeren District Court Case No. 08-069332MED-JARE, 4 July 2008.

<sup>130</sup> *Ibid*, p. 10.

<sup>131</sup> *Id*.

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A 2013 case involved migrant au pairs who were brought to Norway on the basis of a series of email exchanges which clarified, in the end, that sexual services would be expected.<sup>132</sup> One victim stated that though she knew the trafficker expected sexual services, she hoped it would not happen. While she was reluctant at first, the trafficker reminded her that she had agreed, at which point she acceded. The traffickers did not employ violence or imprisonment. At most there was a subtle threat whereby people in the Philippines would find out if the victim did not consent. The victim was also told that if she did not agree, she would need to pay her own return ticket to the Philippines. The same situation repeated itself with the second victim who arrived 6 months later. However, she reneged on her initial consent and sought assistance. Prosecutors stated that they were initially hesitant to bring this case, having concerns about the implications of the initial consent. However it was eventually determined that the alleged victims' position of vulnerability operated to nullify that consent and the case was brought and successfully prosecuted on this basis. In the District Court trial, four days were devoted to analysis of the correspondence between the perpetrator and the victims, with issues of consent being central to this inquiry. Emphasis was ultimately placed on the fact that consent to one stage of a process does not imply consent to other stages; consent can always be withdrawn, as it was in this case. In the Appeals Court, it was ruled that there could be no consent given the abuse of the victims' position of vulnerability.

In at least one other case the Courts have affirmed the vitiation of consent on the basis of abuse of a position of vulnerability, rejecting as irrelevant the fact that the victims had voluntarily returned to their situation of exploitation.<sup>133</sup> However it is relevant to note that this case involved minors in relation to whom consideration of means (including abuse of a position of vulnerability) should not have been relevant under Norwegian law. The case involved exploitation for criminal activity and that may have had some bearing on the Court's approach, but this was not clarified.

### ***Understanding and application of the concept of consent***

Norwegian authorities have linked the issue of consent to both exploitation and means, clearly stating that: "the focus of trafficking is on exploitation, which implies lack of consent."<sup>134</sup> If exploitation by use of force, or threat or misuse of a person's vulnerability is proven, it follows that the victim has not given his or her consent. The early (2006) judicial affirmation of the irrelevance of consent has helped to entrench the legal and policy position on this issue. Practitioners were unanimous

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<sup>132</sup> *LB-2012-63028 (Au pair case) Appeal Court, decision made 2 Feb. 2013.*

<sup>133</sup> See HR-201 3-104-A – Rt-201 3-39 (note that while this case concerned minors, the court included an examination of means used in its consideration of the question of whether trafficking had been established).

<sup>134</sup> "Report Concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Norway, First Evaluation Round" Strasbourg, 7 May 2013, GRETA(2013)5, p. 17 [44]. Available at: [www.coe.int/t/dghl/monitoring/trafficking/docs/Reports/GRETA\\_2013\\_5\\_FGR\\_NOR\\_with\\_cmnts\\_en.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/docs/Reports/GRETA_2013_5_FGR_NOR_with_cmnts_en.pdf).

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that consent is irrelevant where means have been used to procure and / or sustain that consent.

Practitioners did not agree on whether the lack of any specific legislative reference to consent was problematic. However some noted that an explicit statement on the point could assist law enforcement in the identification of victims, some of whom may not be identified because of an assumption that they have consented to the situation. Most practitioners agreed that the victim's feelings about his or her own victimisation should not have a bearing on the culpability of the exploiter.

**Relationship with means:** Practitioners referred to the legislative history of the relevant provision in pointing out the link between means and consent in that the means act to damage consent. They were of the view that the range of means in the legislation was sufficiently wide to capture the myriad ways in which consent can be rendered irrelevant. It was noted that consent will not usually arise as an issue where direct means such as threats, force and violence have been used. The use of such means will usually be sufficient to show that the consent does not exist or, if given previously, that it has been withdrawn. However, consent does become an issue where the 'means' in question is abuse of a position of vulnerability (and sometimes also deception), principally due to the difficulty in establishing where the threshold lies.

**Relationship with type / severity of end-purpose (exploitation):** Some (but not all) practitioners expressed the view that the type of exploitation is highly relevant to determining whether consent has been vitiated or was otherwise irrelevant. For example, the damage caused by sexual exploitation means that: (i) consent in such cases will be assumed to have been more readily vitiated; and (ii) the level of vulnerability required to be established will be relatively lower. This appears to reflect a general view that prostitution is inherently exploitative, while labour is something that people can and do consent to, meaning that prosecutors would likely have to work harder to explain the means used to vitiate the consent given, and the conditions of exploitation would have to be more severe. The fact that such cases need to reach the threshold of 'forced labour' (and not just 'exploitative labour') presents a consent-related obstacle to using the trafficking law to address the exploitation of migrant workers.

**Evidentiary and prosecutorial considerations:** Practitioners noted the evidentiary difficulties associated with trafficking cases and the continuing reliance on victim testimony. Despite its irrelevance at law, if victim testimony indicates consent at some point (and indeed if the victim does not identify as such), this can weaken the case, particularly for jury trials. Certainly defence lawyers will raise these issues, forcing prosecutors to explain irrelevance by proving means.

**Looking ahead:** Practitioners disagreed on whether the irrelevance of consent should be explicitly stated in the law or not. Some were of the view that consent is anyway excluded by the use of means, so explicit reference is unnecessary. Others pointed to the time taken (and wasted) in dealing with and rejecting consent issues: more explicit guidance in the law might improve efficiency. It might also support investigators in identifying trafficking cases and send a strong policy message about

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the focus of the criminal justice response. One practitioner noted that explicit international guidance on consent, while useful to all States, would be especially valuable in States where practitioners do not have explicit legislative or judicial guidance on the issue.

At the fifth session of the Working Group on Trafficking, the representative of Norway expressed the view that, in relation to consent, “it is unacceptable to have to go to the heart and mind of the victim in order to know how to proceed”. The representative considered the language in the Protocol to be a compromise: in the view of Norway, national legislation must address consent in greater detail. In addition, practitioners need to have an understanding of the prosecutorial difficulties that may arise when allegations of consent are made. The main recommendation of the Working Group should be for Member States to clarify the issue in their national legislation.

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## 4 National Law and Practice: Key Findings

A central finding of this study is that there is widespread agreement on core values around consent and specific agreement that it should, in principle, be irrelevant. However, in practice the varied approaches informed by different priorities and practical realities shows that States Parties are grappling with how to reflect these core values in law. The present Part captures the major findings of the survey, as supplemented by the expert group meeting under six substantive headings.

### 4.1 High acceptance of the principle of the irrelevance of consent

The *principle* that consent is always irrelevant in cases of child trafficking and is irrelevant when ‘means’ are used in cases of adult trafficking is widely though not universally accepted, but reflected in varying ways.

#### 4.1.1 *The principle in law*

The survey confirmed that all States either explicitly or implicitly accept the principle that the consent of a child to any part of the trafficking process or outcome will always be irrelevant. With regard to trafficking in adults the survey confirmed that the principle of the irrelevance of consent when ‘means’ are used is widely accepted. Most States surveyed have incorporated the principle directly into their law. In States where the law is silent on the issue of consent, there is usually jurisprudential affirmation of its irrelevance in trafficking cases and / or evidence of solid practitioner understanding of and support for the principle.

Among those surveyed that have incorporated specific reference to the irrelevance of consent, some States have adopted the language of the Trafficking in Persons Protocol (consent is irrelevant where means are established). Others have affirmed the irrelevance of consent but not tied this to a ‘means’ element (Argentina, Indonesia and Thailand). A number of States have expressed the principle differently to the Protocol: for example, that consent may not be a defence to any conduct that would otherwise constitute an offence (Australia, Tonga); that it has no bearing on the existence of any relevant criminal offence (Serbia); that it does not absolve the perpetrator from liability (Argentina, Mexico); or that it does not prevent the State from prosecuting (Indonesia). Information was only available on one State that has defined ‘consent’ for the specific purpose of trafficking in persons offences.<sup>135</sup>

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<sup>135</sup> Kenya’s 2012 anti-trafficking law defines consent as “the person agrees by choice, and has the freedom and capacity to make that choice”. It should be noted that the legislation explicitly makes consent irrelevant once means are established.

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Among those States that have not made specific legislative reference to consent there are often other forms of guidance that capture this concept in one way or another. Practitioners from several States in this group pointed out that under general rules of criminal law, consent would anyway be legally invalidated when obtained through obstructive agents such as force and coercion and further, that consent was automatically a non-issue in relation to certain forms of exploitation (such as forced labour). Courts in some States without explicit legislative provision on consent have explicitly affirmed its irrelevance (Israel, Norway, Switzerland). In other States, guidance has been provided to courts and criminal justice agencies that apparent consent is to be disregarded in particular circumstances (Japan<sup>136</sup> and, the United Kingdom).

#### **4.1.2 Attitudes to the principle: Underlying values around consent**

All practitioners interviewed expressed broad support for the idea that perpetrators of trafficking should not be allowed to escape justice by pointing to apparent consent on the part of victims. Most practitioners expressed the view that it is the intention and actions of the perpetrator that should be the focus of attention during the investigation, prosecutorial and adjudication stages), not the intention and actions of the victim. This position was considered to be in keeping with basic ideas about justice and responsibility for wrongful acts.

Particularly in discussions around complex cases (e.g. cases in which victims continue to assert consent), a significant number of practitioners raised the notion of *values*: that consent should not be permitted to trump fundamental human and social values such as dignity and freedom and protection of the most vulnerable within society. In addressing the value of protecting vulnerable populations, some experts maintained that underlying consent to exploitation, there is often vastly unequal bargaining power or acute vulnerability and that the interest of protecting vulnerable populations is at the core of the discourse on consent. The issue of values associated with the irrelevance of consent was raised most often in connection with trafficking for sexual exploitation, sometimes with the sub-text that prostitution does not accommodate meaningful consent and any consent asserted (by a ‘victim’ or ‘perpetrator’) should be disregarded on that basis. However the survey confirmed that the issue of consent is much more complex and nuanced than discussions around the specific question of whether individuals can consent to

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<sup>136</sup> Japan’s *Notification regarding the enforcement of the Partial Revision of the Penal Code* (1 July 2005) provides direction to prosecutors on implementation of the Code’s provisions on trafficking in persons. It directly addresses the issue of consent. The Notification states that in trafficking cases, apparent consent may not be “made on the basis of free and serious will” and it is therefore not to be presumed that the existence of a crime should be “naturally denied” in the face of such apparent consent. The Notification uses the example of a victim who is brought to Japan after consenting to work in prostitution: “it is required to disclose whether the consent was not her real intention, and whether [in view of] the situation the victim has been put under, the control was illicit as it was beyond her consent”.

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prostitution. For example, in relation to trafficking for labour exploitation, there was widespread agreement among persons interviewed that society should not endorse (by legitimising apparent consent) exploitative labour conditions for persons who are made vulnerable through lack of economic alternatives: such endorsement would fail to uphold basic principles of human dignity and non-discrimination. However it did not follow for all practitioners that such exploitation should always be characterised as trafficking. In fact several noted that rigid and implacable acceptance of the irrelevance of consent was unrealistic and unworkable in competitive and difficult labour markets.

It is one thing to assert that consent should never trump fundamental values but quite another to secure agreement on what those values are and how they should be understood and applied. As is the case in general criminal law (see discussion at 2.1 above), values can be invoked to support very different positions on the issue of trafficking, given the subjective way in which even universally accepted values are understood and applied. A number of practitioners expressed concern that the values of individual autonomy and freedom of choice are at risk when consent is completely disregarded. They cited examples of women working in prostitution or people accepting sub-standard jobs because they needed the money and were making a rational choice to accept such work / hardship as one step on the path to a better life. Holding the consent of such persons irrelevant therefore risks rejecting the possibility that these individuals were exercising agency, potentially undermining the core values of autonomy and freedom that are cherished and upheld in other situations and for other people. In this sense, the undifferentiated attribution of 'vulnerability' to a group such as women or migrants can take power away from those who may be seeking to use that power to improve their circumstances.

Many practitioners expressed, as an important 'value', the idea that it is (or should be) impossible to consent to one's own exploitation. However when presented with examples of exploitation that appeared to have been validly consented to (for example, where no 'means' are apparent) most modified their view to the effect that consent to *severe* exploitation or consent to exploitation that was not meaningful (because of fraud, coercion, etc.) should be impossible. The evident confusion on this point is no doubt exacerbated by the lack of a clear definition of exploitation or any guidance on what threshold of severity, if any, is required.

#### 4.2 Irrespective of the approach taken in law, consent is often highly relevant in practice

A major finding of the survey and the expert group meeting is that, irrespective of how (and whether) the irrelevance of consent is framed in legislation, the issue is often highly relevant in practice, with criminal justice practitioners experiencing difficulty internalizing a rule that in some senses appears to be counter-intuitive, especially since, in other crimes, consent can be the element which distinguishes between an action which is criminal and one which is not (e.g. rape). Questions

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around consent may not arise in the ‘severe’ and ‘straightforward’ trafficking cases, usually because the circumstances of those cases make perfectly obvious that consent was never present in the first place. For example, questions about consent will rarely be asked of victims who are found locked in a brothel or a factory in terrible physical conditions. In less straightforward cases, consent sometimes becomes a way of working out whether trafficking has occurred or whether another offence – or indeed no offence at all – has been committed.

Indeed, consent appears to be an important factor at every stage in the criminal justice response to trafficking:

- Victim identification (for instance, where victims are not identified as such on the basis that they appear to have consented or that they refuse to self-identify);
- Decisions about which cases to investigate (where apparent consent is a factor in deciding not to investigate or deprioritising a particular investigation relative to one in which alleged victims clearly have not consented);
- Decisions about which charges to lay (where apparent consent may alter a charge from trafficking to a different offence);
- Decisions about which cases to refer for prosecution (where apparent consent may be a factor in deciding not to refer cases);
- Decisions about which cases should be prosecuted (where apparent consent may be a factor in deciding not to take a case forward on the basis of an assessment of the likelihood of successful prosecution);
- Prosecution and adjudication of trafficking cases (where apparent consent presents an obstacle to successful conviction); and
- Sentencing of offenders (where indications of apparent consent may result in lesser penalties).

The following is a list of the most relevant observations drawn from practitioner interviews and review of materials including cases:

**In the case of child trafficking, assertions of consent are more quickly rejected as irrelevant, but consent can still be an issue:** Even in relation to children, consent has not proved in practice to be entirely irrelevant. A number of examples were provided from different States of consent being raised as a defence in cases of trafficking involving child victims. In most instances that defence was rejected outright. However in several cases the courts concerned did entertain discussions around consent and relied on the establishment of ‘means’ (abuse of vulnerability) to demonstrate that consent had been vitiated or was otherwise irrelevant. Interestingly, one practitioner made the point that some adult victims may be more vulnerable than children, and for example, those with a mental disability. It was also noted that while there is a distinction in law, there is not necessarily any substantive difference between a 17 and 11 month old and an 18 year old.

**Criminal justice focus and reliance on victim testimony enhances the relevance of consent:** The prevalent focus on victim testimony as a key form of evidence means that the actions, experiences and views of the victims will often be front and centre



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of investigations and prosecutions. Victims often play a critical role in the criminal prosecution of traffickers and their accomplices. In fact, investigations and prosecutions are usually difficult and sometimes impossible without the cooperation and testimony of victims. This contributes to placing victims and their views on what happened and how they perceived the situation at the centre of the investigatory and prosecutorial processes. Heavy reliance on victim testimony increases this focus, further reinforcing the relevance of consent. That can be particularly relevant when persons who have been identified as victims of trafficking do not consider themselves as victims. Sometimes that will be the result of some emotional or psychological tie to the exploiter. Sometimes it will be the result of cultural, socioeconomic, religious, or other psychological factors. Sometimes victims have genuinely experienced an improvement in their condition in life and do not feel they have lost control or been exploited. Criminal justice officials can harbour preconceptions about foreigners or members of particular minorities, as well as stereotyped views on how a victim 'should' behave. They may also fail to understand the complexities – and common contradictions – of victim testimonies. These factors can all impact on how issues of consent are considered at the investigative and prosecutorial stages.

In the face of these challenges, practitioners share the view that trials should ideally focus on the perpetrator's conduct, rather than on the victim's state of mind.

**Courts and juries will often consider consent:** Even if legally irrelevant, courts will often entertain discussions around consent such that indications of consent can impact on how the victim is perceived and how his or her actions or situation are interpreted. While experiences vary among States, it appears that indications or assertions of consent may operate to prejudice a court (both judge and jury) against an alleged victim. However, the impact of apparent consent will depend on how the issue is handled. Where issues around victim vulnerability are presented, explained and understood (by informed prosecutors, through expert testimony etc.), apparent or asserted consent appears to be less relevant and less likely to present an obstacle to prosecution. Conversely, failure to explain how subtle means can be used by exploiters to manipulate consent will often operate to make apparent consent much more of an issue for the court. For instance, the victim's consent to elements of the process (e.g., their consent to enter a country irregularly or use fraudulent documents in doing so, or to undertake certain types of work) may be misunderstood as signifying their consent to the exploitation or to being trafficked. Practitioners from within systems that provide for juries in criminal trials affirmed that juries are particularly interested in the issue of consent and may not "care enough to convict" if there is evidence that alleged victims were in some kind of voluntary arrangement from which they derived a benefit. While few common law States were surveyed, there is some indication that the relatively greater subjectivity of approach allowed through the use of precedent and jury trials may influence considerations of consent.

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**Apparent or asserted consent can make cases difficult to prosecute and make prosecutors reluctant to submit indictments:** Practitioners from a number of States acknowledged that cases in which victims appeared to consent to a particular situation were more difficult to advance through the system and to prosecute successfully. The situation is made worse when it is the victim himself or herself who continues to maintain consent. The point at which consent appears to have been given also seems to be relevant. There is general agreement that initial consent to travel or to undertake a particular type of work should certainly be irrelevant and should not compromise a prosecution. However, the victim's apparent or asserted consent to the actual situation of exploitation is considered much more damaging to the case, particularly when the exploitation does not appear to be terribly egregious. Where the victim repeatedly asserts that he or she consented and was not victimized, a judge or jury may not be willing or inclined to convict the alleged perpetrator. Even a victim's implicit consent may negatively impact on his or her credibility, and be perceived to reduce the alleged perpetrator's culpability. For instance, a victim who does not leave a situation where there is an opportunity to do so, or fails to come forward to make a complaint, or knowingly returns to an exploitative situation, may be taken to have consented in a way that may be difficult for decision-makers to disregard. Some practitioners admitted that indications of victim consent to the situation could be fatal: effectively preventing an investigation or prosecution from being initiated or from successfully progressing. Victim assertions of consent raise additional practical challenges. Such persons may be less willing to cooperate with criminal justice processes, and more likely to return to their exploitative situation or to a situation in which they are vulnerable to trafficking.

Many practitioners suggested that these practical and theoretical problems should be met "head on": in order to paint the fullest possible picture about the circumstances under which consent was seemingly given, both before deciding to prosecute and during the course of a trial. These circumstances may include the cultural, socioeconomic and psychological situation of the victim before the trafficking occurred; the ways in which the trafficker caused the victim to seemingly consent; the relationship between trafficker and victim; and the details of the exploitation.

**Consent can be relevant to determining the intention of the accused:** In some States, even though a victim's consent is not directly in issue, the victim's testimony on how he or she perceived and reacted to the actions of the accused may nevertheless be highly relevant to establish criminal intent to exploit. For example, if a victim testifies that he or she was satisfied his/her identity documents were kept for 'safekeeping' and that he or she had agreed to this arrangement, then it would be difficult to establish coercion (through confiscation of identity documents) with an intention to exploit.

**Indicators of consent can affect sentencing:** A number of cases examined for this study suggest that lesser sentences may be imposed in some jurisdictions when there are indicators that victims had somehow consented to – or are satisfied with –

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the arrangements on which the prosecution was based. This was the case even where the law or jurisprudence required consent to be disregarded. Sometimes this assessment appeared to be linked to the type of ‘means’ used and the form of exploitation. For example, from the cases examined, it appears that assertions or indications of consent in cases of trafficking for sexual exploitation will sometimes result in reduced sentences for offenders. It should be noted that indications of consent and court interest in the question of consent both tend to decrease, relative to the severity of the ‘means’ used and the exploitation suffered. This factor may contribute to the survey finding that indications of consent can affect sentencing.

### 4.3 ‘Means’ are often critical to considerations of consent

In many of the States surveyed the extent to which consent is relevant in a particular case depends heavily on the ‘means’ used and the way in which the ‘means’ element of the definition is understood and applied. Complete overriding of consent through liberal interpretation of ‘means’ (such as abuse of a position of vulnerability) can blur the distinction between trafficking and other offences. On the other hand, a narrow interpretation of the ‘means’ can result in appreciable impediments to prosecutions. (It should be noted that in some of the States surveyed, the issue of consent was not tied to ‘means’, whether in legislation, case law and / or practice).

The Trafficking in Persons Protocol ties consent to the ‘means’ element of trafficking, providing that where ‘means’ are used, consent is to be considered irrelevant. The survey confirmed the central place of the ‘means’ element in practitioner understanding of consent – even in those States that have omitted the means element altogether from their definition of trafficking (Argentina, Australia, Belarus, Israel and Norway). Exceptions to this rule seemed to be Indonesia and Thailand, where practitioners maintained that consent was irrelevant, without connection to ‘means’ both in legislation and practice and the Philippines where the irrelevance of consent, though tied to ‘means’ in legislation, was not tied to them in practice.

Some surveyed States include ‘means’ additional to those mentioned in the Trafficking in Persons Protocol (Australia includes the means of ‘psychological oppression’), while other states include fewer ‘means’ in their legislation (Thailand and the United States omit ‘abuse of a position of vulnerability’, though the former considers it would be entailed by ‘deception’, and case law in the latter shows it would be subsumed under the ‘means’ of ‘coercion’). Other States nuance their use of means: United Kingdom legislation includes force, threat and deception in general and abuse of vulnerability only in relation to mentally and physically ill, disabled and young people. Further confusion arises given that even those States that include the means element in legislation may not require it in practice (the Philippines), whereas those States that do not provide for a ‘means’ element may nonetheless consider the use of means in practice (Israel). Regardless of the approach taken to the means *per se*, the evident commonality for all States is that

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the concept of the irrelevance of consent is recognised on some level, and poses practical challenges to practitioners.

The survey further affirmed the general (but not universal) view that where there are indications of consent, those indications cannot simply be ignored. Rather, it is the responsibility of the investigator / prosecutor / court to establish whether those indications of consent have any bearing at all on the existence of a crime and / or on the culpability of the alleged perpetrator. Within major legal systems, the most common and direct way for this to be tested is to examine the validity / quality of the alleged or indicated consent. In cases of trafficking, it is widely understood that this is to be done through an examination of the 'means' used by the alleged perpetrators to facilitate the exploitation. If 'means' are established then any further consideration of consent, including its 'quality' are irrelevant.

Complications arise, at least in part because the 'means' themselves are not clearly defined or delineated. As a result, there is considerable scope for States to develop and apply highly restrictive or exceedingly broad or even contradictory interpretations of particular 'means': including interpretations of 'means' that may not in fact vitiate or even seriously damage consent but which will nevertheless, once shown to have been used, automatically trigger the "irrelevance of consent" provision. This is a critical point: the Protocol does not (and national laws reflected in this study that have incorporated the Protocol's provision on consent do not) explicitly require that means used must operate to vitiate or damage the victim's consent. However, some practitioners are of the view that the means must be adequately serious (or at least not frivolous) so their use has some effect on the victim's consent - being to negate, impair or otherwise damage it. According to this approach, the link made in the Protocol to the use of means and consent, can be interpreted as requiring a certain threshold of effect. Cases may be easier to prosecute if no such severity is required but this can operate to blur the line between trafficking and other offences, elevating what should perhaps be a lesser crime to one of trafficking.

Conversely, other practitioners expressed the opinion that the mere use of means should render any assertions of consent irrelevant, irrespective of the actual effect that this use has on the victim's consent. In other words, this view holds that it is wholly irrelevant that the victim's consent was not negated, impaired or damaged through the alleged perpetrator's use of means. This approach rather posits that consent to violations of human dignity, such as that resulting from exploitation in trafficking contexts, or consent to certain types of exploitation, cannot be acceptable to society. The inclusion of more 'subtle' means such as 'abuse of a position of vulnerability' are accordingly construed by some practitioners as speaking to the varied means used by traffickers, which need not negate, damage or impair consent. Furthermore, concern was expressed that if it was necessary to prove damage or negation of consent through the use of means then this would weaken investigations, prosecutions and convictions and divert attention from the actions and intentions of the perpetrator, instead focusing on the victim and how his or her state of mind was affected. Some practitioners who participated in the expert group meeting stressed that subtle means have become "the business model

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of traffickers" and maintained that traffickers seem to choose them, whether because they require less effort or because they run less of a risk in terms of prosecution and conviction. In light of this reality, a narrow interpretation of 'means' would serve to impede prosecutions of cases that merit being prosecuted as trafficking.

**The 'means' used is a highly relevant consideration:** The type of 'means' used in a particular case tends to affect how issues of consent arise and how they are considered. The survey affirmed that in most situations and in most States (irrespective of the legislative position on the issue) the relevance of consent is diminished relative to the perceived harshness of the means used and / or the perceived severity of the exploitation to which the victim has been subjected. Accordingly, in cases where physical violence is used against victims; where the trafficking involves abduction or severe restrictions on freedom; in cases where gross fraud is perpetrated against victims to facilitate their initial or continuing compliance, then consent is often not raised at all as an issue. If it is raised, it is very quickly dismissed as meaningless. In cases where more 'indirect' or 'subtle' means are used (such as 'abuse of a position of vulnerability'; some forms of coercion or minor deception) then indications or assertions of consent are more likely to be raised and consent will become an issue in ascertaining whether a crime of trafficking in persons has in fact been committed.<sup>137</sup>

**Lack of clarity around the parameters of 'means' – the example of deception:** Deception about the nature and / or conditions of work is often present in early phases of trafficking in persons cases. In cases where deception appears to be the only means (e.g. where deception or other 'means' are not used to maintain the 'victim' in an exploitative situation), questions may arise around the level of deception. Should any kind of deceit at any point in the process operate to render consent irrelevant or must the deceit relate to a fundamental aspect of the arrangement? One practitioner provided the example of a person being promised a salary at one point in the recruitment process but receiving only half of the agreed amount. A broad definition of deception could result in this being characterized as a trafficking case, even if the 'victim' testifies that the disparity between what was promised and what was received did not influence her decision to accept or remain in the position. Another cited example related to a possible case of trafficking in persons for removal of organs: is deceit relating to the legality of the arrangement sufficient to invalidate consent to organ removal? What about deceit relating to a much more fundamental aspect, such as the longer-term medical consequences of the procedure?

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<sup>137</sup> In this regard it is important to note a reported increase in the use of more 'subtle' means by exploiters in maintaining control over their victims. See for example, Issue Paper: Abuse of a position of vulnerability and other "means' within the definition of trafficking in persons, (UNODC, 2012), p. 84; and Analysing the business model of trafficking in human beings to better prevent the crime' (OSCE, 2010) pp.51-2, (examining the subtle means of controlling victims, in which context "Force and coercion are at times more subtle or completely lacking" such that "Sometimes no force or threat is necessary to maintain control over victims".

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**Lack of clarity around the parameters of ‘means’ – the example of ‘other forms of coercion’:** Coercion is an umbrella term, used previously in the trafficking context to refer to a range of behaviours including violence, threats and deceit, as well as abuse of a position of vulnerability.<sup>138</sup> In the Trafficking in Persons Protocol it is linked, but not made synonymous with the threat and use of force - indicating that a range of behaviours falling short of force is included within its scope. The Issue Paper on ‘abuse of a position of vulnerability’ indicated that within national criminal justice systems, coercion is commonly understood at the national level as falling between force and abuse of vulnerability in terms of severity. During the present survey process, practitioners referred to coercion in very different ways, affirming both the breadth of behaviour that can be encompassed by the term and the lack of clarity around its possible or preferable parameters. For purposes of the present discussion the questions raised are similar to those that are triggered in relation to deception: most critically, is any form of coercion, no matter how subtle, employed at any stage in the trafficking cycle, sufficient to establish the ‘means’ element of trafficking – and thereby to render irrelevant any assertion of consent? Potentially difficult examples raised by the survey include withholding of identity documents; exaggerated warnings about the dangers of the environment outside the place of work (sometimes linked to victims’ irregular migration status); familial pressure exerted to induce a person to enter into a marriage; and subtle psychological pressure through invoking the importance of the ‘victims’ role in supporting family back home. Of course similar questions could be asked around force: is a single, mildly forceful act sufficient to establish the ‘means’ element or must the ‘force’ be more systematic or reach some level of severity?

**Abuse of a position of vulnerability: A critical ‘means’ in respect of considerations of consent:** The survey confirmed that of all the stipulated means, it is ‘abuse of a position of vulnerability’ that is of greatest relevance in cases of trafficking where victim consent is indicated or asserted. This is not surprising. As noted previously, questions of consent arise less frequently and are dismissed much more quickly where violence, fraud or other clearly consent-nullifying means are used. The survey confirmed that where there are clear indications of consent and particularly in cases where victims themselves are asserting consent, this can often be sufficient to call into question all stipulated means *except* abuse of a position of vulnerability.<sup>139</sup>

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<sup>138</sup> See, for example, European Parliament Resolution on trafficking in human beings, Resolution A4-0326/95 of 18 January 1996, OJ C 032, 5 Feb. 1996 (“deceit or any other form of coercion”); Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children (97/154/JHA) OJ L 063, 4 Mar. 1997 (“coercion, in particular violence or threats, or deceit”); Council of Europe, Committee of Ministers, Recommendation No. R (2000) 11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation, adopted on 19 May 2000 (“coercion, in particular violence or threats, deceit, abuse of authority or a position of vulnerability”).

<sup>139</sup> In Moldova for example, abuse of a position of vulnerability is only considered relevant as a potential ‘means’ where the victim had given his or her consent to the situation: it is the victim’s vulnerability that is used to explain away and nullify the apparent consent. Where other, more

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The previous issue paper confirmed the fluidity of the concept of abuse of a position of vulnerability in both law and practice: that it is capable of being expanded or contracted to include situations in – or exclude situations from – the definition of trafficking. It is in this way that abuse of a position of vulnerability is closely tied to the two conflicting and troublesome trends that have been identified throughout the study: first, in some States, there is an implied presumption *against* someone being a victim of trafficking (or at least against the case being worth pursuing) when overt (typically physical) means are not present. In other words, the easiest trafficking cases to prosecute (and the ones typically pursued) are those where the consent of the victim is not even a question because of the severity of the ‘means’ and / or the nature of the exploitation suffered. Second: a liberal interpretation of the more ambiguous means – including a low threshold for establishing abuse of a position of vulnerability – can result in apparent consent being overridden to the point that ‘trafficking’ comes to include a very broad range of conduct that otherwise may be treated as a lesser offence. For example, in States where all prostitution is assumed to be exploitative, abuse of a position of vulnerability can be used to categorize all persons working in prostitution, irrespective of their apparent consent, as victims of trafficking and all persons otherwise involved in prostitution (including pimps, brothel owners and managers) as traffickers. In Switzerland, economic or social “difficulties” and irregular migration status (and the defendant’s knowledge of these facts) operate to render irrelevant any claims of consent whether made by offenders or victims.<sup>140</sup> The survey indicated that similar approaches are taken in other States including Argentina and the Philippines.

**Lack of clarity on the question of whether it is sufficient to just establish use of ‘means’ or whether it is also required to prove that the means used actually vitiated or otherwise damaged consent:** As noted above, the Trafficking in Persons Protocol does not explicitly require that ‘means’ used must operate to vitiate or damage consent. Practitioners generally acknowledged that the consent principle as

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physical means are used to move or maintain the individual into a situation of exploitation (such as force or abduction), the consent of the victim is not at issue. A Finnish case of trafficking for sexual exploitation provided to the 5<sup>th</sup> session of the Working Group provides a useful illustration. In this case the lower court considered the issue of consent in the context of considering whether APOV had been made out. The lower court found that the victim’s consent was implied through factors such as no restriction on freedom of movement; ability to refuse clients; means to remove herself from the situation; no inherent vulnerabilities; and continuation in the situation after her alleged exploiters were no longer around. The Court of Appeal reversed this decision, confirming that the defendants had intentionally abused the victim’s vulnerability which was established through her inadequate language skills, lack of local support, poor financial situation and mental vulnerability: [the victim] “had no true or viable alternative but to submit to continuing the provision of sexual services”. The Court of Appeal explicitly distanced itself from considering questions of “will”, rather “paying attention to the individual characteristics and mental ability of the victim to defend and protect herself in given circumstances ... refocus[ing] attention away from the victim’s possible motives, original voluntariness, sufficient active or physical resistance, or unawareness of the nature of the work promised to her”. Venla Roth, “Analysis of key concepts of the Protocol with a focus on consent”, presentation to the CTOC Working Group on Trafficking in Persons, Vienna, 6 November 2013.

<sup>140</sup> UNODC, *Issue Paper: Abuse of a Position of Vulnerability and other Means within the Definition of Trafficking in Persons* (2012), p. 67.

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formulated in the Trafficking in Persons Protocol only requires ‘means’ to be established, not a further inquiry as to their effect on the quality of apparent consent. However the survey provided strong indication that, in practice, the question of whether a ‘means’ used actually impacted consent is a very real one in many jurisdictions. For example, when deciding whether a particular act of coercion or deception or abuse of vulnerability satisfies the ‘means’ element of the definition in cases where there are indications of consent, the inquiry will often focus on whether that ‘means’ made the consent ‘suspect’ in some way: that as a result of the ‘means’ used, it was uninformed or not based on full knowledge, or that it was in any other sense not completely ‘free’. In some States courts have made this process explicit. For example, the Egyptian Court of Cassation has affirmed that coercion (physical and psychological) must be established to have diminished the will of the victim such that the crime can be considered to have been committed against the will of the victim and without his or her consent.<sup>141</sup> On the other hand, in some jurisdictions, no such further inquiry is undertaken and it is sufficient that a ‘means’ was present without examining if it affected consent.

**The Importance of assessing ‘a constellation of circumstances’:** While only one country surveyed (Israel) explicitly referred to the need to establish the crime of trafficking through consideration of ‘a constellation of circumstances’, the core idea was expressed and accepted by others.<sup>142</sup> Most often, decisions about which cases to investigate and prosecute are made by considering the broad circumstances of the case and judicial determinations around whether trafficking has been established are similarly broad-based. These may include a range of means, circumstances of exploitation, and depending upon the language of the law, other circumstances which attest to core elements of the trafficking in persons definition such as buying or selling the alleged victim.<sup>143</sup> Examples of relevant circumstances might include fraud, restrictions on movement, withholding of identify documents and failure to provide a ‘living wage’, a combination of which might be required in order to attain the threshold of trafficking. This point is broader than the narrow issue of consent but has strong resonance for how considerations of consent could be constructively dealt with.

#### 4.4 The *type* and *severity* of exploitation are also relevant to considerations of consent

The Trafficking in Persons Protocol does not establish a hierarchy of forms of exploitation. However, in practice, the extent to which consent is relevant in a

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<sup>141</sup> *Ibid*, p. 21.

<sup>142</sup> For example Japanese prosecutorial guidance refers to the need to consider “every factor comprehensively”. See Notification Regarding the Enforcement of the Partial Revision of the Penal Code, July 1, 2005, Part 2, Section 1(1). At the 5th session of the Working Group on Trafficking in Persons, the delegate from China affirmed the need for “a comprehensive assessment of victim circumstances”. See also the United Kingdom country study above (referring to “broad circumstances of the case” being subject to analysis).

<sup>143</sup> See Country Studies Israel and Serbia.



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particular case may depend on the type of exploitation, as well as on the severity of that exploitation.

The survey confirmed a general consensus among practitioners that the ‘type’ of exploitation should not be relevant to the issue of consent. However there are strong indications that, in practice, the type of exploitation at issue is indeed a highly relevant consideration. In some cases this is simply because the question of whether a person consented to an act that would otherwise be lawful is critical to establishing the existence of an offence (for example, consensual marriage versus forced marriage). In other cases it appears that values and attitudes around what is acceptable or not within different spheres of activity can play a role in determining the relative relevance of consent in particular situations.

In respect of ‘severity’ of exploitation, practitioners generally acknowledged that severity of exploitation would make a difference to considerations of consent in much the same way that severity of ‘means’ operates: the more severe the exploitation the more self-evident it would be to criminal justice officials, courts and others that any consent asserted by perpetrators or victims is spurious and should be disregarded or alternatively, the more severe the exploitation, the less societal values accept that consent can be relevant. Simply put, the more severe exploitation is, the less relevant consent becomes.

**Forms of exploitation embodying ‘means’:** A number of practitioners noted that certain forms of exploitation, most prominently forced labour and forced marriage, embody consent-vitiating or consent-compromising ‘means’. Far from rendering consent irrelevant, considerations of consent are inevitable in such cases because the underlying actions (labour, marriage) are not unlawful unless they are non-consensual. In practice the result will depend on the extent to which means are approached as a distinct element of the offence in the jurisdiction in question.

**Trafficking for removal of organs – an anomaly?** 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 at national law. In other words, unlike sexual exploitation, forced labour or services, slavery, practices similar to slavery and servitude, the removal of organs may be lawful or unlawful depending on the purpose and circumstances of that removal. In many States organ removal will be lawful under certain specified circumstances. It is unclear how consent operates – or should operate – in the context of trafficking in persons for removal of organs? The Protocol’s *Travaux Préparatoires* clarifies certain aspects of the issue with respect to children.<sup>144</sup> International guidance on

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<sup>144</sup> *Travaux Préparatoires*, p. 347 (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). See also United Nations and Council of Europe, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs* (Council of Europe / United Nations, 2009), pp. 80–81 (noting 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 in human beings is committed. Regarding the question of what legitimate medical or therapeutic reasons are, reference must ... be made to recognised

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the subject of organ transplantations requires that for live donations “informed and voluntary consent” is obtained.<sup>145</sup> Such guidance may not explicitly address the issue of trafficking in persons for the “removal of organs” nor the distinct issue of trafficking in organs but instead focus on the conditions for “live donations”. However, all “live donations” imply organ removal from the person consenting to the “live donation”. Accordingly, the international standards for “consent” may be of direct relevance to the present context. International guidance elaborates further on the standard of consent that must be obtained. WHO Guiding Principle 3,<sup>146</sup> for example, sets out preconditions for “informed and voluntary consent”, explicitly requiring that “live donors should be informed of the probable risks, benefits and consequences of donation in a complete and understandable fashion; they should be legally competent and capable of weighing information; and they should be acting willingly, free of any influence or coercion.” Practitioners from multiple States interviewed for the survey (most of which include “removal of organs” within the list of exploitative purposes in national law) stated that organ trading with apparently valid consent of the ‘donor’, even if illegal and even if it involved possible abuse of vulnerability would in their respective jurisdiction not usually be prosecuted as trafficking in persons. Whether it ought to be is another question,<sup>147</sup> and the paucity of case law makes much of the above speculative.

**Sexual exploitation versus labour exploitation – different standards and priorities:**

The survey affirmed that the type of trafficking-related exploitation at issue can make a difference to how assertions of consent are understood and how it impacts on the criminal justice process. Generally, in most of the States surveyed, the role of consent was stressed as being more complex in labour cases than for cases of sexual exploitation. This can relate to different legal thresholds between the two forms of exploitation.<sup>148</sup> In some States even where victims themselves strongly assert consent, or where there are indications of such consent, such assertions will be disregarded in cases of trafficking for sexual exploitation. When combined with a liberal interpretation of more ‘subtle’ means such as “abuse of a position of vulnerability”, it becomes possible to charge, as trafficking, conduct that may elsewhere be considered pimping or profiting from prostitution. In those same

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medical and ethical standards.”).

<sup>145</sup> See for example, WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, as endorsed by the sixty-third World Health Assembly in May 2010, Resolution WHA/63.22

<sup>146</sup> Ibid.

<sup>147</sup> Further on this point see the 2013 report of the UN Special Rapporteur on trafficking in persons especially women and children, which focuses on trafficking in persons for removal of organs. UN Doc. A/68/256, 2 August 2013.

<sup>148</sup> For instance the United States Victims of Trafficking and Violence Protection Act of 2000 gives special protection to victims of severe forms of trafficking including *any type* of “commercial sex act” induced by force, fraud or coercion. Non-sexual work is only considered severe, where force, fraud or coercion is used to subject the person to involuntary servitude, peonage, debt bondage or slavery. See sections 103(8)(A) and (B) and 107(b)(1)(A), (1)(C), (2)(e).

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States, a similar assertion of consent on the part of a victim of trafficking for labour exploitation or indications of consent may be treated quite differently: considered as highly relevant to the question of whether or not trafficking for labour exploitation did in fact occur.<sup>149</sup> In several States practitioners pointed out that the ubiquity of poor working conditions and poor wages was an important factor going to the relevance of consent: if consent were truly treated as irrelevant, the huge numbers of cases of trafficking for labour exploitation would overwhelm the system. In light of this reality, taking at least some account of consent – especially where the exploitation is not at the extreme end of the scale when measured against local conditions – may be considered a way of prioritizing cases.<sup>150</sup> One country surveyed was an exception to this tendency, as it requires a higher threshold for trafficking for sexual exploitation than it does for trafficking for labour exploitation, which is equated with slavery. However, common to both systems is the practical relevance of the type and severity of exploitation in addressing consent.<sup>151</sup>

**Sexual exploitation versus labour exploitation – different evidentiary burdens:**

Because of the factors outlined above, consent may be considered differently by courts in cases of trafficking for labour exploitation and cases of trafficking for sexual exploitation. The results of the survey indicate that in most of the jurisdictions surveyed, labour exploitation cases, the prosecution may have to work harder to explain the ‘means’ used to render consent irrelevant (or, as the issue is framed in some States, the means used to vitiate consent) and that the conditions of exploitation will have to be more severe to achieve a conviction than is the case in situations of trafficking for sexual exploitation. Generally it was considered that a lower threshold of exploitation is required to prove sexual exploitation (given that the sexual context is often considered exploitative in and of itself), than is the case for forced labour (given that labour occurs in an otherwise ‘normal’ context). One country surveyed was an exception to this trend, with sexual exploitation requiring a higher evidentiary burden than does labour exploitation.

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<sup>149</sup> It is important to note that the consent dichotomy between sexual exploitation and labour exploitation did not hold true for all States surveyed. For example, in States where prostitution is a legal activity (and thereby capable of being consented to) consent is highly relevant to establishing the fact of exploitation. For example, in Australia victim assertions of consent may be sufficient to prevent an investigation or prosecution from going forward unless there are clear indicators that the consent was damaged or vitiated through the use of means such as deception, force and coercion.

<sup>150</sup> While prevailing conditions in the general labour market were seen as a useful indicator of exploitation rising to a level that overrode apparent consent, practitioners maintained that comparisons with the conditions in a victim’s country of origin were not valid and should not be used as a measure to weigh up the relevance of consent.

<sup>151</sup> Spain appears to constitute an exception to this. Practitioners indicated that in this country trafficking for forced prostitution is considered more difficult to prove than trafficking for forced labour. Several reasons were cited including non-regulation of prostitution and the high standard of proof required to establish forced prostitution as well as societal acceptance of prostitution. In addition, strong labour regulations have resulted in a conflation of forced labour with the concept of ‘slavery’, unequivocally regarded as unacceptable to Spanish society

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**Sexual exploitation versus labour exploitation – a gender dimension:** Exploitative purposes appear to be highly gendered in practice and gendered responses to trafficking have fed into this trend. In almost every country women and girls are more often represented in identified cases of trafficking for sexual exploitation. Men and boys are more often associated with trafficking for labour exploitation. A difference in how consent is considered in these two areas can be expected to both reflect and perpetuate deeply entrenched gender stereotypes. Certainly the survey indicated in most of the States surveyed, that criminal justice officials sometimes hold highly gendered views on consent: viewing it as less relevant in cases involving women victims as compared to cases involving men victims. In effect, more evidence may be required (for example, of greater levels of exploitation and / or the use of harsher means) to affirm the irrelevance of a male victim’s consent as compared to that of a female victim. Once again, one country surveyed was an exception to this tendency.

#### 4.5 The issue of criminal liability of trafficked persons can expose the limits of the principle of the irrelevance of consent

The irrelevance of consent is tested most acutely in the context of trafficking in persons for the purpose of exploitation in criminal activities. International policy recognizes that trafficked persons should not be held accountable for offences they have been compelled to commit by traffickers or as a direct consequence of being subject to trafficking such as (but not limited to) immigration violations, prostitution offences and undocumented work offences.<sup>152</sup> The rationale for this rule is that in a situation of trafficking, often actions are involuntary or otherwise outside the control of the victim.<sup>153</sup>

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<sup>152</sup> While the Trafficking in Persons Protocol is silent on this issue, the CTOC Working Group on Trafficking in Persons has recommended that States Parties to the Protocol “[c]onsider, in line with their domestic legislation, not prosecuting or punishing trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts”. “Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009” UN Doc. CTOC/COP/WG.4/2009, 21 April 2009, recommendation 1(H). A provision to that effect is included in the European Trafficking Convention, at Article 26, and in the recital to EU Directive 2011/36/EU, at paragraph 14. Note the Explanatory Report to the Council of Europe Trafficking Convention links the notion of compulsion to the means element of trafficking, thereby including involvement in unlawful activities as a result of coercion, abduction, fraud, deception, or abuse of power or of a position of vulnerability. Council of Europe, Explanatory Report on the Convention on Action against Trafficking in Human Beings, ETS 197, 16.V.2005, para. 273. In 2013, the OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings published, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, the “Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking” which examines the issue of consent linked to the principle of non-punishment.

<sup>153</sup> For example, EU Directive 2011/36/EU, at recital paragraph 14, affirms that the principle of non-prosecution / non-punishment for status offences: “should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in”.

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The situation is less clear with regard to legal responsibility for victim involvement in criminal activities where such activities appear to be the exploitative purpose of the trafficking itself. Examples that have come to light in available case law, include trafficking for purposes of drug production and for organized theft. There may also be implications of legal responsibility in those States where prostitution is unlawful. The involvement of (typically former) victims of trafficking in trafficking activities is a related but potentially distinct phenomenon. The principal question for the present study is the extent to which a victim's apparent consent to involvement in criminal activities should bear on his or her own culpability for such crimes. The survey confirmed that most States have not taken an explicit position on this issue, perhaps in part because the purposes of exploitation set out in legislation tend not to include exploitation in criminal activities.<sup>154</sup> In practice, it appears clear that crimes committed incidentally in the course of being exploited are more readily excused than crimes committed as a direct manifestation of the exploitative purpose, particularly where there is some indication of possible consent in the latter case.

The survey further revealed that States confronting trafficking for the purpose of exploitation in criminal activities are reluctant to fully embrace the principle of the irrelevance of consent, even in situations where the 'means' relevant to trafficking in persons can be established. The principal concern seems to be the risk of providing a blanket immunity that would enable criminally responsible persons to escape the consequences of their actions and be used to an even greater extent by criminal entrepreneurs to further their activities. For example, if it were accepted that exploited, deceived and / or coerced foreign workers would not be charged for drug cultivation on the basis that apparent consent was vitiated or otherwise rendered irrelevant through abuse of their vulnerability or other 'means', then this may open the door to an increase in exploitation of such persons. It may also create a substantial obstacle to prosecution of the entrepreneurs who, through the use of such persons, are able to remove themselves from the front line of drug cultivation. If it were accepted that persons who had themselves been trafficked should be immune from prosecution for involvement in trafficking related criminal activities then this may encourage the use of such persons and indeed prevent what some would argue are valid prosecutions.

The distinction between considerations of consent in relation to the crime of trafficking as compared to involvement of trafficking victims in criminal activities appears to be one of degree rather than substance. In other words, the survey indicated that while similar reasoning is applied in both situations, the threshold for disregarding apparent consent appears to be relatively higher in the latter. A further factor might be the seriousness of the crimes addressed in the cases presented to us, compared to crimes that occur randomly in the course of trafficking or as a result of it which are generally, though not always, immigration crimes. The small

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<sup>154</sup> Note that EU Directive 2011/36/EU adds to the Protocol's list of exploitative purposes, "exploitation of criminal activities" (Article 2(3)) to 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" (Recital, para. 11).

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number of cases examined for this study confirmed that courts in multiple States have called into question the ‘victimhood’ of persons who have knowingly entered or returned to the criminal ‘workplace’ and have been relatively less willing to accept broad interpretations of ‘more subtle’ ‘means’ (such as abuse of a position of vulnerability) as a justification for disregarding apparent consent to involvement in criminal activities.

#### 4.6 Guidance should take into account the need for clarity balanced by flexibility:

The survey and expert group meeting revealed a desire for clear guidance around “consent” in the interests of justice, consistency and certainty. It was felt that the parameters of the crime of trafficking should be known and understandable to all.

Most practitioners find “consent” a complex and difficult issue to deal with in practice, even when the law or other materials state a particular position very clearly. This seems to point to the need for clarity. However, during the expert group meeting, practitioners also expressed an awareness of the diversity of legitimate approaches to this topic and of the complexity of the issue, both of which require striking a balance between clarity and flexibility. Thus, some practitioners expressed the view that guidance could be useful in raising the issues around consent, even if the provided guidance does not give one answer.

Other points emerged on the need for and nature of clarity and guidance:

- While adhering to the spirit of the Protocol, States should remain free to decide how they will deal with consent in national law. National experience confirms that there is not one particular approach to consent that would be uniformly suited to all States and all situations. It is therefore important that any guidance offered is not prescriptive.
- To be useful, guidance or considerations could be based on common understandings of how consent operates within the different major legal systems and be sufficiently broad and flexible to take account of differences between national legal systems.
- Guidance must steer a balanced course between the two risks that have been uncovered around consent: (i) that indications or assertions of consent are preventing the identification, investigation and prosecution of trafficking cases; and (ii) that rigid adherence to the irrelevance of consent may distort understandings of what constitutes ‘trafficking’ and compromise an effective criminal justice response.
- While remaining mindful of the risks outlined above, guidance should steer criminal justice agencies towards a focus on the criminal actions and intentions of the perpetrator rather than the actions and intentions of the victim.

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## 5 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 as presented above. Note that the Issue paper has resolved or drawn conclusions on some, but not all of these points.

### **Broad questions of values, policy and risk:**

- What are the underlying reasons behind the irrelevance of consent? Do they relate to values? Practical considerations? Realities? All three?
- Can a person consent to exploitation? To severe exploitation? To enslavement?
- Are there situations where the elements of trafficking, as established by the Protocol are indeed present but consent should *not* be disregarded, because it is objectively affirmed or asserted by the 'victim' in a way that appears meaningful? Conversely, are there situations when consent should be irrelevant even if no 'means' have been employed?
- Is there a risk that the principle of the irrelevance of consent when 'means' are established, (particularly when applied in the context of a liberal interpretation of means), will result in a widening of the concept of trafficking that goes beyond the spirit of the Protocol and the intention of the Member States who participated in its drafting? What would be the practical repercussions?
- Conversely, is there a risk that a restrictive understanding of the principle of the irrelevance of consent will result in a narrowing of the concept of trafficking that is not in accordance with the spirit of the Trafficking in Persons Protocol and the intention of Member States who participated in its drafting? What would be the practical repercussions?
- Is there a related risk that the principle of the irrelevance of consent may be ignored in practice: that investigators, prosecutors and courts may use indications or assertions of consent to reduce focus on 'difficult' or 'unclear' trafficking cases? Could such an approach ever be justified?
- Are considerations of consent potentially relevant to distinguishing between situations characterized by poor conditions of employment and situations of trafficking for forced labour?
- What role, if any, should consent play in differentiating between situations that should be addressed as serious crimes of trafficking in persons for forced labour and situations that may be more appropriately addressed as less serious labour infractions?

### **Implementation of Article 3(b) of the Protocol:**

- When establishing whether a crime of trafficking has occurred, should it be necessary to prove that the 'means' actually negated consent or that they were

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of sufficient severity to have negated or damaged consent? Or should use of the 'means' alone be sufficient to make consent completely irrelevant, as a value statement?

- What are the parameters of the "irrelevance of consent"? Is it restricted to establishing whether a crime of trafficking has occurred or should it also extend to other matters such as identification of victims and sentencing of perpetrators?
- When is consent relevant and to what? To the *act* of trafficking? To the intended exploitation? The actual exploitation? Does it make any difference if the reference to irrelevance of consent is attached to the "act" or exploitative "purpose" element?
- Is the formulation of such a reference important and / or legally significant? For example, does affirmation that consent is irrelevant in cases of trafficking in children imply that it might be relevant in cases of adults?
- Is alternative wording of this principle preferable? For example, should it be stated that consent may not be a defence when means are used? What are the risks raised by alternatively phrasing the principle?

#### **Consent and the 'means' element:**

- Is the key to dealing with consent ensuring that the 'means' are properly demarcated and defined?
- Would it be appropriate to demarcate and define means by requiring that they be sufficiently serious so as to negate any apparent or asserted consent? How would seriousness be determined?
- Are there any problems associated with such an overly prescriptive approach to means? For example, could this prevent the individual circumstances of a victim from being properly taken into account? Might it impede prosecutions?
- Does the use of 'subtle' means such as abuse of vulnerable position blur the distinction between crime types where consent is at issue? To what extent do the UNODC Practitioner Guidelines on abuse of a position of vulnerability<sup>155</sup> address and respond to this risk? Can they be improved to take better account of consent?
- Given that traffickers tend to use 'subtle' means as a matter of choice, how can practitioners ensure that questions of consent do not impede such prosecutions?
- What is the practical impact on consent of a definition of trafficking that does not contain the means element? Are means anyway considered but just in the context of 'exploitation'? Is the principle of the irrelevance of consent just as applicable or must it be modified?

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<sup>155</sup> UNODC, *Guidance Note on 'abuse of a position of vulnerability' as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (2012).



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- If ‘means’ are relevant to consent in general – how can we understand the approach to consent in the context of purposes of exploitation that encompass means (such as ‘forced’ labour and ‘forced marriage’)? Does this make it unnecessary to separately establish means once the purpose of the act has been established? Should it still be necessary to establish ‘means’ in relation to the ‘act’ of trafficking?

**Consent and the severity of means and exploitation / exploitative purpose:**

- Is it the case that the use of more direct means (force, violence, etc.) is more readily considered to have rendered consent irrelevant (or to have vitiated consent) than more subtle means (abuse of vulnerable position, minor deception, psychological coercion)? Is this appropriate?
- Does the presence of more direct means facilitate investigations, prosecutions and convictions? If so, why?
- Is it the case that the severity of exploitation has a bearing on the relevance of consent? Should it?
- Is it the case that the type of exploitation has a bearing on the relevance of consent? Should it?
- Is the principle of irrelevance of consent more problematic in relation to some exploitative purposes than others? If so, which ones and why?

**Consent in relation to criminal liability of trafficked persons:**

- Should the Trafficking in Persons Protocol’s provision on consent apply equally to consideration of criminal culpability in relation to crimes committed by victims of trafficking where the exploitative purpose of trafficking is crime? Would such an approach be practical or desirable from a policy and public order perspective?
- How should the issue of consent be dealt with when considering trafficking offences involving persons who are or were (or allege they are or were) victims of trafficking?

**Substantive issues that could be addressed through guidance are analysed in Annex 1 to this issue paper.**

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## ANNEX 1: Key considerations for criminal justice practitioners in addressing the irrelevance of ‘consent’ in trafficking in persons

The following key points for consideration on the concept of consent in the definition of trafficking in persons are offered to criminal justice practitioners confronting victim consent in trafficking in persons identifications, investigations and prosecutions. They emerged from discussions at the expert group meeting held in Vienna, Austria on 17 to 18 February 2014.

The key considerations focus on the issues which may arise concerning the victim's consent, and suggest a number of concrete actions which may be helpful in addressing them. Naturally, their utilization depends on a State's system of law, legislation, case law and guidelines.

### INTRODUCTION

#### 1. Understanding the Irrelevance of Consent in Trafficking in Persons

The starting point for any practitioner dealing with cases of trafficking is that consent is irrelevant. The base line is established in the Trafficking in Persons Protocol, which ties consent with 'means' (except in the case of child trafficking). However, clearly, national legislations may differ in the ways they implement this baseline. They may tie the topic of consent to the 'means' used by the trafficker or not; they may phrase the irrelevance in different ways: that consent is not an element of the crime, that it is not a defence to the crime, that it has no bearing on the guilt or innocence of the alleged trafficker. However, since the Trafficking in Persons Protocol is the baseline, it is useful for practitioners to know and understand its provisions thus:

1.1. Article 3(a) of the Trafficking in Persons Protocol, supplementing the United Nations Transnational Organized Crime Convention defines the crime of trafficking in persons.

“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.

Article 3(b) of the Trafficking in Persons Protocol explicitly states that:

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The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

1.2. Article 3(b) makes explicit that while the consent of child victims of trafficking is always irrelevant, the consent of an adult becomes irrelevant where the trafficker has used any of the prescribed ‘means’.

1.3. No distinction is drawn in the Trafficking in Persons Protocol according to the “means” used or the type of exploitation, meaning that the victim’s consent to intended exploitation is irrelevant, regardless of the type of exploitation<sup>156</sup>, and regardless of which means have been used.

1.4. Two considerations are relevant to implementing the provision of the Protocol: first, the risk that too broad a conception of trafficking may dilute the seriousness of the crime, and second, the risk that too narrow a conception of trafficking may impede the investigation and prosecution of the crime of trafficking in persons.

1.5. The inclusion of the provision on the irrelevance of consent is considered to reflect Member States' anticipation of potential risks and confusion posed by the victim’s apparent consent, including the risk that victims who have apparently consented may not be identified as victims, or that the victim’s consent could erroneously be invoked as a defence to the crime of trafficking.

## IDENTIFICATION AND INVESTIGATION

### 2. Risks and challenges posed by the issue of consent to victim identification and to investigations

2.1. The apparent consent of a victim to his or her exploitation, or an apparent willingness to remain in an exploitative situation may pose distinct challenges in identifying that person as a victim of trafficking. Victims of trafficking in persons may have actively sought out the situations in which they are exploited, may have become accustomed to them, and / or may consider themselves to be “better off” in exploitative situations compared to their previous situation. Victims may have complex relationships with their traffickers that are marked by control, familial or other close ties, dependency or even affection. Owing to many complex reasons, a victim may ‘consent’ to exploitation such that he or she may not initially appear to be a victim. There may be socioeconomic factors involved: for example, victims may be accustomed to working long hours in bad conditions. The apparent consent may also reflect cultural factors, including emphasis on the family head or unit as a decision maker or accepted gender roles that discourage women and girls from expressing their views. Psychological factors may also be relevant - including fear, shame, and inability to face what has happened. Moreover, victims may be

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<sup>156</sup> For further information on the issue of consent in the context of cases involving “abuse of position of vulnerability” see UNODC, *Issue Paper: Abuse of a Position of Vulnerability and other Means within the Definition of Trafficking in Persons* (2012), in particular pages 78-79.

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labouring under a misapprehension that if they initially consented, they had agreed to the entire process and thus failing to consider themselves as victims of crime.

2.2. The fact that victims may not identify themselves as victims but instead insist that they have consented to the exploitative situations in which they are found, may make it difficult to assist or remove such persons from their situations. They may also be vulnerable to re-trafficking, and may return to their exploitative situations.

2.3. Victims who have 'consented' to their exploitation – especially those who feel they have benefited and wish to remain or return – will often be unwilling to cooperate with criminal justice practitioners and refuse to denounce or testify against their traffickers. Such persons often have little or no incentive to participate in criminal justice processes against the person or people they consider to be their benefactors.

### **3. Managing and mitigating risks posed by consent issues to investigations and victim identification**

3.1. A frontline official should not be dissuaded from referring a case for further investigation on the sole basis of a person's assertions of consent. The mere fact that a person may appear to be willingly performing work or delivering services under certain conditions should not result in non-referral of a case for investigation or the cessation of an investigation. Those who are responsible for victim identification or otherwise in a position to identify potential trafficking victims should be trained to understand that apparent consent does not necessarily mean that the individual concerned has not been trafficked. Investigators too should not be deterred from pursuing an investigation for the sole reason that the person asserts consent, but rather, should consider the constellation of circumstances that has resulted in a victim being in an exploitative situation, and approach his or her consent as a possible indicator of the means that may have been used to traffic him or her.

3.2. Every victim and every instance of trafficking in persons are unique and present distinct challenges requiring specific and non-stereotypical responses. In determining whether consent in a particular case was given freely or was the result of improper manipulation by the trafficker, all the facts must be collected through a thorough investigation, including careful, sensitive interviewing of the victim. By applying victim-sensitive interview techniques, front line officials and investigators will be better able to build trust and rapport with victims so as to more effectively establish an accurate picture of what was done to the victim. Careful and sensitive questioning of the victim in an environment of trust may provide reasonable explanations for initial denials that resolve the issue of consent.<sup>157</sup>

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<sup>157</sup> Victim-sensitive interviewing techniques are the subject of Module 8 'Interviewing victims of trafficking in persons who are potential witnesses' and Module 9 'Interviewing child victims of trafficking in persons' of the UNODC Anti-Human Trafficking Manual for Criminal Justice Practitioners available at: <http://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>.

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3.3. Investigators should ensure that victims' perceptions of their situations do not distract them from gathering evidence of the actions and intentions of the alleged trafficker. Their capacity to do so can be strengthened through training that addresses the mechanisms used by traffickers to control victims; the 'means' used to exploit them; common victim behaviour; and the potential vulnerability of persons to trafficking both before, during and after they are trafficked.<sup>158</sup> Ultimately, investigators must make a careful analysis in close consultation with the prosecutor, to determine whether the evidence is sufficient to establish each and every element of the crime of trafficking.

## PROSECUTION

### 4. Risks and challenges posed by the issue of consent to the prosecution process

4.1. Where blatant means have been used to traffic a person (such as threat or use of force or abduction), there is generally little dispute that consent has either not been given or is meaningless. Where more 'subtle' or ambiguous means have been used, issues of consent may pose challenges in trafficking cases, and may be a factor in the mind of decision-makers (both judges and jurors). The fact that human traffickers increasingly use subtle means, underscores the importance of securing full and truthful accounts from victims and obtaining sufficient corroborative evidence to establish means.

4.2. Indications or assertions of victim consent may be potentially harmful to successful prosecutions, particularly where there is heavy reliance on victims' testimonies in the absence of alternative evidence. Victim testimonies may be inconsistent, contradictory, or even patently false and change throughout the trial process. Victims may repeatedly assert that they consented to their exploitation. Or the victim may refuse to testify at all and not be present at trial. As a result, judges and juries may be reluctant to convict, irrespective of the evidence, if they do not believe that the individual concerned has indeed been victimized.

4.3. In this regard, judges and juries may be influenced by certain myths, preconceived stereotypes, or assumptions about victims who consent to perform certain types of work or provide certain services. Such assumptions can unduly influence decision-makers, posing challenges to prosecutors who must work to assist judges and juries to see beyond a victim's apparent consent to understand the actions, methods and exploitative intentions of traffickers.

### 5. Managing and mitigating risks posed by consent issues to the prosecution of trafficking

5.1. The presence or absence of apparent or asserted consent should not be a determining factor in deciding whether to prosecute a given case as one of

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<sup>158</sup> These topics are addressed in Modules 1 to Modules 4 of the UNODC Anti-Human Trafficking Manual for Criminal Justice Practitioners, available at: <http://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>.

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trafficking. Rather, the prosecutor should take into consideration all the evidence in the case to determine whether that evidence taken as a whole, is sufficient to prove each and every element of the trafficking crime. This determination will necessarily include consideration as to whether the victim is an effective witness and is willing to testify. This is of particular concern in cases where the victim asserts consent, as it is likely that in such cases the victim will not wish to testify against the alleged trafficker. The prosecutor must weigh whether in the absence of the victim's testimony the case can be successfully prosecuted as a trafficking crime.

5.2. Though consent as such is not a defence to the crime of trafficking in persons, indications or assertions of consent may be relevant evidence of whether means were used. As noted above, consent may be used by the defence to argue lack of means, or by the prosecution to establish their use. For instance, a victim's consent may offer insight into the use of deception to achieve that consent, or the abuse of power or of his or her vulnerable position. Prosecutors should consider bringing evidence to show how the trafficker intended and acted to exploit his or her victim, through the use of means (in the case of adults).

5.3. It is good practice for practitioners to directly confront consent issues early in the trial process by appropriating the issue swiftly and addressing it directly, so as to assist the court to understand the full picture. It is preferable that practitioners not rely solely on victim testimonies, but be equipped with corroborative evidence to explain inconsistent victim testimonies, and to show why a victim may not consider him or herself to be victimized during the trafficking process or even afterwards, during the trial process.<sup>159</sup> It is helpful if evidence is contextualised to assist judges and juries to understand why victims have made the choices they have made or have a lack of meaningful choices to do otherwise, and in addition, to show the fullest picture of the circumstances under which a victim has seemingly consented before, during and after the trafficking process.

5.4. Prosecutors and investigators should be sensitive to the possibility that in some cases the victim asserts consent because he or she has been influenced by the traffickers through bribery or intimidation. Thus the victim may refuse to acknowledge abuse, not because he or she really believes it did not happen, but because the traffickers have obstructed justice. Prosecutor should explore this possibility and aggressively investigate and prosecute such instances under separate obstruction laws. This may require the use of proactive investigative techniques as well as the cooperation of the victim, further emphasizing the importance of establishing a relationship of trust between the victim and the prosecutor/investigator, and the use of appropriate victim interview skills. Measures also need to be put in place to protect victims from intimidation and

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<sup>159</sup> Evidence may include intercepted telephone conversations or text messages, financial records, traces at the crime scene, and photographs of exploitative conditions or the victim's living conditions before he or she was trafficked. Sometimes the absence of things can supplement victim testimony, for instance including the absence of condoms in brothels or the testimony of a neighbour that he never saw a victim come or go from premises. Expert testimony (including medical, psychological and anthropological) may be useful in explaining victim testimonies and any lies or inconsistencies therein.

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retaliation for their cooperation with the criminal justice process. Of course, the prosecutor should not compel an unwilling victim to testify, particularly where effective protection measures cannot be put in place.

5.5. It is the prosecutor's role to ensure that prosecutions of traffickers remain focused on the actions and intentions of traffickers and that this is conveyed to the court. The actions and state of mind of the victim may be relevant to shedding light on the actions or intentions of the traffickers, but should not have a direct impact on the culpability of traffickers. Distracting considerations of the victim's consent or non-consent can be deflected by pointing to its irrelevance either way, as an element of the trafficking in persons offence.

5.6. Some national laws, case law, or guidance provide evidential aids which might be proposed in other jurisdictions by prosecutors handling court cases. Among them are evaluating consent on the basis of a constellation of circumstances; the irrelevance of the prior sexual conduct of the victim; and the non-conclusive nature of evidence such as whether or not the victim attempted to escape.

## 6. The importance of training

During the expert group meeting a consensus emerged regarding the importance of training for all practitioners dealing with victims and potential victims of trafficking in order to properly address the subject of consent. Such training is important for all relevant officials - front line officials, specialist investigators, prosecutors and judges. Important topics to be addressed include:

- The elements of the crime, clarifying the irrelevance of consent;
- How the issue of consent may arise in a case;
- The importance of thoroughly understanding the circumstances of apparent consent – consent to what? At what stage? Why?;
- The centrality of vulnerability and unequal bargaining power in understanding victim assertions of consent;
- Stereotypes about victims that may impact on how consent issues are understood and dealt with;
- Traffickers' methods of control, including 'subtle' means and their connection to apparent consent; and
- Typical victim behaviour including assertions of consent, contradictory and false statements, return to situation of exploitation, failure to escape situation of exploitation even when the opportunity arises, failure to complain at the first opportunity.<sup>160</sup>

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<sup>160</sup> These topics are addressed in Modules 1 to Modules 4 of the UNODC Anti-Human Trafficking Manual for Criminal Justice Practitioners, available at: <http://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>.

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## ANNEX 2: Survey Instrument

### SURVEY

#### The concept of 'consent' in the context of trafficking in persons

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?*

*2. What role does the 'means' element as defined in Article 3 play in your domestic criminal offences, if any?*

- *Must the 'means' element in the Protocol be proven to establish TIP?*
- *If so, what means are included in the definition?*

### PART II: CONSENT

#### (A) Consent in the definition of trafficking

*3. Does your criminal law on trafficking contain any reference to the consent of the victim to the crime?*

*4. According to the UN definition of trafficking, the victim's consent is irrelevant if any of the stipulated 'means' have been used. Is this also the case in your law?*

- *How is the victim's consent relevant or irrelevant in trafficking in your criminal law?*
- *Is consent relevant in other aspects of your response to trafficking, for example, in relation to victim identification, protection and support?*

*5. Do you believe that the presence or absence of a means element in the trafficking definition influences the way in which the issue of consent is or should be considered?*



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6. Do you think that it is important to stipulate the irrelevance of consent? Do you see any problems with including this stipulation or leaving it out?

7. Does your system of law (legislation and case law) include reference to consent of the victim to the crime in crimes other than trafficking? In which crimes is it a defence and in which crimes not?

## **(B) Consent in practice**

8. Is it possible / feasible to pursue a prosecution for trafficking when the victim has clearly consented to the terms of his or her employment or situation?

9. How can consent be nullified? (Must it be proven that the means acted to cancel the consent or is it enough that means were used). Eg does deceit have to deceive?

- Is there a general provision in criminal law regarding 'means' which nullify consent?
- In respect to trafficking specifically?
- Can consent be nullified by force, fraud or coercion?
- Can consent be nullified by the abuse of a position of vulnerability?
- How else can consent be nullified in law?

10. Where consent is at issue, does it relate to the alleged victim's consent to an 'act' perpetrated by the trafficker (recruitment, harbouring, etc.) or to the victim's consent to the actual or intended 'exploitation' or either?

11. How is it proven that consent was given or vitiated or not?

- What evidence is brought to show that the victim consented and that the consent was meaningful?
- How is it proven that the trafficker vitiated the consent, such that the consent is nullified?

12. Can consent ever be a relevant consideration in cases involving children? What about other vulnerable populations like the mentally disabled?

## **(C) National case examples**

13. Is there case law on the issue of a victim's consent to trafficking? Can you provide it?

14. Have there been any cases where the consent of the alleged victim was an issue in determining either the existence of trafficking or the severity of the alleged exploitation?

## **(D) Hypotheticals**

**Consider the following hypotheticals and discuss the role that 'consent' would play in each of them.**

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**15. A young woman aided to migrate to the country agrees with those who facilitated her migration, to work as a prostitute. Her alleged ‘trafficker’ is aware that she is very poor and has a family to support.**

- Would her consent be an issue in prosecution?
- On what basis if any, would her consent be considered nullified?
- Would it make a difference if the woman received some payment and appears to be free to leave her employment?
- Would it make a difference if the woman was smuggled to her destination?

**16. An irregular migrant approaches a restaurant owner seeking employment, offering to work for considerably less than minimum wage. She is paid in accordance with that agreement and is otherwise not mistreated.**

- Would this scenario be considered potential trafficking? Why or why not?
- Would the migrant’s consent be relevant here?
- On what basis, if any, would her consent be deemed nullified?
- In establishing consent, would the fact that she approached the employer be relevant?

**17. A young migrant agrees to work in drug cultivation. He is paid very little and endures harsh conditions of employment.**

- Would the migrant’s consent be relevant? How?
- Would the fact of him having no resources or contacts be relevant in establishing consent?
- Would the illegality of the exploitative activity make a difference as to whether or not his consent is vitiated?

**18. A migrant incurs a transportation debt to be smuggled into another country. He is told that he can pay off the debt by working for the smuggler in the country of destination.**

- On what conditions would this scenario become one of trafficking?
- On what basis would the smuggled migrant’s consent to the arrangement be deemed vitiated?
- Would the type and nature of the work make a difference to whether or not the migrant is considered to have consented to it?

**19. A poor person with a family to support responds to an internet advertisement offering to buy her kidney. She is explained the health risks and is paid the promised sum.**

- Is this a situation of trafficking in persons? Why or why not?
- How is the person’s consent relevant?
- On what basis would her consent be considered vitiated?

## **(E) Links with exploitation**

**20. Do you think that the type of exploitation is relevant to proving whether consent was given or vitiated or not?**

**21. How is exploitation defined in your legislation, if at all?**

- Do you think exploitation is defined too broadly or narrowly?

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**22. Which are the most commonly cited types of exploitation in trafficking-related prosecutions in your country?**

- Are prosecutions for some types of exploitation more successful than others?
- Why or why not?

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

Commercial adoption:	
Commercial surrogacy:	
Sale of organs:	
Pornography / prostitution:	
Criminal activities:	
Begging:	
Other:	

**24. On what basis would consent to these exploitative purposes be considered valid, and on what basis would consent be considered vitiated?**

Commercial adoption:	
Commercial surrogacy:	
Sale of organs:	
Pornography / prostitution:	
Criminal activities:	
Begging:	
Other:	

**(F) Guidance for practitioners**

**25. What guidance, if any, do you think practitioners should be given on the issue of consent in understanding trafficking in persons?**

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

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

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

Mr. Sigurd Skjelde Aaserudhagan (Norway)  
Dr. Flora Acselrad (Argentina)  
Judge Philip A. Aguinaldo (Philippines)  
Mr. Chathom Akapin (Thailand)  
Ms. Lilian Doris S. Alejo (Philippines)  
Ms. Luly Altreusiraty (Indonesia)  
Ms. Marija Andjelkovic (Serbia)  
Mr. Jan Austad (Norway)  
Ms. Dalya Avramoff (Israel)  
Ms. Anetter Berger (Norway)  
Ms. Julia Borgiannibatho (International Labour Organization)  
Ms. Tamar Bornstein (Israel)  
Ms. Pamela Bowen (United Kingdom of Great Britain and Northern Ireland)  
Ms. Carmela Buehler (Switzerland)  
Ms. Carla Menares Bury (United States of America)  
Mr. Peter Carter (United Kingdom of Great Britain and Northern Ireland)  
Ms. Parosha Chandran (United Kingdom of Great Britain and Northern Ireland)  
Mr. Andhika Chrisnayudhanto (Indonesia)  
Dr. Saisuree Chutikul (Thailand)  
Mr. Marcelo Colombo (Argentina)  
Ms. Sara Cronan (Australia)  
Mr. Arie Dharmanto (Indonesia)  
Mr. Mitar Djuraskovic (Serbia)  
Ms. Federica Donati (Office of the High Commissioner for Human Rights)  
Ms. Karen Drake (Australia)  
Ms. Kirstin Duncan (Australia)  
HH Judge Martin Edmunds (United Kingdom of Great Britain and Northern Ireland)  
Ms. Zaidi Gatti (Argentina)  
Mr. Sasa Gosic (Serbia)

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Ms. Jaala Hinchcliffe (Australia)  
Mr. Paul Holmes (Australia-Asia Program to Combat Trafficking in Persons)  
Ms. Benedicte Hordnes (Norway)  
Ms. Caroline Haughey (United Kingdom of Great Britain and Northern Ireland)  
Mr. Lalu Muhamad Iqbal (Indonesia)  
Ms. Sommanat Juaseekoon (Thailand)  
Dr. Orit Kamir (Israel)  
Mr. Zarif Khan (United Kingdom of Great Britain and Northern Ireland)  
Ms. Saowanee Khomepatr (Thailand)  
Ms. Rebekah Kilpatrick (Australia)  
Mr. Vipon Kititansasorchai (Thailand)  
Mr. Valery Kuzmich (Belarus)  
Ms. Tatjana Lagumdzija (Serbia)  
Dr. Yuval Livnat (Israel)  
Mr. David Patrick Lopez (United States of America)  
Ms. Martha Lovejoy (United States of America)  
Ms. Eurídice Marquez Sanchez (International Organization for Migration)  
Ms. Penny McKay (Australia)  
Ms. Branka Milosavljevic (Serbia)  
Ms. Tamara Mirovic (Serbia)  
Mr. Kerry Neal (The United Nations Children's Fund)  
Ms. Joy Ngozi Ezeilo (United Nations Special Rapporteur on Trafficking in Persons, Especially Women and Children)  
Mr. Anh Nguyen (International Organization for Migration)  
Ms. Patricia Fernandez Olalla (Spain)  
Ms. Olivera Otasevic (Serbia)  
Mr. Jumpon Phansumrit (Thailand)  
Ms. Kim Ralston (Australia)  
Mr. Fernando R. Ramirez (Argentina)  
Ms. Stephanie Richard (United States of America)  
Mr. John Cotton Richmond (United States of America)  
Dr. Wanchai Roujanavong (Thailand)  
Mr. Pravit Roykaew (Thailand)

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Ms. Zoi Sakelliadou (Office of the EU Anti-Trafficking Coordinator)  
Ms. Beatriz Sanchez (Spain)  
Dr. Merav Shmueli (Israel)  
Mr. Maxim Shrub (Belarus)  
Mr. Yongyoot Srisattayachon (Thailand)  
Ms. Silje Elisabeth Stenvaag (Norway)  
Pol. Gen. Chatchawal Suksomjit (Thailand)  
Ms. Erna Seponu Sycile (Indonesia)  
Mr. Matthew Taylor (Canada)  
Mr. Shabda Thian (Indonesia)  
Mr. Joaquin Sanchez-Covisa Villa (Spain)  
Mr. Lautgeug Utomo (Indonesia)  
Ms. Georgina Vaz Cabral (Organization for the Security and Co-operation in Europe)  
Ms. Lisa West (Australia)  
Ms. Gro Wildhagen (Norway)  
Mr. Milan Zarkovic (Serbia)



# UNODC

United Nations Office on Drugs and Crime

For more information about UNODC's work against human trafficking and migrant smuggling contact:

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