**THE CONCEPT OF EXPLOITATION IN THE CONTEXT OF THE DEFINITION OF TRAFFICKING IN PERSONS**

**GUIDANCE ON POLICY AND PRACTICE**

*The following points represent the general conclusions of the group of experts convened to review and finalise the Issue Paper on the concept of exploitation in the definition of trafficking in persons.*

**1. Understanding the Protocol:**

1.1. Not all exploitation is trafficking. The forms of exploitation stipulated in the Protocol’s definition of trafficking are not ‘trafficking’ unless the other required element/s (act / means) are also established.

1.2. In relation to the ‘purpose’ element of the definition of trafficking, the Protocol’s formulation is to be considered a minimum standard below which States Parties should not fall.

1.3. Exploitation in the context of trafficking is not subject to precise international legal definition. However some forms of exploitation are defined in international law. When considering definitions and understandings to be attached to particular forms of exploitation, guidance should be sought from the relevant international legal instruments including human rights treaties that clarify the concepts associated with trafficking in persons.

1.4. A measure of flexibility in how ‘exploitation’ is understood and applied can be important in capturing different forms of exploitation that may be encountered in practice. However, it is also important that the national legal framework provides criminal justice practitioners and the community with a sufficient level of clarity with regard to the parameters of the purpose element of the trafficking offence.

**2. Relevance of severity:**

2.1. In principle, the apparent severity of exploitation should not be a consideration in determining whether or not a situation of trafficking exists. Exploitation that appears to be less ‘severe’ may nevertheless be an indicator / element of trafficking in persons. Practitioners would benefit from nationally tailored guidance aimed at helping them to distinguish forms and manifestations of exploitation on the basis of whether they should be considered a possible indicator or element of trafficking.

2.2. There should be no hierarchy of exploitative types: significant harm can result from any type of exploitation. Accordingly, assumptions about impact should not be made on the basis of the *type* of exploitation.

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

3.1. Practitioners should avoid making assumptions or judgments about exploitation with reference to stereotypes and / or any standards *other than those set out in the national law governing the investigation or prosecution*. For example, the fact that a victim may have experienced some improvement in his or her previous situation should not be relevant to a determination of whether the purpose element of trafficking has been established. The victim’s subjective belief regarding his or her situation should also not interfere with the application of an objective standard with regard to determining whether the purpose element of the trafficking definition has been established.

3.2. In practice, culture and national context (for example religious beliefs, ethnicity of victim, etc.) may impact on how different forms of exploitation (and thereby the purpose element of the definition) are understood and applied. There is a risk that such approaches result in differing application of criminal justice standards. When considering cultural and national perspectives, States Parties and their practitioners should be guided by the overall purposes of the Protocol[[1]](#footnote-1) and by relevant international human rights standards including those protecting human dignity and freedom.

**4. Evidentiary and procedural issues:**

4.1. For many reasons - including the complexity of the offence and obstacles to securing victim cooperation - the investigation and prosecution of trafficking cases is often difficult, time-consuming and complex. These realities should not detract from the overall responsibility of the practitioner to carefully and objectively analyse the facts and evidence of a trafficking case and ensure that the appropriate charges are laid and pursued.

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

4.3. When addressing problems associated with establishing the purpose element of the crime (exploitation), practitioners may wish to consider certain promising practices that are emerging. For example, many States find that the task of securing evidence of exploitation can be made easier through more and better cooperation and coordination between: (i) investigators and prosecutors; (ii) criminal justice agencies and other officials such as labor inspectors; and (iii) criminal justice agencies and those working with victims.

4.4. Other promising practices that may facilitate the securing of evidence of exploitation include: (i) specialization of the investigative and prosecutorial response; (ii) parallel financial investigations aimed at identifying assets and proceeds of crime; (iii) international cooperation aimed at securing information and evidence from another country; and (iv) strategic use of non-trafficking offences to target lower-level offenders for purposes of securing evidence against high-level offenders.

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

4.6. Practitioners should be aware of the possibility that exploitation may be appropriately charged as a non-trafficking offence (either on its own or concurrently with a trafficking charge). Care should be taken to ensure that any alternative offence considered or charged adequately reflects the gravity of the exploitation. Care should also be taken that this approach does not result in a denial of protections and entitlements to victims – or indeed a failure to identify and respond effectively to all victims of criminal exploitation.

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

1. Article 2 of the Protocol states that it purposes are: *(a)* To prevent and combat trafficking in persons, paying particular attention to women and children; *(b)* To protect and assist the victims of such trafficking, with full respect for their human rights; and *(c)* To promote cooperation among States Parties in order to meet those objectives. [↑](#footnote-ref-1)