Abuse of a Position of Vulnerability within the Definition of Trafficking Persons

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Introduction

In Chapter 3, ambiguity around the scope and substantive content of the definition of trafficking in persons was identified as a significant challenge to the effective implementation of the international legal framework regulating this issue. In 2010, States Parties to the Trafficking in Persons Protocol requested the United Nations Office on Drugs and Crime (UNODC) to examine certain concepts within the definition of trafficking that were proving ‘problematic’ at the national level.1 The present chapter focuses on one of three concepts examined by the authors for UNODC in response to that request: abuse of a position of vulnerability (APOV) as a means by which the ‘act’ element of the definition of trafficking is committed.2

The study included detailed consideration of the drafting history of the Protocol; a review of relevant literature, including analysis of legal frameworks and associated practice; and in-depth interviews with practitioners in twelve countries representing different regions and legal traditions. A draft report bringing together the background research and country studies was then prepared and discussed by a group of expert practitioners before being finalised and published.3 While this chapter reflects and builds on that work, its analysis and conclusions offer a deeper analysis that draws directly on the authors’ collective experience of working with legislators and criminal justice officials in more than fifty countries as they grapple with understanding and applying the vague and perennially contested definition of trafficking.

Part 1: abuse of a position of vulnerability in international law and practice

In the 2000 Trafficking in Persons Protocol, abuse of a position of vulnerability is cited in a list of ‘means’ by which persons can be subject to a range of actions such as recruitment, transportation, and harbouring, for purposes of exploitation. The concept has since been included in a number of other instruments and been analysed in interpretative texts and guides. This Part summarises those developments and draws some preliminary conclusions.
Vulnerability is central to how trafficking is understood, and to the discourse that has developed around the phenomenon. Typically, it is used to refer to inherent, environmental, or contextual factors that increase the susceptibility of an individual or group to being trafficked: factors such as poverty, inequality, discrimination, and gender-based violence — all of which contribute to creating conditions that limit individual choice and, it is understood, make it easier for traffickers and exploiters to operate. Specific factors that are commonly cited as relevant to individual vulnerability to trafficking (and are occasionally extrapolated as potential indicators of trafficking) include gender, age, membership of a minority group, and lack of legal status. Factors shaping vulnerability to trafficking differently and disproportionately impact groups that already lack power and status in society, including women, children, migrants, refugees, and internally displaced persons. Addressing trafficking-related vulnerabilities to reduce susceptibility to trafficking is widely acknowledged as a key preventative approach; accordingly, international law requires States to take action to prevent trafficking through addressing vulnerability.

However, the subject of this chapter is not vulnerability as a form of susceptibility to trafficking, but rather the distinct yet related concept of abuse of vulnerability as a means by which trafficking is perpetrated. The distinction and the overlap are both critical. The mere fact of a person’s vulnerability to trafficking (because of poverty, gender, etc.) provides no evidence as to whether the requisite means element of the trafficking definition has been established. However, our understanding of the factors that increase susceptibility to trafficking provides important insight into the kinds of vulnerability that can be abused in order to traffic a person. For example, the irregularity of an individual’s legal status vis-à-vis the country of destination appears to be a form of vulnerability that is particularly amenable to abuse aimed at placing or maintaining an individual in a situation of exploitation. The question of whether less tangible factors commonly identified as increasing vulnerability to trafficking (such as poverty and inequality) can be similarly transposed is considerably more complicated.

The concept of ‘abuse of a position of vulnerability’ in the Trafficking Protocol and other instruments

Article 3 of the Trafficking in Persons Protocol defines trafficking as comprising 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 definition that will constitute the actus reus of trafficking. This element can be fulfilled by a variety of activities including, but not limited to, the undefined practices of recruitment, transportation, transfer, harbouring, or receipt of persons. The final element of the definition, “for the purpose of exploitation”, introduces a mens rea requirement into the definition. Trafficking occurs if the implicated individual or entity intended that the action (which, in the case of trafficking in adults, must have occurred or been made possible through one of the stipulated means) would lead to exploitation. Trafficking is thereby a crime of specific or special intent (dolus specialis).

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 of a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person), only needs to be established in trafficking in adults. This aspect of the definition confirms the position reflected in earlier treaties on the subject — that individuals can be placed in a situation of exploitation through indirect methods, such as deception and
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fraud, as well as by more direct methods, such as physical force. Beyond a clarification of abuse of a position of vulnerability, discussed below, none of the stipulated ‘means’ is defined, and there appears to be significant overlap between some of them (for example, fraud and deception).

The concept of abuse of a position of vulnerability was, at the time of its adoption, unique to the Trafficking in Persons Protocol. The travaux préparatoires to the Protocol include an interpretative note to the effect that 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”.9 No further guidance beyond this rather circular explanation is provided. Most importantly, it is unclear what “real and acceptable alternative” actually means or how it is to be applied in practice. One of the authors of the present chapter participated in the Protocol drafting process and several members of key delegations who were also present were interviewed during the preparation of the UNODC Study. Collective recollections on the point of abuse of a position of vulnerability are inconclusive beyond confirming that the concept, which was introduced at the eleventh hour, reflected a general desire to ensure that the definition was capable of encompassing the myriad, subtle means of coercion by which people are exploited. Critically, introduction of this particular ‘means’ was also seen as a circuit-breaker in the heated debate around trafficking and prostitution: abuse of a position of vulnerability could potentially accommodate an expansion of the concept of trafficking – while being sufficiently vague to avoid locking States into a fixed position on the contentious issue of their domestic response to prostitution.

Inclusion of the concept in subsequent legal instruments has not led to substantive clarification of its scope or substantive content. The 2005 Council of Europe Convention against Trafficking in Human Beings (the European Trafficking Convention) reproduces the definition of trafficking set out in the Trafficking in Persons Protocol, including the ‘means’ element. Commentary to that instrument provides an explanation of the term abuse of a position of vulnerability, stating that:

[T]he vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim’s immigration status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.10

While providing some very broad guidance on what may constitute vulnerability in this context (“any hardship”), the commentary does little to clarify the circumstances under which such vulnerability could be abused for exploitative purposes. EU Trafficking Directive 2011/36/EU11 also explicitly adopts the language of the Trafficking in Persons Protocol’s Interpretative Note in defining “position of vulnerability” as “a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved”.12

Several different tools and documents produced by UNODC13 and the International Labour Organisation (ILO)14 address vulnerability to trafficking in some detail. However, these focus primarily on factors that make persons vulnerable to trafficking and that contribute to identification of victims. They do not address the more complex question of whether, from the point of view of criminal law, a particular characteristic of the victim or the victim’s situation was abused as a means of their trafficking. They provide little or no insight into how the indicators of vulnerability proposed can or should be applied in the context of victim or perpetrator identification; a criminal investigation; or a prosecution.

One potentially useful resource is a set of ILO survey guidelines to help States and others measure the problem of forced labour.15 The Survey Guidelines address abuse of a position of
vulnerability in the context of forced labour—a phenomenon that overlaps with, or at least is closely linked to, trafficking. They explain that:

[T]hreats of denunciation to the authorities, is a means of coercion where an employer deliberately and knowingly exploits the vulnerability of a worker to force him or her to work . . . taking advantage of the limited understanding of a worker with an intellectual disability and threatening women workers with dismissal or with being forced into prostitution if they refuse to comply with the employer’s demands.

In identifying abuse of vulnerability as a means of introducing an individual into, or maintaining him or her in a situation of, forced labour, the Survey Guidelines also prescribe a requisite state of mind that the exploiter “deliberately or knowingly” uses a person’s vulnerability to “force” him or her to work.

Part 2: survey of abuse of a position of vulnerability in national practice

The national practice aspect of the UNODC Study involved a review of legislation and case law, as well as in-depth interviews with practitioners and experts from twelve countries representing different regions and legal traditions (Belgium, Brazil, Canada, Egypt, India, Mexico, Moldova, the Netherlands, Nigeria, Switzerland, the United Kingdom, and the United States). This was supplemented by interviews with practitioners from outside these countries, including several practitioners who work across multiple jurisdictions. The focus of the country surveys was squarely on how the concept of abuse of a position of vulnerability is understood and applied in the context of criminal investigation and prosecution of trafficking in persons. This focus served to exclude broader considerations of APOV within national structures and procedures for the identification of trafficked persons. However, as noted below, the two aspects were found to frequently overlap.

The review of law and practice confirmed widespread confusion and inconsistency around the means element of the definition of trafficking in general, with the concept of APOV presenting particular challenges for States. A summary of the key findings is set out below.

Substantial differences in formulation of the ‘means’ element within national definitions of trafficking

States have taken very different approaches to transposing the three-element structure of the international legal definition of trafficking into their national law. APOV is explicitly referred to as a “means” by which trafficking may take place in the national law of only three of the twelve States formally surveyed (Egypt, Moldova, and the Netherlands). In Nigeria and the United States, the national definition of trafficking mirrors the three-element structure but with a more restricted list of means that does not include APOV. Belgium and Canada have adopted a definition of trafficking that comprises only two elements: an “action” and an exploitative “purpose”. The remaining States surveyed (Brazil, India, Mexico, Switzerland, and the United Kingdom) have taken divergent approaches, none of which align with the above categories. For example, in Brazil, select means have been transposed into legislation and are relevant to determining penalties but not to establishing the trafficking offence. Indian legislation does not define trafficking nor explicitly mention means in criminalising it, though proposed amendments would introduce means including APOV, but only where victims are exploited in prostitution. In the
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United Kingdom, trafficking offences are captured across various legislative acts, one of which appears to introduce a means element including a concept akin to APOV, though only for some forms of exploitation. Recent amendments to anti-trafficking legislation in the United Kingdom do not require means when determining whether a person has been subject to slavery, servitude, or forced or compulsory labour; regard may be had to all the circumstances, including those that make a person more vulnerable than others.\(^\text{18}\)

Despite these great differences in legislative approach, APOV is a fraught issue for all countries surveyed for the study, including those whose legal definitions do not include this aspect of the means element (or indeed any means element at all). For example, a review of relevant case law in the United States confirmed that while APOV is not included as an explicit means in the national legal framework, considerations about the existence of vulnerability and its abuse can be relevant to both proving the listed means of 'coercion' and the exploitative purpose.

Practitioner perceptions of abuse of vulnerability in the crime of trafficking

The UNODC Study found that vulnerability is central to understanding trafficking, in that abuse of vulnerability is considered to be an inherent feature of most, if not all, trafficking cases. Responses to questions about specific vulnerability factors were remarkably similar across very different countries of origin and destination. Commonly cited examples included age (youth and, less commonly, old age); irregular legal/migration status; poverty; precarious social status; pregnancy; illness and disability (mental and physical); gender (typically being female, but also transgender); sexual orientation and cultural beliefs; isolation caused by migration and/or inability to speak the local language; lack of social networks; dependency (on employer, family member, etc.); threats to disclose information to family members, officials, or others; and abuse of emotional/romantic relationships.

Some of these vulnerability factors, such as age, illness, disability, gender, and poverty, were acknowledged to be pre-existing or intrinsic to the victim. Others, such as isolation, dependency, and irregular legal status were recognised as vulnerabilities that can be created by the exploiter in order to maximise control over the victim. Both pre-existing and 'created' vulnerability were acknowledged as capable of being subject to abuse. However, in identifying vulnerability factors, few practitioners noted the distinction between pre-existing and created vulnerabilities, or indeed between vulnerability as susceptibility to trafficking, and abuse of that vulnerability as a means by which trafficking occurs or is made possible. Indeed, many practitioners approached the existence of vulnerability as synonymous with its abuse.

Relationship of abuse of vulnerability with other means

The survey of national law and practice sought to ascertain whether APOV could ever stand alone as the sole means by which an individual is moved into or maintained in a situation of exploitation, \(i.e.\) whether a prosecution or conviction could be successfully pursued where APOV is the only means used by a trafficker. There appear to have been very few cases prosecuted on this basis, and those examples that were made available failed to demonstrate that the success of the prosecution depended on proof of that means.\(^\text{19}\) Egyptian courts, for example, have relied on APOV in cases concerning marriage of minors (for whom means anyway need not be established) for purposes of exploitation, where other means cannot be shown. The survey noted a high level of fluidity between the various ‘means’ stipulated in national laws due, at least in part, to the absence of definitions of terms. For instance, even within the same jurisdiction, different understandings...
of ‘abuse of power’ were evident – it was explained as referring to situations involving abuse by public officials (Brazil, Nigeria, the United Kingdom), or involving any relationship of dependence (the United Kingdom, Switzerland), or as a corollary to APOV, whereby a person’s vulnerability gives rise to another person’s power (India, the Netherlands, the United Kingdom). The absence of definitions of key concepts grants a significant measure of judicial discretion when it comes to the ‘means’ element of the definition of trafficking and is clearly a major factor in creating and sustaining such widely divergent understandings around APOV. Some practitioners noted that definitional imprecision is not necessarily disadvantageous: drawing clear distinctions between stipulated means may pose a barrier to prosecutions that are pursued on the basis of multiple means.

The precise relationship between APOV and other means appears to depend on how the concept is or is not reflected in the legal framework. In some cases, vulnerability and/or its abuse is used as a subsidiary means in that its function appears to be bolstering or substantiating evidence of other means. For instance, it may be established that a person has been deceived through the abuse of their position of vulnerability, where a less vulnerable person would not have been deceived. Even in Nigeria, where APOV has not been transposed into legislation, it is considered a key component of deception: vulnerability makes a person susceptible to deceit where another person would not be. In other cases, establishing APOV is an important means by which an explicit element of the offence can be established. In Moldova, for instance, where legislation explicitly provides for several forms of APOV, practitioners consider that APOV alone can satisfy the means element.

Relationship of abuse of a position of vulnerability with the ‘act’ element

The international definition of trafficking establishes a clear link between the ‘act’ element and the means of trafficking: it is necessary to establish that an offender abused the victim’s position of vulnerability in order to recruit, transfer, harbour, or receive that person. The relationship between APOV and the ‘acts’ of trafficking was not directly considered during the country surveys, yet emerged as an important issue during subsequent discussions amongst practitioners.

In practice, and in much the same way that specific ‘means’ are often not identified in establishing that trafficking has occurred, the particular ‘act’ on which a prosecution relies is rarely made explicit, and the link between ‘acts’ and ‘means’ is typically not articulated. However, country surveys confirmed that ‘recruitment’ is the act most frequently cited in connection with APOV, reinforcing the tendency to focus on vulnerability as susceptibility to trafficking rather than abuse of vulnerability as a ‘means’. This stands to reason in countries of origin from where victims are recruited, but was also echoed by respondents in countries where exploitation takes place, in pointing to pre-existing vulnerability as the reason traffickers selected particular people for recruitment. There is very little information available on APOV being linked to other specified acts, such as harbouring or receiving, though it was noted that less ‘subtle’ means may be more relevant to control victims after the recruitment phase (Nigeria), suggesting that APOV may be more relevant for some trafficking ‘acts’ than others or, indeed, that the evidentiary burden differs according to the ‘act’ with which the allegation of APOV is or should be linked.

Relationship of APOV with the ‘purpose’ element (exploitation)

The relationship between the ‘means’ of trafficking and the exploitative purpose is a complex and contested one. Simply understood, the exploitation element of the trafficking definition can inform what is meant by ‘abuse’ of vulnerability, in the sense that it means only that the trafficker used the victim’s vulnerability for the criminal purpose of exploiting him or her.²⁰
The survey confirmed that a number of countries (including several that have dispensed with the means element altogether, and others that have incorporated only direct means, such as force and coercion) have integrated abuse of vulnerability into their understanding of exploitation. In such situations, the victim’s vulnerability is typically explored alongside other means, such as deceit (as mentioned above), or to ascertain the trafficker’s exploitative intent. In the Netherlands, for instance, APOV was indicated as being useful in determining that the intended purpose is in fact exploitation, and in ensuring that a person exploited for criminal purposes is identified as a victim and not prosecuted for crimes he or she committed in the course of being exploited. In other countries, rather than being treated as a separate element of the crime, the victim’s vulnerability and its abuse by traffickers may be relevant to ascertain the overall narrative of the crime, and to substantiate evidence of exploitation. This is the case in India, where judgments have revealed that abuse of vulnerability is implicit in understanding forced labour, and in the United States, where APOV is not specified as a means in domestic understanding of the offence, but is nonetheless relevant to proving other means and exploitation. Similarly, in Canada, where there is no means element, consideration of the totality of the circumstances that place a victim in an exploitative situation may include vulnerability factors and their abuse.

In several countries, strict application of APOV appears to have contributed to lowering the threshold for ‘exploitation’. Put simply, exploitative conduct that may not otherwise be associated with trafficking – perhaps because it appears to lack a clear coercive or deceptive element (such as pimping or labour rights abuses) – is being prosecuted as such through invocation of APOV. Several stark examples emerged, including a case in the Netherlands in which a group of irregular migrants approached a Chinese restaurant manager and in some instances ‘begged’ him to give them work. The manager accommodated the migrants in shared bedrooms and paid them less than minimum wage, and was subsequently prosecuted for human trafficking. It did not matter that he took no initiative and did not intentionally abuse their vulnerability; the standard of ‘conditional intent’ was satisfied by his awareness of the vulnerable situation of the migrants. APOV is considered the easier means to prove in the Dutch context and has lowered the threshold to such an extent that there is some unease as to whether trafficking has become conflated with irregular employment of migrants who are themselves in irregular situations.

**APOV and the principle of the irrelevance of consent**

The Trafficking Protocol is unambiguous on the point that consent is irrelevant in relation to trafficking in children, or, in the case of adults, where any of the specified means have been used. The nature of the means is immaterial. For consent to be considered irrelevant where APOV is the means used, 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. It is clear that mere use of means alone is not enough; the result of the use of those means to achieve the relevant ‘act’ must be that the victim’s consent was vitiates.

Unsurprisingly, consent tends to be a non-issue in the face of clear consent-nullifying means such as force, abduction, or gross deception. However, the country surveys confirmed that where APOV and other ‘softer’ means are alleged, consent can indeed be an issue. For instance, in some countries, APOV may only be considered a potential ‘means’ where the victim appears to have consented to the situation – it is the victim’s vulnerability and its abuse that is used to explain away and nullify the apparent consent. Even where APOV is not explicitly included as a ‘means’ in legislation, it may nevertheless be relevant to explaining how consent was vitiates: i.e. how a person could be deceived or coerced by the trafficker in a situation where a non-vulnerable person would not have been.
The relationship between APOV and consent will sometimes be at issue in situations where the victim does not explicitly identify themselves as such. In this sense, the presence of consent can be relevant to establishing whether a given set of circumstances points to a crime (and whether that crime is indeed trafficking). For example, in Moldova, while it is clear that consent is vitiated by the use of ‘direct’ means, APOV is important in establishing that consent is vitiated in less clear cases, and can be the difference between a case being treated as one of pimping and one of trafficking, resulting in higher penalties for the perpetrator and more protections for the object of the crime. Similarly, in Switzerland, even though no means element is included in Swiss law, APOV can render consent to prostitution irrelevant, serving to make what would otherwise be prostitution a situation of trafficking-related exploitation.

Here it is relevant to note that practical problems often have a sharper political edge. For example, in countries where all prostitution is assumed to be exploitative, APOV can be used to categorise all persons working in prostitution as victims of trafficking, and all persons otherwise involved in prostitution (including pimps, brothel owners, and managers) as traffickers. The effect can be to both reduce the agency of the presumed ‘vulnerable’ person(s), and/or potentially exclude people who are presumed not to be vulnerable. For instance, where economic or social ‘difficulties’ and irregular status (and the defendant’s knowledge of these facts) operate to vitiate consent of women in the sex industry, it is not clear that the same low-threshold for nullifying consent would operate in respect of regularised or non-foreign sex workers – or indeed of workers in other sectors.

Evidentiary issues associated with APOV

The evidentiary requirements of APOV under the Trafficking Protocol appear to be twofold: (i) proof of the existence of a position of vulnerability on the part of the victim; and (ii) proof of abuse of (or intention to abuse) that vulnerability as the means by which a particular act (recruitment, harbouring, etc.) was undertaken. Practitioners surveyed for the study agreed that the elements of proof used to establish APOV should be the same elements that are required to establish other aspects of the offence. For example, as is required with respect to other means, the perpetrator must have intended to use the means to commit an act for the purpose of exploitation, and the degree of ‘abuse’ of that vulnerability must be sufficiently serious as to vitiate the consent of the victim.

However, the treatment of APOV in national practice appears to be quite different. For example, among those countries that have included APOV within their definition of trafficking, the focus of inquiry is generally on establishing the fact of vulnerability, rather than on proving its abuse.25 In effect, this means that the mere existence of vulnerability may be considered sufficient to satisfy the means element and thereby help support a conviction. Some countries have further established that abuse of, or intention to abuse, vulnerability may be inferred from a defendant’s knowledge of the (proven) vulnerability. In the Netherlands, ‘conditional intent’ is sufficient – such that the perpetrator need not take initiative in abusing the victim’s vulnerability, or intentionally abuse it, but simply be aware of the vulnerable position.26 In Moldova, the subjective element of the crime is direct intention to abuse the victim’s vulnerability, requiring proof that the offender knew of the victim’s vulnerability, often established by the relationship between the perpetrator and victim. Similarly, Egyptian courts require only proof that the offender was aware of the victim’s vulnerability, generally proven by the relationship between them.

While practitioners noted that ‘knowledge’ refers to a mental state and can be correspondingly difficult to prove – particularly in comparison with other, more tangible means, such as force or deception, that require a specific action or initiative on the part of the trafficker – the threshold
of proof does not appear to be very high. This, coupled with the readiness with which intention is inferred from knowledge, raises concerns that APOV may open the door to conduct that does not seem to reach the threshold of trafficking being prosecuted as such.

It is widely accepted that the significant evidentiary obstacles associated with trafficking crimes makes the involvement of victims in the criminal justice process vital to the success of prosecutions. Practitioners interviewed for the study noted that when a prosecution relies on APOV (often because other means were not available), these challenges would be particularly acute. Persons trafficked through abuse of a position of vulnerability often do not identify as such: they have typically escaped a bad situation and ended up in a less-worse one. They have no incentive to cooperate in the prosecution of the exploiters, whom they may well have approached in the first instance and feel grateful towards. Lack of victim testimony, or unhelpful testimony, can make it extremely difficult to establish APOV, even if the fairly low standards noted above are in place.

Practitioner views on the value of the concept of APOV

The UNODC Study explicitly sought to move beyond an analysis of practice and ascertain the views of criminal justice practitioners on the value of the concept of abuse of a position of vulnerability. Those views were far from uniform – ranging from “vital” and “essential” (given the convictions that would not be achieved otherwise), to “neutral” (no impact one way or another), to “harmful” (given the problematic convictions that result or could result from its misapplication).

Some practitioners from countries that have included the concept in their national law expressed the view that omission of this means from the definition of trafficking would result in fewer convictions, particularly in cases where the victim did not identify as such, or where direct means were not present or could not be proved. They saw APOV as providing them with an additional (or, sometimes, the only) avenue to both capture and explain trafficking that occurs through means more complex, subtle, and ambiguous than force, fraud, and coercion. In this regard, it was repeatedly noted that traffickers are becoming increasingly adept at recognising and manipulating vulnerability to create dependencies, expectations, and attachments. Indeed, the use of other, more ‘tangible’ or ‘direct’ means such as force and violence was noted to have decreased in recent years, as more subtle strategies of abuse of vulnerability are refined. This fact was stressed as increasing the relevance of APOV and the need to strengthen understanding of it.

However, practitioners from States that have included only the more direct means noted that the essence of abuse of vulnerability – including its modern and evolving manifestations – can be captured through an appropriate interpretation of these more direct means. For instance, in Nigeria, deceit, inducements, and threats or use of force are effective means because the victim’s vulnerability is abused. In the United States, vulnerability and its abuse are relevant in proving the listed means of ‘coercion’ and in determining sentences within stipulated maximum and minimum penalties. Abuse of vulnerability is also a major consideration in establishing appropriate sentences in Belgium, where means are not part of the trafficking offence but are relevant in determining whether the offence is accompanied by aggravating circumstances that should bear on the sentence imposed.

Other practitioners agreed that inclusion of APOV as a ‘means’ would likely support more convictions for trafficking, but observed that this may not necessarily be a desired outcome. They noted that trafficking is an extremely serious crime carrying severe penalties, and expressed the view that proving a charge of trafficking should be difficult. In addition, trafficking convictions should be strictly reserved only for trafficking crimes; the definition should not expand
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to support prosecutions for conduct that does not rise to the level of seriousness envisaged by a criminal charge of human trafficking.

Conclusion: risks and opportunities

The concept of “abuse of a position of vulnerability” was introduced into the Trafficking in Persons Protocol to ensure that a sufficiently wide range of exploitative conduct (and means of making that conduct and its exploitative outcome possible) was captured within the international legal definition. However, drafters were not prepared to establish its parameters with any specificity. Their instruction, issued through an Interpretative Note, that APOV “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” is vague and subjective, raising many more questions than it answers. For example, what does a real alternative mean? Must the alternative be specific, available, and known and, if so, to the victim, the perpetrator, or both? Is it necessary to objectively establish the existence of a particular alternative? And what makes an alternative acceptable? To whom must an alternative be acceptable? Must it be acceptable from an objective point of view, or is the acceptability of an available (and ‘real’) alternative to be measured from the point of view of the alleged victim? More critically, the substance of the instruction focuses only on the existence of vulnerability, thereby implying that any subsequent inquiry into whether the alleged perpetrator actually abused or intended to abuse the vulnerability of the alleged victim is unnecessary. This is potentially at odds – or at least establishes a tension with – the clear meaning of the text. It also reduces the threshold of culpability by contradicting the principle that the actus reus of a crime be established on the basis of the perpetrator's acts or omissions, not on the basis of the victim's situation.

The shortcomings of the Interpretative Note are reflected in national law and practice, with the UNODC Study providing ample confirmation that States are interpreting and applying the concept of APOV in very different – and sometimes highly problematic – ways. The dangers associated with a concept as vague and ill-defined as APOV are well articulated by a prosecutor with experience across multiple jurisdictions:

I was always uncomfortable with the abuse of vulnerability phrase. Abuse of power or authority seems less problematic to me because power differentials are more easily quantifiable and can be based on well-recognized legal concepts such as “colour of law”, guardianship, employment, parental and in loco parental relationships. But “vulnerability” seems awfully imprecise, with uncertain legal foundation. As a general statement in the Protocol it may be fine, but when that phrase is imported into a national criminal statute without limiting language or clear definitions, it is a problem. In my view, the phrase violates fundamental due process and fairness by failing to make clear what is and is not prohibited. Also, because the phrase is subject to various interpretations, it allows for inappropriate or politically driven prosecutions. This is a particular concern in countries with weak institutions under pressure to demonstrate results in the area of trafficking. I have seen evidence of this in my work: examples of abuse of vulnerability being frequently used, without much analysis, to justify a number of prosecutions that did not in fact appear to be trafficking at all. Given the high sentences provided in many new TIP laws, vague and imprecise language criminalizing conduct can have serious consequences.

The UNODC Study sought to address these and other difficulties by offering a Guidance Note for practitioners that explicitly set out an understanding of APOV. It is notable that this
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Guidance Note was developed and adopted by the same group of practitioner experts brought together to review the draft Study. The note offers the following interpretation:

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

It remains to be seen whether a more consistent understanding of APOV, in keeping with the spirit of the Protocol, emerges over time. Subsequent work on other aspects of the definition undertaken by the present authors appears to confirm that the battle for conceptual clarity must be fought on many fronts. Vagueness and imprecision obstruct the work of those seeking to end impunity and secure justice for victims, and enable potentially harmful expansion of what is considered to be ‘trafficking’. At the same time, the decline in use of more ‘direct’ means by traffickers, as they become more skilled at preying upon a seemingly endless pool of vulnerable people, underscores the need to keep definitional tools sharpened against the evolving landscape of exploitation. States must retain the capacity to shape their laws to meet national needs, but clear parameters that reflect an understanding of trafficking as a serious crime – that can be perpetrated by subtle, as well as more direct means – should be agreed and respected.

Notes

1 Report of the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010, UN Doc. CTOC/COP/WG.4/2010/6 (17 February 2010), para 31(b). Note that the mandate specifically directed the research towards “assist[ing] criminal justice officers in penal proceedings”.

2 Other concepts studied were the principle of the irrelevance of consent and ‘exploitation’ as the overarching purpose of trafficking. See UNODC, The Role of Consent in the Trafficking in Persons Protocol (Vienna: UNODC 2014) (Hereafter UNODC, Consent Study) and UNODC, The Concept of Exploitation in the Trafficking in Persons Protocol (Vienna: UNODC 2015) (UNODC, Exploitation Study).

3 UNODC, Abuse of a Position of Vulnerability and Other ‘Means’ Within the Definition of Trafficking in Persons (Vienna: UNODC, 2012) (Hereafter UNODC Study).

4 See, for example, United Nations, Global Plan of Action to Combat Trafficking in Persons, UN Doc. A/RES/64/293 (12 August 2010), preambular para 3.

5 International Labour Office and the European Commission, Operational Indicators of Trafficking in Human Beings (2009).


7 The Trafficking in Persons Protocol does not define ‘exploitation’, rather providing a non-exhaustive 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”. UN 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: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations
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8 UNODC, Anti-Trafficking Practitioners’ Manual (Vienna: UNODC, 2009), Module 1, 4. UNODC further notes that domestic law could enable mens rea to be established on a lesser standard than direct “intent” (such as recklessness, willful blindness or criminal negligence): Ibid.


10 European Trafficking Convention Explanatory Report, para 83.


12 Ibid., art 2(2). Note that the Interpretative Note to the Protocol refers to “real and acceptable alternative”, appearing to require that both elements be satisfied. The language of the Directive requires only that the alternative be “real” or “acceptable”.


14 See, for example, International Labour Office and the European Commission, Operational Indicators of Trafficking in Human Beings (2009).


16 Concerning the relationship between forced labour and trafficking, the survey instrument notes that “forced labour is closely linked to human trafficking”, citing the CEACR’s explanation that “trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour provided under Article 2, paragraph 1 of the [forced labour] Convention”. Ibid., 12, 19. While acknowledging that the Protocol’s definition does not require either movement or the involvement of a third party, the survey instrument considers whether these factors should be included in an “operational definition of trafficking for forced labour, for the purpose of data collection”. Ibid., 19 (emphasis in original). This discussion forms part of a broader debate about the scope of the trafficking definition referred to in the text of this chapter. See further Gallagher, A.T., The International Law of Human Trafficking (Cambridge: Cambridge University Press, 2010), pp. 35–36, 47–53.

17 Ibid., 16. Note that the Guidelines also affirm certain limits: “the obligation to stay in a job because of the absence of alternative employment opportunities, taken alone, does not equate to a forced labour situation; however, if it can be proved that the employer is deliberately exploiting this fact (and the extreme vulnerability that arises from it) to impose more extreme working conditions than would otherwise be possible, then this would amount to forced labour.” Id.

18 Modern Slavery Act 2015, sections 1(3) and (4)(a).

19 A notable exception is the 2009 Dutch Chinese restaurant case, mentioned below.

20 It is beyond the scope of this chapter to explore exploitation in any depth beyond this basic understanding, and the reader is referred to the subsequent UNODC Exploitation Study (2015).

21 See for instance: PUDR v Union of India (The Asian Games case) 1982 AIR 1473.


23 The study confirmed that although the means used is theoretically immaterial to the irrelevance of consent, in practice the extent to which consent is irrelevant depends heavily on the means used. See UNODC Consent Study (2014), pp. 80–85.

24 This understanding is affirmed by the Interpretative Note in its reference to APOV being established where the victim is left with no alternative but to submit to the trafficker. See UNODC, Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, A/55/383/Add.1 (3 November 2000), para 63.

25 Moldova, which has sought to meet the evidentiary obstacles associated with APOV by establishing an objective test, appears to be an exception. The test requires that both the vulnerability and the abuse of that vulnerability be proven. Criteria have been developed to help ascertain vulnerability, and a range of factors, including knowledge of the vulnerability and the defendant’s state of mind, are brought to bear in proving the second element.

Abuse of a position of vulnerability


29 Albert Moskowitz, in written correspondence with the authors.

30 UNODC Consent Study (2014); UNODC Exploitation Study (2015).