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IDENTIFICATION OF VICTIMS OF HUMAN TRAFFICKING: DEFINITION, IMPORTANCE, AND STATES' OBLIGATIONS

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Abstract

Human trafficking has been an ever-longing international problem, which violates human rights in various forms of crime. There are many root causes which explain the existence and the rapid rise of human trafficking, including the emerging of supply and demand culture. This raised effort against human trafficking in the international community. These effort is focused on the prevention against trafficking, protection of victims, and prosecution of criminals. Human trafficking itself may be defined by activities revolving around it, the means used, and the purpose of the exploitation itself. The main challenge when encountering human trafficking is the ability to identify the forms of human trafficking, which requires reasonable measures of multidimensional support and protection. However, the obligations provided in several established legal instruments, for example Trafficking Protocol, are sometimes ambiguous, and subsequent State practice shows that they have had rather limited results. Therefore, a better approach is necessary in combatting human trafficking. This might include allowing courts to certify as such any victims who are identified during the proceedings, allowing a judicial or administrative determination to be made based on the application of law enforcement, border control or other officials who encounter victims in the course of investigations or prosecutions; and/or allowing a judicial or administrative determination to be made based on the application of the alleged victim personally or some representative, such as a representative of a non-governmental organization.

Keywords: *human trafficking, trafficking in persons, victims identification*

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I. INTRODUCTION

Human trafficking – also referred to as ‘trafficking in persons’ and ‘trafficking in human beings’¹ – is a massive international problem present in every continent of the world. People are trafficked for many exploitative purposes, such as sexual exploitation, labor exploitation, forced marriage, forced begging, removal of organs, or child soldiery.² Obviously, to determine with precision how many people are trafficked

¹ All these terms are used interchangeably in this paper. Trafficking in persons stems from the *Trafficking Protocol* and the *ASEAN Trafficking Convention*, while trafficking in human beings is used in the European instruments.

² See Daan Everts, ‘Human Trafficking: The Ruthless Trade in Human Misery’ (2003)

is an impossible task due to the covert nature of the phenomenon. In general, however, it is estimated that victims add up to millions. According to some United Nations agencies, there were about 25 million people subjected to forced labour and sexual exploitation – the most common forms of human trafficking – in 2016 around the world.³

There are many root causes which explain the existence and the rapid rise of this scourge during the last few decades. Current world conditions have created increased demand and supply. More precisely, some of the reasons why human trafficking has spread like wildfire include globalization and the rise of the global economy, regional conflicts, and even climate change. Globalization has caused increasing economic and demographic disparities, poverty and the marginalization of rural communities, transportation costs decline and growth of (sex) tourism. With the rise of the global economy, producers depend more on labor exploitation to stay competitive and satisfy consumers who seek cheap goods and services. The rise of regional conflicts after the end of the Cold War led to an increased number of vulnerable people and refugees. Some of which were and are still exploited by rebel groups to fund their military operations. Climate change, for its part, has forced vulnerable populations to migrate from seaside areas to cities and highlands in search of a livelihood.⁴ The increase of demand and supply has generated a prosperous business for local and transnational criminal groups who have well understood that human trafficking is a low risk and high profits activity. Today, human trafficking is ranked among the most profitable forms of transnational crime, alongside the sale of drugs and the sale of arms.⁵ To further compound these causes, it has been stressed that if human trafficking has been able to flourish,

10(1) *The Brown Journal of World Affairs* 149-58; Alexis A Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Westport, 2009) 110-21; Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press, 2010).

³ Office of the High Commissioner for Human Rights, *Human Rights and Trafficking in Persons* <<https://www.ohchr.org/EN/Issues/Trafficking/TiP/Pages/Index.aspx>>. For other figures, see, eg, Polaris, *The Facts* <<https://polarisproject.org/human-trafficking/facts>>.

⁴ For a thorough analysis of the root causes of human trafficking, see Louise Shelley, *Human Trafficking: A Global Perspective* (Cambridge University Press, 2010) 37-58.

⁵ *Ibid* 7.

this is partially due to the complicity of the police and the corruption of officials who let criminal groups function effectively.⁶

Members of the international community have developed and started implementing a series of strategies aimed at tackling human trafficking. These strategies notably focus on the prevention against trafficking, protection of victims, and prosecution of criminals.⁷ To protect, assist and support victims of human trafficking, it is of paramount importance to identify them correctly. Indeed, victims are entitled to specific rights that other individuals, like irregular or smuggled migrants, don't necessarily have. If the identification process fails and leads to incorrect identification, then victims lose the opportunity to benefit from all their rights, they are prevented from receiving adequate protection and assistance, and they may face undesirable consequences like, for example, being criminalized by the destination country and/or re-trafficked once in their country of origin. The risk of no identification or misidentification exists and is due to various reasons that relate to the victims themselves and to the (in-) competent authorities involved in the victim identification process. Therefore, in order to avoid a failure to identify a trafficked person correctly, international and regional legal instruments require States to adopt a series of measures to ensure that identification can and does take place. However, the precondition for identifying a victim – and also investigating the crime and prosecuting the traffickers – is to be aware of the constituent elements of the definition of the crime of human trafficking.

The first part of this paper analyses the constituent elements of the definition of human trafficking as set forth in international and regional legal instruments (I). The second part looks at the challenges yet the importance of proper identification of trafficked persons, emphasizing the special rights that international law recognizes to victims of

⁶ Leslie Holmes, 'Human Trafficking & Corruption: Triple Victimization?' in Cornelius Friesendorf (ed), *Strategies Against Human Trafficking: The Role of the Security Sector* (National Defence Academy and Austrian Ministry of Defence and Sport, 2009) 83-114; Pasuk Phongpaichit, Sangsit Phiriyarangsarn, Nualnoi Treerat, *Guns, Girls, Gambling, Ganja* (Silkworm Books, 1998); Osita Agbu, 'Corruption and Human Trafficking: The Nigerian Case' (2003) 4(1) *West Africa Review* 1-13

⁷ See, eg, US Department of State, *3Ps: Prosecution, Protection, and Prevention* <<https://www.state.gov/j/tip/3p/>>.

trafficking. This part mainly focuses on the differences between human trafficking and migrant smuggling in terms of definition and rights granted to these two categories of individuals (II). Finally, the third part exposes the measures that international and regional legal instruments require States to undertake in order to make victim identification a reality and explains the limits of some of them (III).

II. DEFINITION OF TRAFFICKING IN PERSONS

The first definition of the term ‘trafficking in persons’ is contained in the globally accepted 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (‘Trafficking Protocol’).⁸ Article 3(a) of the said Protocol provides:

“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.⁹

As explained in the Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (‘Legislative guide’),

[t]he main reason for defining the term “trafficking in persons” in international law was to provide some degree of consensus-based standardization of concepts. That, in turn, was intended to form the basis of domestic criminal offences that would be similar enough to support efficient international cooperation in investigating and prosecuting cases.¹⁰

⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) (‘Trafficking Protocol’).

⁹ *Ibid* art 4.

¹⁰ United Nations Office on Drugs and Crime (‘UNODC’), *Legislative guide for the*

Hence the central obligation established in Article 5 of the Trafficking Protocol for all States Parties to ‘adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.’¹¹

Since 2000 few numbers of regional treaties or treaty-like instruments containing a definition of human trafficking have been adopted. For example, the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (‘European Trafficking Convention’)¹² and the 2015 ASEAN Convention against Trafficking in Persons, Especially Women and Children (‘ASEAN Trafficking Convention’)¹³ provide a definition identical to the one in the Trafficking Protocol. As regards the 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 (‘EU Anti-Trafficking Directive’)¹⁴, that instrument

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 in United Nations Office on Drugs and Crime, Legislative Guides for the Implementation of the United Nations Convention against Transnational Crime and the Protocols thereto (United Nations publication, 2004) Part Two, 269 [35] (‘Legislative guide’).

¹¹ *Trafficking Protocol* art 5(1). Under art 5(2), attempting to commit, organizing, directing, participating as an accomplice in any form of human trafficking has also to be criminalized. UNODC highlights the fact that each State Party to the *Trafficking Protocol* must ensure that the conduct set forth in art 3 is criminalized in their domestic legislation (art 5), even though they do not need to follow the precise wording of the Protocol. See United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners, Module 1: Definitions of trafficking in persons and smuggling of migrants* (United Nations, 2009) 2 (‘Anti-human trafficking manual’).

¹² *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS No 197 (entered into force 1 February 2008) art 4(a) (‘European Trafficking Convention’).

¹³ *ASEAN Convention against Trafficking in Persons, Especially Women and Children*, opened for signature 21 November 2015 (entered into force 8 March 2017) art 2(a) <<http://agreement.asean.org/media/download/20160303122945.pdf>> (‘ASEAN Trafficking Convention’).

¹⁴ *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* [2011] OJ L 101/1,

also contains a very similar – not to say more detailed – definition of trafficking in human beings.¹⁵ The definition of trafficking in persons consists of a combination of three constituent elements:

- an action: ‘recruitment, transportation, transfer, harbouring or receipt of persons’;¹⁶
- by certain means used to secure that action: ‘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’;¹⁷
- for the purpose of exploitation, which ‘include[s], 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’.¹⁸

In criminal law terms, these three constituents – ie action, means, purpose – represent the *actus reus* and *mens rea* of the crime of trafficking in persons, two concepts in the absence of which no conviction can be rendered. The *actus reus*, ie the material or physical element, is split into two parts: the action and the means. The *mens rea*, ie the mental element that reflects the state of mind of the person charged with an offence, is

art 2(1) and (3) (*EU Anti-Trafficking Directive*). For further reading on the Directive, see, eg, Carolina Villacampa Estiarte, ‘The European Directive on Preventing and Combating Trafficking in Human Beings and the Victim-Centric Treatment of this Criminal Phenomenon’ (2012) 2(3) *European Criminal Law Review* 291-317.

¹⁵ Note, however, art 1(3) of the 2002 *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*. Member States of the South Asian Association for Regional Cooperation have opted for a much narrower definition, limiting the application of the Convention to 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’. *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, done on 5 January 2002 (entered into force in 2005) <http://saarc-sec.org/digital_library/detail_menu/saarc-convention-on-preventing-and-combating-trafficking-in-women-and-children-for-prostitution> (*SAARC Trafficking Convention*).

¹⁶ *Trafficking Protocol* art 3(a).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

the purpose element of the definition.¹⁹ For a crime of human trafficking to be recognized, each of the three constituents afore-mentioned must be present and considered together.²⁰ For example, the ‘recruitment’ of persons (action), involving ‘deception’ (means), for ‘forced labour’ (purpose) is a conduct that must be criminalized as trafficking.²¹ There is, however, an exception regarding trafficking in children. Indeed, Article 3(c) of the Trafficking Protocol provides that ‘[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article’.²² In other words, the existence or not of the means element – like the threat or use of force, coercion, abduction, fraud, deception, abuse of power – is irrelevant when determining the existence of the crime of trafficking in children.²³

This exception is particularly important when trying to identify victims of human trafficking. As Anne Gallagher observes: ‘Because it is unnecessary to show that force, deception, or any other means were used for trafficking in children, the identification of victims of trafficking and the identification of their exploiters can be expected to be easier for child victims as compared to adults.’²⁴

The Trafficking Protocol does not define the concept of ‘victim’. However, the definition can be safely taken from the European Trafficking Convention, whose definition of trafficking mirrors the one in the Trafficking Protocol. According to Article 4(e) of the Convention, “[v]ictim” shall mean any natural person who is subject to trafficking in

¹⁹ *Anti-human trafficking manual*, above n 11, 4-5.

²⁰ *Ibid* 4.

²¹ *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No 197 (Council of Europe, 16 May 2005) 14 [75] (‘*Explanatory Report*’); *Legislative guide*, above n 10, 268 [33]. For examples of human trafficking, see *Anti-human trafficking manual*, above 11, 6-7.

²² 22 *Trafficking Protocol* art 3(c).

²³ Under art 3(d) of the *Trafficking Protocol*, “Child” shall mean any person under eighteen years of age’. See also *European Trafficking Convention* art 4(d), *EU Anti-Trafficking Directive* [2011] OJ L 101/1, art 2(6); *ASEAN Trafficking Convention* art 2(d); *SAARC Trafficking Convention* art 1(1)

²⁴ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 29.

human beings as defined in this article'.²⁵ A victim is, therefore, anyone subjected to a combination of the three constituents (or two constituents when that person is a child) explained above.²⁶

Furthermore, trafficking in persons exists whether or not the victim consents to be exploited.²⁷ This is stated in Article 3(b) of the Trafficking Protocol: '[t]he 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'.²⁸ Once it is demonstrated that a prohibited means (eg deception) has been used, consent becomes irrelevant and cannot be used as a defense to absolve a trafficker from criminal responsibility.²⁹ Here the means element operates to annul an a priori meaningful consent. As put by the United Nations Office on Drugs and Crime ('UNODC'), 'no person can consent to being exploited, because in the case of adults, consent has been negated through the use of improper means and, in the case of children, their vulnerable position makes it impossible for them to provide consent in the first place'.³⁰ Anne Gallagher notes that the non-applicability of consent in case of abuse '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'.³¹ Moreover, consenting to do a certain work must be distinguished from consenting to be exploited. Someone may consent to certain employment, he/she may possibly be willing to engage, for example, in prostitution, but that does not mean that they consent to be subjected to abuse of all kinds.³² Therefore, if

²⁵ *European Trafficking Convention* art 4(e).

²⁶ *Explanatory Report*, above n 21, 17 [100].

²⁷ *Ibid* 17 [97]. For further discussion on the notion of consent, see Jessica Elliott, *The Role of Consent in Human Trafficking* (Routledge, 2014). On how courts handle the subject of victim consent, see United Nations Office on Drugs and Crime, *Evidential Issues in Trafficking in Persons Cases: Case Digest* (UNODC, 2017) 132-9.

²⁸ *Trafficking Protocol* art 3(b). See also *European Trafficking Convention* art 4(b); *EU Anti-Trafficking Directive* [2011] OJ L 101/1, art 2(4); *ASEAN Trafficking Convention* art 2(b); *SAARC Trafficking Convention* art 1(3).

²⁹ *Legislative guide*, above n 10, 270 [37]; *Anti-human trafficking manual*, above n 11, 8; *Explanatory Report*, above n 21, 16 [91] and 17 [97].

³⁰ *Anti-human trafficking manual*, above n 11, 8.

³¹ Gallagher, above n 24, 28.

³² *Explanatory Report*, above n 21, 17 [97].

consenting to certain employment freely chosen is normal and relevant, consenting to be exploited is not and does not absolve the abuser from his/her crime.

With respect to the exigence or not of the transnational nature of the crime of trafficking in persons and the involvement of an organized criminal group, it is important to distinguish between the scope of application of the Trafficking Protocol – and of the 2000 United Nations Convention against Transnational Organized Crime whose provisions apply *mutatis mutandis* to the Protocol³³ – and the requirements for the establishment of the offence of trafficking in the domestic law of a State Party. As stated in Article 4, the Trafficking Protocol ‘shall apply, except as otherwise stated herein, to the prevention, investigation, and prosecution of the offences [of trafficking in persons], where those offences are transnational in nature and involve an organized criminal group’.³⁴ However, it is worth mentioning that, while States Parties have to establish some degree of transnationality or involvement of an organized criminal group in order to trigger most of the provisions of the Protocol (eg interstate cooperation obligations), the offence of trafficking in persons can be established by a State Party in its domestic law even where some degree of transnationality of the crime or the involvement of an organized criminal group do not exist.³⁵

For the sake of a better understanding of the concept of human trafficking, the following paragraphs aim at clarifying the meaning of some of the terms set forth in the definition. Here, it must be stressed that this exercise of clarification is limited notably by the fact that ‘not all concepts and terms in the Protocol are fully defined’, which more generally causes a hindrance for the effective implementation of the

³³ *Trafficking Protocol* art 1(2).

³⁴ *Ibid* art 4 (emphasis added). See also *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003) art 3 (‘*Transnational Crime Convention*’). see also *ASEAN Trafficking Convention* art 3. Cf *European Trafficking Convention* art 2: ‘This Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime’.

³⁵ See *Transnational Crime Convention* art 34(2). The only exception to this principle is when the language of the criminalization requirement specifically incorporates one of these elements (see, eg, *Transnational Crime Convention* art 5(1)). *Legislative guide*, above n 10, 258-9 [25].

Protocol.³⁶ Given the very large variety of the situations that can be rightly qualified as human trafficking, Anne Gallagher emphasizes that ‘it is [...] important to accept that no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world’.³⁷

The first constituent of the three-part definition is the ‘action’ element which consists of recruitment, transportation, transfer, harbouring or receipt of persons. Interpretative materials of the Protocol – like the *Travaux préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (‘*Travaux préparatoires*’)³⁸, the Legislative guide, the Model Law against Trafficking in Persons (‘Model Law’)³⁹ – do not provide any interpretation of these terms. Readers can, however, refer to the instructive guidance provided by the Council of Europe and the United Nations in Trafficking in organs, tissues and cells, and trafficking in human beings for the purpose of the removal of organs. In this joint study, the actions are defined as follows:

“The actions mentioned encompass a variety of activities starting before the actual exploitation and involve more than just the physical transportation from one place to another. [...] Recruitment is to be understood in a broad sense, meaning any activity leading from the commitment or engagement of another individual to his or her exploitation. It is not confined to the use of certain means and therefore also includes the use of modern information technologies. [...] Transportation is also a general term and does not define any particular means or kinds of transportation. The act of transporting a person from one place to another constitutes this element; as in the cases of trafficking in human beings for sexual or labour exploitation, it is not necessary for the victim to be present illegally in a

³⁶ Working Group on Trafficking in Persons, *Analysis of key concepts of the Trafficking in Persons Protocol: Background paper prepared by the Secretariat*, UN Doc CTOC/COP/WG.4/2010/2 (9 December 2009) 2 [5].

³⁷ Gallagher, above n 24, 52

³⁸ United Nations Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations publication, 2006) (‘*Travaux préparatoires*’).

³⁹ United Nations Office on Drugs and Crime, *Model Law against Trafficking in Persons* (United Nations publication, 2009) (‘*Model Law*’).

*state's territory. The offence therefore includes transnational and national trafficking. The transfer of a person includes any kind of handing over or transmission of a person to another person. This is particularly important in certain cultural environments where control over individuals (mostly family members) may be handed over to other people. As the term and the scope of the offence are broad, the explicit or implied offering of a person for transfer is sufficient; the offer does not have to be accepted for the offence of trafficking in human beings to be constituted if the other elements are also present. The harbouring of persons means accommodating or housing persons in whatever way, whether during their journey to their final destination or at the place of the exploitation. [...] The receipt of persons is not limited to receiving them at the place where the exploitation takes place either, but also means meeting victims at agreed places on their journey to give them further information on where to go or what to do.*⁴⁰

The second constituent of the definition is the 'means' element which comprises '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'.⁴¹ As explained earlier, this element is only relevant to trafficking in adults. While some components of the element are self-evident (eg abduction), others are overlapping.⁴² Coercion can be seen as an umbrella term that covers not only the threat or use of physical harm but also other forms of pressure (eg psychological restraint, economic pressure) exerted against the victim or victim's family in order to limit the free will of a victim.⁴³ Deception and fraud are closely connected and should be seen as cheating or misleading the victim.⁴⁴ According to the Model Law:

Deception or fraud can refer to the nature of the work or services that the trafficked person will engage in (for example the person is promised

⁴⁰ Council of Europe and United Nations, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs* (Council of Europe/United Nations, 2009) 78 ('*Trafficking in organs*').

⁴¹ *Trafficking Protocol* art 3(a).

⁴² Gallagher, above n 24, 31.

⁴³ *Ibid*; *Trafficking in organs*, above n 40, 78; *Model Law*, above n 39, 11.

⁴⁴ *Trafficking in organs*, above n 40, 78.

a job as a domestic worker but forced to work as a prostitute), as well as to the conditions under which the person will be forced to perform this work or services (for instance the person is promised the possibility of a legal work and residence permit, proper payment and regular working conditions, but ends up not being paid, is forced to work extremely long hours, is deprived of his or her travel or identity documents, has no freedom of movement and/or is threatened with reprisals if he or she tries to escape), or both.⁴⁵

The phrase ‘abuse of power’ has not been defined in the Travaux Préparatoires. Instead, the phrase ‘abuse of authority’ was initially proposed but disputed. Drafters of the Trafficking Protocol noted that ‘[t]he word “authority” should be understood to include the power that male family members might have over female family members in some legal systems and the power that parents might have over their children’.⁴⁶ With regard to the ‘abuse of a position of vulnerability’, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime indicated that the expression ‘is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved’.⁴⁷ This vulnerability, which the trafficker takes advantage of, maybe of any kind: financial, social, physical or psychological. In other words, the causes for which a person may be placed in a position of vulnerability are manifold and include, for instance, having entered the country illegally, pregnancy, reduced capacity to form judgments by virtue of illness, infirmity or physical or mental disease or disability, addiction to any substance, promises or giving sums of money or other advantages to those having authority, or being in a precarious situation from the standpoint of social survival.⁴⁸ Finally, the definition of ‘giving or receiving of payments or

⁴⁵ *Model Law*, above n 39, 12.

⁴⁶ *Travaux préparatoires*, above n 38, 343 nn 20.

⁴⁷ *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*, 55th sess, Agenda Item 105, UN Doc A/55/381/Add.1 (3 November 2000) 12 [63] (‘*Interpretative notes*’). See also *Explanatory Report*, above n 21, 15 [83].

⁴⁸ *Model Law*, above 39, 9-10. Given the difficulty to inquire into the state of mind

benefits to achieve the consent of a person having control over another person' is not clear as the component has been defined neither in the Travaux préparatoires nor in other interpretative documents. As well, the distinction between this component and the concepts of abuse of power or position of vulnerability is blurred.⁴⁹

The third constituent of the definition of human trafficking is the 'purpose of exploitation' element which 'include[s], 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'.⁵⁰ UNODC identifies the 'purpose of exploitation' as being the 'dolus specialis mental element' (special intent) of the concept of human trafficking, which one is defined as 'the purpose aimed at by the perpetrator when committing the material acts of the offence'.⁵¹ It is important to emphasize that 'the fulfillment of the dolus specialis element does not require that the aim be actually achieved'.⁵² In other words, no actual exploitation needs to take place for the offence of trafficking to be completed. Rather, it is sufficient that an intention to exploit exists, and this by whoever is involved in the trafficking cycle, be it, for instance, the recruiter, the transporter or the brothel owner.⁵³ Indeed, UNODC states that

*"[a]n offence of trafficking in persons should not require that actual exploitation take place. As is clear from the Trafficking Protocol, actual exploitation need not occur provided there is a manifestation of intention to exploit the individual. All that is required is that the accused committed one of the constituent acts, employing one of the listed means [in case of trafficking involving adult victims] for the purpose or, put another way, with the intention that the individual be exploited."*⁵⁴

of the victim, the *Model Law* suggests lawmakers to adopt a definition of 'abuse of a position of vulnerability' that rather focuses on 'the offender and his intention to take advantage of the situation of the victim', *Ibid* 10.

⁴⁹ Gallagher, above n 24, 33.

⁵⁰ *Trafficking Protocol* art 3(a).

⁵¹ *Anti-human trafficking manual*, above n 11, 5 nn 1.

⁵² *Ibid*.

⁵³ Gallagher, above n 24, 34, see esp nn 89.

⁵⁴ *Anti-human trafficking manual*, above n 11, 6. See also *Explanatory Report*, above n 21, 16 [87].

The word ‘exploitation’ is not defined either in the Trafficking Protocol, its Travaux Préparatoires, or other interpretative instruments. Instead, Article 3(a) of the Trafficking Protocol provides a non-exhaustive list – hence the use of the expression ‘at a minimum’ – of forms of exploitation. The wording ‘exploitation of the prostitution of others or other forms of sexual exploitation’ has intentionally not been defined in the Travaux Préparatoires ‘in order to allow all States, independent of their domestic policies on prostitution, to ratify the Protocol’.⁵⁵ Emphasis is on the idea of exploitation. States can, therefore, comply with the Trafficking Protocol whether or not they legalize or criminalize non-coerced adult prostitution.⁵⁶ Later on, however, the Model Law has offered to define ‘exploitation of prostitution of others’ as meaning ‘the unlawful obtaining of financial or another material benefit from the prostitution of another person’⁵⁷, and ‘sexual exploitation’ as meaning ‘the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials’.⁵⁸ The last form of exploitation mentioned expressis verbis in Article 3(a) of the Trafficking Protocol concerns the trafficking in persons for purposes of ‘organ removal’. This type of trafficking must be distinguished from the trafficking in organs, tissues, and cells, for the reason that in the former case the object of the crime is the trafficked person, while in the latter case it is the organs, tissues, and cells.⁵⁹ Obviously, the removal of organs does not always constitute an offence. In its interpretative notes, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime specified that ‘[t]he removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons should not be

⁵⁵ *Interpretative notes*, above n 47, 12 [64].

⁵⁶ *Model Law*, above n 39, 14.

⁵⁷ *Ibid.* This definition derived from United Nations Interregional Crime and Justice Research Institute, *Trafficking in Human Beings and Peace Support Operations: Trainers Guide* (UNICRI, 2006) 153. It is specified that the term ‘unlawful’ has been added to indicate that the exploitation of prostitution of others has to be unlawful in accordance with the national laws on prostitution.

⁵⁸ *Model Law*, above n 39, 20.

⁵⁹ *Trafficking in organs*, above n 40, 93.

considered exploitation’.⁶⁰

Some of the components of the purpose element are not defined either in the Trafficking Protocol or in the Travaux Préparatoires. Nonetheless, UNODC notes that ‘concepts like forced labour, slavery, practices similar to slavery and servitude are elaborated upon in a number of international conventions and should, where applicable to States concerned, guide the interpretation and application of the Protocol’.⁶¹ So, the Model Law derives the definition of ‘forced labour or services’ from the 1930 ILO Convention No. 29 concerning Forced or Compulsory Labour. Article 2(1) of the said Convention provides that ‘forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.⁶² Here, once again the overlapping of some components of the definition of human trafficking is apparent. Whilst the Trafficking Protocol draws a distinction between exploitation for forced labour (eg forced factory work) or services (eg forced prostitution) and sexual exploitation, it is widely recognized that ‘[c]oercive sexual exploitation and forced prostitution fall within the scope of the definition of forced labour or compulsory labour’.⁶³ UNODC also derives the definition of ‘slavery’ from Article 1(1) of the Slavery Convention of 1926 as amended by the 1953 Protocol,⁶⁴ and offers to define ‘slavery’ as meaning ‘the status or conditions of a person over whom any or all the powers attaching to the right of ownership are exercised’ or as meaning ‘the status or condition of a person over whom control is exercised to the extent that the person is treated as property’.⁶⁵ Interpretation of the wording ‘practices similar to slavery’ derives from the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices

⁶⁰ *Interpretative notes*, above n 47, 12 [65].

⁶¹ *Model Law*, above n 39, 15.

⁶² *Convention (No 29) concerning Forced or Compulsory Labour*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932). It is interesting to note that the *EU Anti-Trafficking Directive* expressly

⁶³ *Model Law*, above n 39, 15.

⁶⁴ *Slavery Convention, signed at Geneva on 25 September 1926, and amended by the Protocol*, opened for signature 7 December 1953, 212 UNTS 17 (entered into force 7 July 1955).

⁶⁵ *Model Law*, above n 39, 20.

Similar to Slavery.⁶⁶ The Model Law states that this notion ‘shall include debt bondage, serfdom, servile forms of marriage and the exploitation of children and adolescents’, all being practices specifically prohibited in the Convention of 1956.⁶⁷ Finally, UNODC defines ‘servitude’ as ‘the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he or she cannot change’⁶⁸, a definition based on an interpretation of the Universal Declaration of Human Rights⁶⁹ and the International Covenant on Civil and Political Rights.⁷⁰

III. CHALLENGES AND IMPORTANCE OF PROPER IDENTIFICATION OF TRAFFICKED PERSONS

Properly identifying a situation of human trafficking – and consequently a victim or a perpetrator – is challenging but of critical importance to ensure special rights owed to trafficked individuals.

A. THE CHALLENGES OF IDENTIFICATION

Difficulties in human trafficking identification are manifold and due to different causes. For example, victims themselves may have no idea that they are trafficked and therefore do not complain, or, when they feel they have been victimized they may face difficulties in explaining why and then fail to report; also, when victims are aware of their situation they may be reluctant to report to law enforcement authorities for different reasons such as their precarious status in the country of destination, the fact that they have broken local laws and are afraid to be caught, the lack of trust in local authorities, or the poor conditions in their countries of origin which includes ‘begging’ in the definition of

⁶⁶ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957).

⁶⁷ *Model Law*, above n 39, 18. For a definition of these practices see *ibid*, 13, 17 and 19.

⁶⁸ *Ibid* 20.

⁶⁹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

⁷⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS (entered into force 23 Mars 1976).

trafficking in human beings, and it recalls that ‘forced begging should be understood as a form of forced labour or services as defined in the 1930 ILO Convention No 29 concerning Forced or Compulsory Labour’. EU Anti-Trafficking Directive [2011] OJ L 101/1, para 11. lead them to accept their horrendous fate in the country of destination.⁷¹ On the side of the authorities – be they in the country of origin, transit or destination –, challenges may arise from the lack of understanding of the concept of human trafficking, lack of commitment and resources, lack of will to conducting active investigations and raiding sites (eg brothels), as well as the potential existence of corruption among law enforcement officers or complicity with traffickers.⁷² In addition, the behavior of some trafficked persons, who have some relative freedom of movement away from their traffickers or who fail to escape from their workplace even when this seems possible, may wrongly lead law enforcement officers to consider that people they come across are not victims of exploitation.⁷³

Another challenge for the authorities and organisms in charge of the identification and protection of victims of human trafficking is to properly distinguish a victim of trafficking from criminals or irregular or smuggled migrants. To define and contrast all these different categories of persons is an exercise that goes beyond the scope of this paper. Therefore, in the following paragraphs, the focus is only placed on the distinction between victims of human trafficking and smuggled migrants.

According to Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime (‘Smuggling of Migrants Protocol’):

“Smuggling of migrants” shall mean the procurement, in order to obtain,

⁷¹ Jacqueline Bhabha and Christina Alfrev, *The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs* (UNHCR, 2009) 10.

⁷² *Ibid.*

⁷³ *Ibid.* See also International Center for Migration Policy Development, *Anti-Trafficking Training for Frontline Law Enforcement Officers: Background Reader* (ICMPD, 2006) 49 (‘Training for Law Enforcement Officers’).

*directly or indirectly, a financial or another material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.*⁷⁴

The three constituent elements of migrant smuggling are (1) the procurement of an illegal entry of another person,⁷⁵ (2) into another State, (3) for the purpose of financial or material^{76,77}. In theory, it is possible to highlight at least three key differences between trafficking in persons and smuggling of migrants. These differences relate to the exploitation, transnationality, and consent elements of the two crimes. Primo, with regard to the exploitation element, it can be noticed that ‘[s]muggler and migrant are partners, albeit disparate, in a commercial operation that the migrant enters willingly’.⁷⁸ The smuggled migrant or intermediaries usually pay fees to the smuggler before or when arriving at the destination.⁷⁹ Then, after having enabled the smuggled migrant to illegally enter or stay in a country, the relationship between smuggler and smuggled migrant generally ends. In other words, the smuggler has no intention to exploit the smuggled migrant after arrival. In contrast, and as explained above, the main purpose of trafficking in persons is the ongoing exploitation of the victim by the offender. This is how illicit profit is generated for traffickers whose intention is that ‘the relationship with the exploited victims will be a continuous one and extend beyond

⁷⁴ *Protocol against the Smuggling of Migrants by Land, Sea and Air; supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 480 (entered into force 28 January 2004) art 3(a) (*‘Smuggling of Migrants Protocol’*).

⁷⁵ Art 3(b) of the *Smuggling of Migrants Protocol* provides that “[i]llegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State’.

⁷⁶ This implies that smuggling activities conducted for non-profit purposes do not fall under the scope of the *Smuggling of Migrants Protocol*. See *Anti-human trafficking manual*, above n 11, 11.

⁷⁷ *Ibid* 10.

⁷⁸ *Ibid* 13.

⁷⁹ UNODC observes that when migrants are not able to pay the entire smuggling fee they become vulnerable to exploitation by the smugglers. United Nations Office on Drugs and Crime, *Toolkit to Combat Smuggling of Migrants, Tool 1: Understanding the smuggling of migrants* (UNODC, 2010) 39 (*‘Toolkit to Combat Smuggling of Migrants’*).

the crossing of the border to the final destination'.⁸⁰Secundo, smuggling of migrants is always transnational because '[t]he objective of the smuggling of migrants or related conduct is always to facilitate the illegal entry of a person from one country into another country or their stay in that country'.⁸¹ In contrast with the smuggling of migrants, human trafficking may occur either across borders or – and this is often the case – within a single country.⁸² Tertio, as UNODC notes, '[m]igrant smuggling generally involves the consent of those being smuggled'.⁸³ By comparison, victims of human trafficking either have never given their consent, or, if they have initially given their consent, 'that initial consent became meaningless, by virtue of the fact that the traffickers have used deception or violence to gain control over their victims'.⁸⁴

As seen above, in theory, differences between migrant smuggling and trafficking in persons exist and can be pointed out. In practice, however, it may be much more challenging to distinguish between these two crimes. There are some reasons for this. One of them is the fact that a trafficked person might start his or her journey as a smuggled person willing to enter illegally into a foreign country before, later in the process, being forced into exploitation in order, for example, to pay for the transportation. Sometimes, also, traffickers make victims believe that they are offering to smuggle them into another country. For that, traffickers, whose intention from the start is the exploitation of trafficked persons, ask victims to pay a fee which is actually nothing else than a fraudulent way to make more money and the expression of deception on the victims. In some situations, as well, smuggling may be the planned intention of the offender at the outset, until a 'too good to miss' opportunity presents itself during the journey and transforms the smuggler and the whole situation into trafficker and human trafficking.

⁸⁰ *Anti-human trafficking manual*, above n 11, 13. UNODC notes that smuggling can become trafficking when, for instance, smugglers sell smuggled migrants or force them to pay transportation costs under exploitative conditions. *Ibid.*

⁸¹ *Toolkit to Combat Smuggling of Migrants*, above n 79, 39.

⁸² *Ibid.*; *Anti-human trafficking manual*, above n 11, 12.

⁸³ *Anti-human trafficking manual*, above n 11, 12. UNODC observes however that people smuggled might withdraw their consent during their journey, for instance if the conditions are suddenly too dangerous. See *Toolkit to Combat Smuggling of Migrants*, above n 79, 39.

⁸⁴ *Toolkit to Combat Smuggling of Migrants*, above n 79, 39.

Last but not least, routes employed by smugglers and traffickers are sometimes the same.⁸⁵

B. THE IMPORTANCE OF PROPER IDENTIFICATION

The above-mentioned challenges lead to the fact that in many countries victims of trafficking are either not identified or, with regard to individuals trafficked internationally, misidentified as, for example, irregular migrants, illegal workers or smuggled migrants.⁸⁶ This has ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, Regional Review on Laws, Policies, and Practices within ASEAN relating to the Identification, Management and Treatment of tremendous consequences for trafficked victims in terms of access to their rights, hence the paramount importance of identifying trafficking victims correctly. Indeed, as stated in the Recommended Principles and Guidelines on Human Rights and Human Trafficking (‘Recommended Principles and Guidelines’) of the Office of the High Commissioner for Human Rights: ‘A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights.’⁸⁷ The said Office stresses clearly:

“If a trafficked person is not identified at all or is incorrectly identified as a criminal or an irregular or smuggled migrant, then this will directly affect that person’s ability to access the rights to which she or he is entitled. In short, failure to quickly and accurately identify victims of trafficking renders any rights granted to such persons illusory.”⁸⁸

International law recognizes more entitlements and rights to

⁸⁵ *Ibid* 38; *Anti-human trafficking manual*, above n 11, 12.

⁸⁶ See, eg, Marija Jovanovic, *Comparison of Anti-Trafficking Legal Regimes and Actions in the Council of Europe and ASEAN: Realities, Frameworks, and Possibilities for Collaboration* (GRETA/Council of Europe, May 2018) 42;

⁸⁷ Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, UN Doc E/2002/68/Add. 1 (20 May 2002) Guideline 2 (‘Recommended Principles and Guidelines’). Victims of Trafficking, especially Women and Children (ASEAN Secretariat, October 2016) 44 (‘ASEAN Regional Review’).

⁸⁸ United Nations Human Rights Office of the High Commissioner, *Human Rights and Human Trafficking* (Fact Sheet No 36, 2014) 12 (‘Human Rights and Human Trafficking’).

victims of trafficking in persons than to smuggled migrants.⁸⁹ This is particularly true when comparing the treaties and other legal instruments on human trafficking with the Smuggling of Migrants Protocol. Then, when taking on board the human rights, substantial differences are certainly reduced but still not fully eliminated. The rights granted to victims of human trafficking comprise, in particular, the right to receive immediate support and protection from further exploitation and harm from the State in whose territory they are located, the right to a safe and preferably voluntary return, as well as the right to adequate and appropriate remedies.⁹⁰

More specifically, reasonable measures of support and protection include moving the victim to a safe place, attending the immediate medical needs of the victim and providing physical, psychological, and social (eg appropriate housing, employment, educational and training opportunities) recovery of victims irrespective of the victim capacity or willingness to cooperate with criminal justice authority, as well as assessing whether the trafficked person is under a risk of intimidation or retaliation by traffickers.⁹¹ States are also required to protect the private life and identity of the victims,⁹² to give trafficked persons information on relevant legal proceedings and the opportunity

⁸⁹ It should be borne in mind that the provisions of the treaties on human trafficking do not all establish the same level of obligation. As stressed in the *Legislative guide*, measures can be grouped into three categories: a) measures that are mandatory for States Parties, measures that States Parties must consider applying or endeavor to apply, and c) measures that are optional. See *Legislative guide*, above n 10, 248-9 [8]-[10].

⁹⁰ On the special measures of assistance and protection which children are entitled to, see United Nations Human Rights Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations publication, 2010) 166-73. See also *European Trafficking Convention* arts 10(4), 12(1)(f), 14(2), 16(7); *EU Anti-Trafficking Directive* [2011] OJ L 101/1, arts 13 - 16. Child protection measures, however, are missing in the text of the *ASEAN Trafficking Convention*, as observed by Jovanovic, above n 86, 40.

⁹¹ See *Trafficking Protocol* art 6. For a commentary of art 6, see *Legislative guide*, above n 10, 280-291. See also *European Trafficking Convention* art 12; *EU Anti-Trafficking Directive* [2011] OJ L 101/1, arts 11 - 12; *ASEAN Trafficking Convention* art 14.

⁹² See *Trafficking Protocol* art 6(1); *European Trafficking Convention* art 11; *ASEAN Trafficking Convention* art 14(6).

to participate in legal proceedings against their exploiters freely, safely and on the basis of full information.⁹³ In comparison, the Smuggling of Migrants Protocol is less stringent on the protection and assistance measures that States Parties shall take. Even though it provides that ‘[e]ach State Party shall afford appropriate assistance to migrants whose lives or safety are endangered’ by reason of being the object of one of the major offences established in accordance with the Protocol (eg being smuggled, accepting fraudulent documents, remaining illegally in a foreign country), the Smuggling of Migrants Protocol does not expressly envisage for smuggling migrants any entitlement to receive legal assistance and physical, psychological and social recovery (eg appropriate housing, counselling and information, medical, psychological and material assistance, employment, educational and training opportunities).⁹⁴ However, from a human rights perspective, UNODC notes that smuggled migrants who are victims of crime during their journey have the right to be informed of the assistance available to them (legal, material, medical, psychological and social), to have access to a safe place and to medical services, to know their rights, their role in legal proceedings, and the nature of such legal proceedings.⁹⁵

Victim’s protection also means that States, be they countries of departure, transit or destination, must not deprive trafficked victims of personal liberty, except for safety reasons⁹⁶. In contrast, smuggled migrants can be detained, under the condition that States are ‘using

⁹³ See *Trafficking Protocol* art 6(2); *European Trafficking Convention* art 12(1); *EU Anti-Trafficking Directive* [2011] OJ L 101/1, art 12; *ASEAN Trafficking Convention* art 14(10). See also *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 96th plen mtg, UN Doc A/RES/40/34 (29 November 1985) annex para 6.

⁹⁴ See *Smuggling of Migrants Protocol* art 16.

⁹⁵ United Nations Office on Drugs and Crime, *Basic training manual on investigating and prosecuting the smuggling of migrants, Module 9: Human Rights* (UNOV et al, 2010) 4-5 (‘*Training manual*’). For UNODC, States should encourage smuggled migrants to participate as witnesses in the criminal proceedings against the smugglers, see United Nations Office on Drugs and Crime, *Toolkit to Combat Smuggling of Migrants, Tool 8: Protection and assistance measures* (United Nations publication, 2010) 27-29 (tool 8.8).

⁹⁶ *Human Rights and Human Trafficking*, above n 88, 18-9. However, detention is likely to be considered as lawful if conducted as a last resort and in response to credible and specific threats to the safety of a trafficked person. *Ibid*.

measures that demonstrate respect for human rights and the safety and dignity of the migrants concerned'.⁹⁷

Moreover, for some experts, States 'should consider [...] not punishing or prosecuting 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'.⁹⁸ This non-criminalization concept – an emerging yet still contentious principle⁹⁹ – is not expressly mentioned in the Human Trafficking Protocol but is provided in some regional legal instruments.¹⁰⁰ Likewise, Article 5 of the Smuggling of Migrants Protocol provides that '[m]igrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of' one of the offences established in accordance with the Protocol.¹⁰¹

Victims of transnational human trafficking who are unlawfully in a country may be entitled to the regularization of their situation. Such a regularization of their status may happen for different reasons and in a number of ways. For instance, Article 13(1) of the European Trafficking Convention rules that

*“Each Party shall provide in its internal law a recovery and reflection period of at least 30 days when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her.”*¹⁰²

⁹⁷ *Training manual*, above n 95, 3.

⁹⁸ Working Group on Trafficking in Persons, *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.4/2009/2 (21 April 2009) 3 [12].

⁹⁹ See Andreas Schloenhardt and Rebekkah Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons: Principles, Promises, and Perspectives' (2016) 4(1) *Groningen Journal of International Law* 10-38.

¹⁰⁰ See *European Trafficking Convention* art 26; *EU Anti-Trafficking Directive* [2011] OJ L 101/1, art 8; *ASEAN Trafficking Convention* art 14(7).

¹⁰¹ *101 Smuggling of Migrants Protocol* art 5.

¹⁰² *European Trafficking Convention* art 13(1). For a commentary on art 13, see *Explanatory Report*, above n 21, 28-9. See also *Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims*

The recovery and reflection period serves a series of purposes such as the elimination of the fear of immediate deportation, the escape from traffickers' influence and the recovery from trauma.¹⁰³ The granting of this recovery and reflection period does not depend upon the collaboration of the victim with the investigative and prosecution procedure.¹⁰⁴ It is worth mentioning, however, that the right to a recovery and reflection period exists neither in the Trafficking Protocol nor in the ASEAN Trafficking Convention. This absence weakens the protection of victims in the sense that they might face deportation before completion of a formal identification.¹⁰⁵

Besides granting a reflection and recovery period for a short period of time, the States of destination may also decide to grant a residence permit to the victims. In that regard, Article 7(1) of the Trafficking Protocol provides that 'each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases'.¹⁰⁶ The meaning of 'appropriate cases' is not clarified in the Trafficking Protocol. However, looking at some regional instruments could help. For example, Article 14(1) of the European Trafficking Convention provides that renewable residence permit to victims shall be issued when 'the competent authority considers that their stay is necessary owing to their personal situation' (see *infra*, principle of non- refoulement for safety reasons), and/or 'for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings' (see *infra*).¹⁰⁷

of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19, art. 6 ('EU Residence Permit Directive').

¹⁰³ See Tenia Kyriazi, 'The Council of Europe Convention on Action against Trafficking in Human Beings' (2006) 59 *Revue Hellénique de Droit International* 655, 665.

¹⁰⁴ *Ibid.*

¹⁰⁵ Jovanovic, above n 86, 40.

¹⁰⁶ *Trafficking Protocol* art 7(1). See also *ASEAN Trafficking Protocol* art 14(4). For a critical analysis of the visa programs granted by the United States, Canada, and the United Kingdom, see Efthimia Barbagiannis, 'Protecting Victims of Human Trafficking: Creating Better Residency Visas' (2017) 25(3) *Cardozo Journal of International and Comparative Law* 561, 574-93.

¹⁰⁷ *European Trafficking Convention* art 14(1). Note that the best interest of the child takes precedence over the two requirements stated in art 14(1). See art 14(2) and the

With respect to the right of return, '[i]nternational human rights law is clear that all victims of trafficking, children as well as adults, who are not residents of the country in which they find themselves are entitled to return to their country of origin'.¹⁰⁸ This right implies a series of obligations for the country of origin (eg to receive its returning nationals without undue or unreasonable delay and with due regard for the safety of the victim¹⁰⁹) as well as for the country of destination. As established in Article 8(2) of the Trafficking Protocol:

*"When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary."*¹¹⁰

This provision shows that the limits to the right of the victim to return in his or her country are the same as the reasons why a State shall permit victims of trafficking to remain in its territory temporarily or permanently: namely the safety of the person and legal proceedings. Destination countries are in principle not prohibited from expelling trafficked victims. However, they are prevented from returning people to a country where there is a serious risk that they will be subject to persecution or abuse (see *infra*, the principle of non-refoulement). Such

Explanatory Report, above n 21, 30 [186]. See also *ASEAN Trafficking Convention* arts 14(4) and 16(5); *EU Residence Permit Directive* [2004] OJ L 261/19, art 8.

¹⁰⁸ *Human Rights and Human Trafficking*, above n 88, 24.

¹⁰⁹ See *Trafficking Protocol* art 8(1); *European Trafficking Convention* art 16(1); *ASEAN Trafficking Convention* art 15(1). Art 14(2) of the *ASEAN Trafficking Convention* provides that the country of origin shall respect and recognize the identification of victims made by the country of destination. The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children notes also: 'Conversely, it is often the case that countries of origin will identify a person as having been trafficked once they return home. In such cases, the country of destination should accept the determination made by the country of origin and work with that country to pursue criminal investigations and support any claims that the victims may have to compensation or other remedies'. *ASEAN Regional Review*, above n 86, 44-5

¹¹⁰ *Trafficking Protocol* art 8(2) (emphasis added). See also *European Trafficking Convention* art 16(2); *ASEAN Trafficking Convention* art 15(2).

a risk becomes a reality when, for instance, authorities punish victims for having left the country without authorization, when families and communities strongly stigmatize or reject victims, or when traffickers carry out intimidation, violence or reprisals against victims and even re-traffic them.¹¹¹ Also, with respect to legal proceedings, States of destination and origin shall encourage victims to voluntarily and temporarily stay in the country of destination ‘for purposes of testifying or otherwise cooperating in the prosecution of their traffickers’.¹¹²

In contrast, the Smuggling of Migrants Protocol does not require States Parties to grant a reflection or recovery period. As well, it does not expressly require States Parties to consider adopting legislative or other appropriate measures that permit smuggled migrants to remain in the territory, temporarily or permanently. Instead, the Protocol concentrates on the obligation of States Parties ‘to facilitate and accept, without undue or unreasonable delay’ the return of smuggled migrants.¹¹³ This said, however, the saving clause laid out in Article 19(1) of the said Protocol provides:

*“Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”*¹¹⁴

This clause implicitly refers, inter alia, to the situation where refugees and asylum-seekers use the services of smugglers. In that case, their expulsion or return from the country of destination is to be challenged by the principle of non-refoulement present in the 1951 Convention Relating the Status of Refugees (‘Refugee Convention’) and some human rights instruments. According to the principle of non-

¹¹¹ *Human Rights and Human Trafficking*, above n 88, 23 and 25. According to Konrad, up to fifty percent of victims who are immediately repatriated to their origin country are re-trafficked. Helga Konrad, ‘The OSCE and the Struggle against Human Trafficking: the Argument for a Comprehensive, Multi-Pronged Approach’ (2006) 1 *Intercultural Human Rights Law Review* 79, 82.

¹¹² *ASEAN Trafficking Convention* art 16(5).

¹¹³ *Smuggling of Migrants Protocol* art 18(1).

¹¹⁴ *Ibid* art 19.

refoulement laid down in Article 33(1) of the 1951 Refugee Convention,

*“[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”*¹¹⁵

Consequently, a refugee whose life is in peril in his own country cannot be repatriated by the country of admission. Further, even though his or her claim for refugee status has been unsuccessful, an asylum-seeker may be exceptionally granted permission to stay if ‘humanitarian or other related grounds’ exist.¹¹⁶

Concerning the right to remedies, the Recommended Principles and Guidelines stresses a widely accepted fact that ‘trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies’.¹¹⁷ Remedies, which may be criminal, civil or administrative in nature, ‘include the means for as full a rehabilitation as possible’¹¹⁸ and should be proportional to the gravity of the harm suffered.¹¹⁹ Remedies involve different forms. The Trafficking Protocol provides that ‘[e]ach State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered’.¹²⁰ Beside compensation, other forms of remedies include restitution, rehabilitation, satisfaction and guarantees of non-repetition.¹²¹ As victims of human trafficking have the right to fair, adequate, effective and appropriate remedies, ‘States should, therefore,

¹¹⁵ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33(1).

¹¹⁶ *Training manual*, above n 95, 7.

¹¹⁷ *Recommended Principles and Guideline*, above n 87, Guideline 9.

¹¹⁸ *Ibid.*

¹¹⁹ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60th sess, UN Doc A/RES/60/147 (21 March 2006) annex, paras 15, 18, 20.

¹²⁰ *Trafficking Protocol* art 6(6). See also *European Trafficking Convention* art 15; *EU Anti-Trafficking Directive* [2011] OJ L 101/1, art 17; *ASEAN Trafficking Convention* art 14(13).

¹²¹ See FactSheet 36, at 29-34.

be careful to ensure that the return of trafficked persons does not jeopardize the initiation and/or successful completion of any legal proceedings involving them'.¹²² This issue is particularly acute when the presence of the victim in the country where he or she has initiated a legal proceeding is a requirement to secure remedial action.¹²³ In such a case, the country should at least postpone repatriation and temporarily regularize the legal status of the victim, until he or she has been able to complete any legal proceedings.¹²⁴ In comparison, the Smuggling of Migrants Protocol is silent on the right to a remedy for smuggled migrants.

III. STATES' OBLIGATIONS SURROUNDING THE IDENTIFICATION OF VICTIMS OF HUMAN TRAFFICKING

International and regional legal instruments impose obligations on States Parties to take measures to identify victims of human trafficking. These measures comprise cooperation between States Parties or national entities, border detection, training, and establishment of national guidelines and procedures. However, the obligations imposed are sometimes ambiguous, and subsequent State practice shows that they have had rather limited results.

The Trafficking Protocol insists on an exchange of information, training and border detection. Article 10(1)(a) requires law enforcement, immigration or other relevant authorities of States Parties to cooperate by exchanging information about a range of relevant matters, including the identification of possible victims in transit.¹²⁵ Article 10(2) requires States Parties to provide or strengthen training for a series of agencies including law enforcement and immigration.¹²⁶ As per this provision, the training should focus on methods used in preventing trafficking, prosecuting traffickers and protecting the rights of the victims, and it should encourage cooperation with elements of civil society and other

¹²² *Human Rights and Human Trafficking*, above n 88, 25.

¹²³ *Ibid.*

¹²⁴ *Ibid.* See above text accompanying nn 107.

¹²⁵ *Trafficking Protocol* art 10(1)(a). On concerns about the confidentiality of information transferred by the sending State Party, see *Legislative guide*, above n 10, 307 [84].

¹²⁶ *Trafficking Protocol* art 10(2).

relevant organizations.¹²⁷ This focus, in our opinion, most probably includes (even though implicitly) methods to identify possible victims. With respect to border detection, Article 11(1) provides that ‘States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons’.¹²⁸ States Parties have also to consider cooperation among border control agencies, notably by establishing direct channels of communication.¹²⁹

The Trafficking Protocol is not without criticism. Anne Gallagher stressed, for example, that the regime established by the Organized Crime Convention and its Protocols (whereby trafficked persons are accorded greater protection and therefore impose a greater financial and administrative burden than smuggled migrants) created a clear incentive for national authorities to identify irregular migrants as smuggled rather than trafficked.¹³⁰

In 2000, the Inter-Agency Group (OHCHR, UNHCR, IOM, and UNICEF) also noted that ‘there is little guidance in either instrument [Trafficking Protocol and Smuggling of Migrants Protocol] regarding how the identification process is to be made and by whom’.¹³¹ To remedy that deficiency, the Legislative guide provides some guidance on the issue:

While the Protocol makes some provision for the assistance and support of victims, there is no specific requirement or process established whereby the status of victims as such can be established. In cases where steps are taken to provide assistance to victims, legislators may, therefore, wish to consider establishing some process or processes whereby victims or others acting on their behalf can seek such status. Generally, these might involve any or all of the following:

¹²⁷ *Ibid.*

¹²⁸ *Ibid* art 11(1).

¹²⁹ *Ibid* art 11(6).

¹³⁰ Gallagher, above n 24, 280.

¹³¹ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children’s Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, 8th sess, UN Doc A/AC.254/27, (8 February 2000), 1 [2].

- (a) Allowing courts or tribunals that convict traffickers or deal with trafficking in civil or other litigation to certify as such any victims who are identified during the proceedings, whether or not they actually participate in those proceedings;
- (b) Allowing a judicial or administrative determination to be made based on the application of law enforcement, border control or other officials who encounter victims in the course of investigations or prosecutions; and/or
- (c) Allowing a judicial or administrative determination to be made based on the application of the alleged victim personally or some representative, such as a representative of a non-governmental organization.¹³²

At the regional level, the European Trafficking Convention, the EU Anti-Trafficking Directive, and the ASEAN Trafficking Convention insist, to varying degrees, on border control (except in the EU Anti-Trafficking Directive), the adequate training and collaboration between competent authorities, and the adoption of legislative and other measures aimed at identifying victims. With respect to border detection, Article 7(1) of the European Trafficking Convention, modeled on Article 11(1) of the Trafficking Protocol, provides that ‘Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in human beings’.¹³³ In addition, drafters sought to strengthen cooperation between border-control services by establishing and maintaining new types of operational action (eg official machinery for direct exchange of information, cross-border observation and pursuit).¹³⁴

¹³² *Legislative guide*, above n 10, at 289 [64].

¹³³ *European Trafficking Convention* art 7(1). See also *ASEAN Trafficking Convention* art 13.

¹³⁴ See *European Trafficking Convention* art 7(6). See also *Explanatory Report*, above n 21, 20 [116]. Under art 5, cooperation is also expected at the domestic level between bodies responsible for combatting trafficking. Such cooperation can be illustrated by the work of the Mobile Research Brigade at Charles de Gaulle airport (France) which consists of tailing potential victims and traffickers in close cooperation with the Mobile Immigration Brigade which provides records of passengers and risk profiles. See European Union Agency for Fundamental Rights, *Fundamental rights at airports: border checks at five international airports in the European Union* (Publications Office of the European Union, 2014), 56 (‘Fundamental rights at airports’).

In practice, however, border guards find the task of victim identification challenging and admit that probably a large number of victims are not identified. One reason is that at the border many victims are not aware of the fact that they will be trafficked once in their destination country and consequently they do not approach the border guards to complain about their future-but- yet-unknown condition.¹³⁵ As put by Marika McAdam: ‘Border officials may be able to identify signs that persons have already been exploited, but where victims or potential victims of trafficking are intercepted at the border before any exploitation takes place, their identification is extremely difficult’.¹³⁶ Other reasons include the fact that the amount of time spent by border guards with (potential) victims is very limited and the fact that border guards do not speak to every person.¹³⁷ In a report published in 2014 on the human rights situation in five European airports, the European Agency for Fundamental Rights (FRA) noted:

In practice, border guards do not speak to every passenger. Of the border guards FRA interviewed, 41% said that they do not generally speak to all third-country national passengers during the first-line check. Of this 41%, only a third (35%) would consider substantial signs of protection needs (to be understood in the broad sense, also including asylum) a reason for addressing third-country national passengers. As groups are handled without necessarily addressing all accompanying passengers, according to shift leaders, the scope for interaction and proactive identification is limited during the check, and a large number of victims can be expected to pass unnoticed, particularly if risk factors are not obvious.¹³⁸

Regional legal instruments also insist on the importance of providing training programmes that help relevant officials that are likely to come into contact with victims or potential victims to unmask trafficking.

¹³⁵ International Organization for Migration, *Identification and Protection Schemes for Victims of Trafficking in Persons in Europe: Tools and Best Practices* (IOM, December 2005) 14 (‘*Identification and Protection Schemes*’).

¹³⁶ Marika McAdam, ‘Who’s Who at the Border? A rights-based approach to identifying human trafficking at international borders’ (2013) 2 *Anti-Trafficking Review*, 33, 38.

¹³⁷ *Identification and Protection Schemes*, above n 135, 14.

¹³⁸ *Fundamental rights at airports*, above n 134, 56.

¹³⁹Relevant officials include law-enforcement officials, immigration and social services, embassy and consulate staff, and border guards.¹⁴⁰ In practice, however, observers from different parts of the world still note the absence of continuous and specialized training that considerably lower the capacity to identify victims quickly and accurately among frontline officials.¹⁴¹ With regard to the European law in this area, Article 10(1) of the European Trafficking Convention states that ‘[e]ach Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims including children’.¹⁴² Proper training is recognized as essential to combat trafficking effectively. The Council of Europe stresses, for instance, that ‘[e]ach country must have anti-trafficking¹⁴³ but that the specialization requirement can take various forms:

“[C]ountries can opt to have a number of specialist police officers, judges, prosecutors, and administrative officers or to have agencies or units with special responsibility for various aspects of combating trafficking. Such agencies or units can be either special services set up to take charge of anti-trafficking action or they can be specialist units within existing bodies.”¹⁴⁴

The European Council insists on the fact that anti-trafficking specialized authorities must, a minima, be insufficient numbers, composed of men and women, have the capability and legal and material resources to recognize signs of trafficking, and have the necessary independence to be able to perform properly.¹⁴⁵

¹³⁹ See *European Trafficking Convention* art 29(1); *EU Anti-Trafficking Directive* [2011] OJ L 101/1, art 18(3); *ASEAN Trafficking Convention* art 16(6).

¹⁴⁰ *Explanatory Report*, above n 21, 45 [297]. In 2011, the European Frontex Training Unit developed an anti- trafficking of human beings training package for European border guards comprising three modules: Awareness, Identification, Interviewing. For further information see Frontex, *Focus: Combating human trafficking at the border – training for EU Border Guards* <<https://frontex.europa.eu/media-centre/focus/combating-human-trafficking-at-the-border-training-for-eu-border-guards-rRzpfI>>.

¹⁴¹ See, eg, Jovanovic, above n 86, 43.

¹⁴² *European Trafficking Convention* art 10(1).

¹⁴³ *Explanatory Report*, above n 21, 44 [292].

¹⁴⁴ *Ibid* 45 [293].

¹⁴⁵ *Ibid* 44-5 [292]-[293].

Moreover, regional legal instruments require States Parties to ensure that their competent authorities collaborate with each other or with support organizations.¹⁴⁶ These latter may be, for example, psychologists, or social workers from the public or NGO sector. Cooperation with such support organizations is an important measure in the sense that it can notably help identify and protect victims properly when, due to a lack of training, the police or judicial officials are not able to distinguish a victim of human trafficking from a smuggled or illegal migrant.¹⁴⁷

Furthermore, Article 10(2) of the European Trafficking Convention provides that '[e]ach Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate'.¹⁴⁸ The ASEAN Trafficking Convention also requires the establishment of national guidelines and procedures for the proper identification of victims.¹⁴⁹ Guidelines¹⁵⁰, procedures, and indicators¹⁵¹, are all written tools

¹⁴⁶ See *European Trafficking Convention* art 10(1); *EU Anti-Trafficking Directive* [2011] OJ L 101/1, art 11(4); *ASEAN Trafficking Convention* art 14(1).

¹⁴⁷ Kyriazi, above n 103, 663-4.

¹⁴⁸ *European Trafficking Convention* art 10(2). See also *EU Anti-Trafficking Directive* [2011] OJ L 101/1, art 11(4).

¹⁴⁹ *ASEAN Trafficking Convention* art 14(1). For further information on guidelines, procedures, indicators, or referral mechanisms used in ASEAN States, see *ASEAN Regional Review*, above n 86, 36-45.

¹⁵⁰ See, eg, gender-sensitive guidelines adopted by the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, in February 2015, for handling women victims of trafficking. These non-binding guidelines are intended to guide frontline agencies and NGOs involved in supporting victims of trafficking. See *ASEAN Regional Review*, above n 86, 36 (Box 5). For guidelines developed at the European level, see European Commission, *Guidelines for the identification of victims of trafficking in human beings, especially for consular services and border guards* (European Union Publications Office, 2013) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/thb-victims-identification/thb_identification_en.pdf>.

¹⁵¹ See, eg, indicators formulated by participants at the ASEAN/COMMIT workshop (15-16 December 2015) for identifying victims of trafficking and associated exploitation as well as special measures for identifying child victims of trafficking. The formulated indicators notably relate to visual signs used by frontline officials and other first responders in seeking to establish whether a situation may be one requiring further investigation, and screening questions to help determine whether there are indications of a possible case of trafficking that requires follow-up and referral. *ASEAN Regional Review*, above n 86, 32-3 (Box 2 and 3). See also United Nations Office

aimed at helping frontline entities (eg police officers) and competent authorities to rapidly identify individuals who have been trafficked. Here, it should be highlighted that establishing relevant indicators for border guards seems to be a difficult task. Marika McAdam stresses the fact that many existing indicators offer little support to border officials because they have been developed to identify situations of current exploitation (indicators therefore more relevant for the police), while border officials are more generally in a position where they have to identify trafficking victims before any exploitation has taken place.¹⁵² Therefore, she suggests recasting and contextualizing the indicators elaborated so far:

*“The ability of border officials to identify trafficked persons before they are exploited will be enhanced if they are equipped with indicators that pertain to the irregular migration process leading to situations of exploitation, rather than exploitative situations themselves. However, it is vital that indicators should not rush towards only the possibility of trafficking, but should support border officials to identify vulnerabilities more broadly.”*¹⁵³

For McAdam, indicators in the hands of border guards should help them identify any type of people trying to cross the border irregularly – be they smuggled migrants, migrants in irregular situations or trafficked victims – rather than focusing only on identifying exploitation. This process of identification would be a prelude to an in-depth investigation conducted later through referral mechanisms and aiming at determining the real status of the persons intercepted.¹⁵⁴

on Drugs and Crime, *Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings* (United Nations publication, 2008) ch 6.

¹⁵² Indicators mentioned by McAdam include: International Labour Office and European Commission, *Operational indicators of trafficking in human beings* (2009) <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf>; United Nations Office on Drugs and Crime//UN.GIFT, *Human Trafficking Indicator* <http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf>. McAdam also notes that even indicators specific to border contexts (eg indicators set forth in *Training for Law Enforcement Officers*, above n 73, 46)

¹⁵³ *Ibid* 46-7.

¹⁵⁴ *Ibid* 42. She acknowledges that these indicators would offer little help in identifying victims of human trafficking when they cross borders regularly. Here she suggests

Among measures established to identify victims, many countries have adopted national referral mechanisms.¹⁵⁵ Such mechanisms can include a procedure where ‘[f]ront-line professionals will use indicators to consider whether an individual could be a victim of trafficking before referring their details to a designated competent authority to make a decision on whether there are reasonable grounds to believe that the individual has been trafficked’.¹⁵⁶ National competent authorities are key elements in the formal identification of victims of human trafficking. As explained by the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children:

“In some parts of the world, victims of trafficking can be provisionally identified as such for purposes of immediate protection and support. However, additional entitlements (such as Regularisation of status to allow a foreign victim to remain in the country of destination for a period of time and/or access to a “reflection period”) require a further, official identification procedure. This will usually be entrusted to a National Competent Authority (NCA) that consists of a team of specialists trained to determine whether a person is a victim of human trafficking.”¹⁵⁷

To formally identify the status of a victim is a process that takes time (weeks or months). Among other things, silence kept by victims suffering from post-traumatic stress disorder, and exchange of information with other countries or support organizations may lengthen the identification procedure.¹⁵⁸ Therefore, taking up a human rights approach instead of a prosecution-oriented one, the European Trafficking Convention and the EU Anti-Trafficking are of limited relevance because even though they enable the identification of human vulnerabilities they don’t help distinguish between smuggled migrants, irregular migrants or trafficked victims.

however that border official could still raise awareness on the dangers and consequences of human trafficking among people they encounter. *Ibid.*

¹⁵⁵ *ASEAN Regional Review*, above n 86, 34.

¹⁵⁶ Jessica Elliott, ‘(Mis)Identification of Victims of Human Trafficking: The Case of R v. O’ (2009) 21(4) *International Journal of Refugee Law*, 727, 733. For a broader definition of the mechanism, see OSCE Office for Democratic Institutions and Human Rights, *National Referral Mechanisms, Joining Efforts to Protect the Rights of Trafficked Persons: A Practical Handbook* (OSCE/ODIHR, 2004), 15-6.

¹⁵⁷ *ASEAN Regional Review*, above n 86, 35 (Box 4).

¹⁵⁸ *Explanatory Report*, above 21, 23 [131].

Directive have introduced the concept of presumption of victim status – a concept present neither in the Trafficking Protocol nor in the ASEAN Trafficking Convention – in order to secure assistance and support to people who are merely presumed victims of human trafficking but not yet formally identified as such. Article 10(2) of the European Trafficking Convention provides:

“Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence [...] has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 [assistance in physical, psychological and social recovery] and 2 [assistance in safety and protection needs].”¹⁵⁹

The presumption of victim status means that as soon as competent authorities have ‘reasonable’ grounds for believing that someone is a victim of human trafficking, they will not remove him or her from the territory of the receiving country to the country of origin or to a third country, and they will provide the person with assistance and support irrespectively of his or her willingness to act as a witness.¹⁶⁰ The presumption of victim status – which requires a standard of proof relatively low – is of paramount importance. Many victims are illegally present in the country where they are exploited. Therefore, application of the reasonable-grounds principle avoids that these people are removed from the receiving country and are prevented from assistance and support before they can be successfully identified as victims.¹⁶¹

IV. CONCLUSION

The prompt and accurate identification of victims of human trafficking is crucial to ensure proper rights, assistance, support, and protection are granted to them under national and international law.

¹⁵⁹ *European Trafficking Convention* art 10(2). See also *EU Anti-Trafficking Directive* [2011] OJ L 101/1, art 11(2).

¹⁶⁰ *Explanatory Report*, above n 21, 23 [131] – [133]. *EU Anti-Trafficking Directive* [2011] OJ L 101/1, Preamble para 18.

¹⁶¹ *Explanatory Report*, above n 21, 23 [131].

Therefore, international and regional legal instruments have imposed a series of measures aimed at facilitating and strengthening States' efforts made to unmask the offence of human trafficking. These measures include cooperation between official services or with support organizations, training of frontline officials and other people likely to be in contact with victims, adoption of legislative and other measures (tools, guidelines, indicators, etc.), and border control.

However, victim identification remains a major challenge. Despite considerable efforts put by States, international organizations and members of the civil society, human trafficking is still an invisible crime. Observers stress that only a very small portion of the total number of persons trafficked is identified.¹⁶² The reasons for low levels of identification are numerous, including on one side the lack of awareness and resources from frontline officials, and on the other side the victims' perception of corruption and complicity by competent authorities. Too often, identification is reactive and still greatly depends on the victim. If an individual has insufficient confidence to approach frontline responders – like law enforcement officers, border guards, NGO workers – and cannot self-identify as a victim, then he or she has a high risk of never being identified as a victim of human trafficking and never being referred to appropriate support and protection services.¹⁶³

In order to overcome the challenge of prompt and accurate identification, solutions have been suggested. More efforts must be put into proactive identification by competent bodies from destination countries, transit countries and countries of origin as well. Possibilities for improvement of the identification of victims include developing or strengthening constant and specialized training and implementing capacity building initiative in order to address lack of awareness of frontline officials¹⁶⁴, ensuring that guidance, procedures and indicators are received and understood, updated and implemented to guarantee prompt assessment and quick reaction from frontlines officers¹⁶⁵, developing or strengthening functional national referral mechanisms¹⁶⁶,

¹⁶² See, eg, *ASEAN Regional Review*, above n 86, 35.

¹⁶³ *Identification and Protection Schemes*, above n 135, 14.

¹⁶⁴ Jovanovic, above 86, 43, *ASEAN Regional Review*, above n 86, 44

¹⁶⁵ *Fundamental rights at airports*, above n 134, 56.

¹⁶⁶ European Commission, *Commission Staff Working Document, Accompanying the*

ensuring that sufficient resources (human, financial, technological) are provided to all services involved in the identification process, and ensuring appropriate coordination and exchange of information between all relevant actors. First and foremost, however, all these efforts – and those related to prevention and prosecution – have to be strongly encouraged and supported by a common political will to combat human trafficking.

Today, and despite considerable efforts put by the majority of those involved in the fight against human trafficking, findings are alarming: given the number of people still trafficked, it is obvious that prevention efforts have had limited effects; victim identification is mainly reactive; and only a few traffickers are prosecuted and convicted comparing to the large cohort of people trafficked.¹⁶⁷ It is a truism to say that combatting human trafficking is not an easy task. To have some chance of eradicating this scourge, further efforts shall be made not only in the prevention, detection and prosecution fields *stricto sensu*, but also in the elimination or at least the mitigation of all the root causes of human trafficking, whether it is poverty, lack of education, corruption, climate change or other causes.

document: Report from the Commission to the European Parliament and the Council: Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, SWD(2016) 159 final (19 May 2016), 43.

¹⁶⁷ According to UNODC, approximately 6'800 persons have been convicted during the years 2012-2014. United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (United Nations publication, 2016) 34.