



UNODC

United Nations Office on Drugs and Crime

The Concept of
'Harbouring'
in the Trafficking in Persons Protocol

Issue Paper



Acknowledgements

The present publication was developed by the Human Trafficking and Migrant Smuggling Section of the United Nations Office on Drugs and Crime (UNODC) under the leadership of Ilias Chatzis, under the substantive guidance of Morgane Nicot and Martin Hemmi. The publication was drafted by Joseph Lelliott (consultant), School of Law, University of Queensland.

UNODC expresses its appreciation to those who attended the expert group meeting on 5 March 2021 which, due to travel restrictions and social distancing measures linked to the global COVID-19 pandemic, was held virtually. Input was provided by: Marcela Rodriguez (Argentina), Erwann Tor (France), Tilek Kudayarov (Kyrgyzstan), Khalaila Hanan (Jordan), Essam Al-Raggad (Jordan), Nadia Zulkefli (Malaysia), Aznee Salmie Ahmad (Malaysia), Koh Teck Chew (Malaysia), I.A. Mulokoshi (Namibia), Innocentia Nyoni (Namibia), Sarah Elliot (UNHCR), Pam Bowen (United Kingdom), Janie Chuang (USA), Janet Zinn (USA), Laura Rundlet (USA), and Karen Strauss (USA).

Special thanks are extended to students of Queen Mary University London, who have contributed with case law research, collection and analysis: María Barraco, Eva Ford, Esther Jaromitski, Ramy Metwally Abdelhady, Angeli Romero, Dylan Siry, as well as to Yang Ding and Laura Clark from Harvard University, Sarah Conolly from Cornell University, and Rory McFadden from the University of Queensland.

We would also like to thank our UNODC colleagues Silke Albert, Giorgina Alonso, Amjad Al-Adarbeh, Samantha Munodawafa, Mukundi Mutasa, Alline Pedra, Zhypara Rakisheva, Pascale Reineke-Schreiber, Olana Rodionenko, Zoi Sakelliadou, Gilberto Zuleta, former UNODC colleague Raushan Bolotalieva as well as current and former UNODC interns: Ilaria Marconi, Michelle Rakue and Eleonora Scala.

The study was made possible through funding received from the Government of the United States of America.



TABLE OF CONTENTS

Acknowledgements	1
Executive Summary	6
1 Introduction	10
1.1 Context of the Review.....	12
1.2 Purpose and Terms of Reference.....	13
1.3 Methodology.....	13
Initial Desk Research.....	13
Questionnaires and Interviews.....	14
Drafting the Issue Paper.....	14
Review by Expert Group.....	14
Finalisation of the Issue Paper.....	14
1.4 Limitations.....	15
1.5 Structure of this Paper.....	15
2 The Concept of ‘Harbouring’	17
2.1 Ordinary Meaning in various Languages.....	18
2.1.1 English.....	18
2.1.2 Spanish.....	19
2.1.3 French.....	19
2.1.4 Russian.....	19
2.1.5 Chinese.....	20
2.1.6 Arabic.....	20
2.1.7 Other Languages.....	20
2.2 International Law and Policy.....	21
2.3 Case Law.....	24
2.3.1 Trafficking Case Law.....	24
2.3.2 Non-Trafficking Case Law.....	25
2.4 General Conclusions on the Concept of ‘Harbouring’.....	25
3 ‘Harbouring’ in National Legislation	27
4 ‘Harbouring’ in Context	30
4.1 Scenarios of Harbouring.....	31
Scenario One: Harbouring prior to Exploitation.....	31
Scenario Two: Harbouring during Exploitation.....	31
Scenario Three: Harbouring as the Sole Act of Trafficking.....	33
4.2 ‘Harbouring’ and ‘Means’.....	33
4.3 ‘Harbouring’ and Types of Exploitation.....	33
4.4 ‘Harbouring’ and the Smuggling of Migrants.....	34
5 National Law and Practice in Surveyed Countries	36
5.1 Argentina.....	37
Summary.....	37
Legal Framework.....	37
Case Law.....	38
Key Observations.....	38
5.2 Bangladesh.....	39
Summary.....	39
Legal Framework.....	40
Key Observations.....	41
5.3 Fiji.....	41
Summary.....	41
Legal Framework.....	41
Key Observations.....	42
5.4 France.....	43
Summary.....	43
Legal Framework.....	43
Case Law.....	44
Key Observations.....	44

5.5	Jordan.....	45
	Summary	45
	Legal Framework.....	45
	Key Observations.....	45
5.6	Kyrgyzstan.....	46
	Summary	46
	Legal Framework.....	46
	Key Observations.....	47
5.7	Malaysia	48
	Summary	48
	Legal Framework.....	48
	Case Law.....	49
	Key Observations.....	49
5.8	Namibia.....	50
	Summary.....	50
	Legal Framework.....	50
	Case Law.....	51
	Key Observations.....	52
5.9	United Kingdom.....	53
	Summary.....	53
	Legal Framework.....	53
	Case Law.....	54
	Key Observations.....	54
5.10	United States.....	55
	Summary.....	55
	Legal Framework.....	55
	Case Law.....	56
	Key Observations.....	57
6	Key Findings.....	58
	‘Harbouring’ as a Flexible Term.....	59
	International Law and Policy.....	59
	‘Harbouring’ in National Legislation.....	60
	Legislative Definitions.....	60
	Situations of ‘Harbouring’ and its Relationship to Exploitation.....	60
	‘Harbouring’ Brings Exploitation Itself within the Scope of Trafficking.....	61
	Relationship to the ‘Means’ Element.....	61
	The Understanding of ‘Harbouring’ in the Surveyed Countries.....	61
	Physical Presence.....	62
	‘Harbouring’ and its Relationship to Other Acts.....	62
	Judicial Interpretation.....	62
	‘Harbouring’ as Accommodation.....	62
	The Temporal Minimum.....	63
	‘Harbouring’, Exploitation Offences, and Charging Decisions.....	63
	‘Harbouring’ Receives Little Attention.....	63
	Select Bibliography.....	64
	Annex One – Overview of National Legislation.....	67
	Legislation in English.....	68
	Legislation in French.....	70
	Legislation in Spanish.....	70
	Legislation in Russian.....	70
	Legislation in Chinese.....	71
	Legislation in Arabic.....	71
	Legislation in other languages.....	71
	Annex Two – Table of Survey Country Legislation.....	73
	Annex Three – Survey Instrument.....	77

Abbreviations and Acronyms

ASEAN	Association of Southeast Asian Nations
COP	Conference of the Parties to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto
CTOC or UNTOC	United Nations Convention Against Transnational Organized Crime
GLOTIP	UNODC Global Report on Trafficking in Persons
EU	European Union
Lao PDR	Lao People's Democratic Republic
NGO	Non-Governmental Organization
OUP	Oxford University Press
POCA	(Namibia's) Prevention on Organized Crime Act 2004
SAARC	South Asian Association for Regional Cooperation
Trafficking in Persons Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
TVPA	(US's) Trafficking Victims Protection Act
UK	United Kingdom
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
US	United States
USC	United States Code
US/TIP Office	United States Department of State Office to Monitor and Combat Trafficking in Persons

Executive Summary

This Issue Paper examines the concept of ‘harbouring’ in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (‘Trafficking in Persons Protocol’). Article 3(a) of the Protocol defines trafficking as constituting three elements: an act element, a means element (by which the act is achieved), and a purpose element of exploitation.¹ Where any of the stipulated means are present (or where the trafficked person is a child) any consent of a victim of trafficking to their exploitation is irrelevant.²

While the Trafficking in Persons Protocol enjoys wide acceptance by the international community,³ uncertainty over certain aspects of the definition of trafficking persists. Clarity regarding what is, and equally what is not, trafficking is significant for a range of reasons. Characterising conduct as ‘trafficking’ has implications for who may be prosecuted as a trafficker, who is identified as a victim, and for States’ broader understanding of the nature and extent of trafficking in their jurisdictions. The importance of a clear international definition of trafficking in persons is recognised by States Parties to the Protocol.⁴

Analysis of the concept of ‘harbouring’ is important for a number of reasons, not least because there is little guidance in the Protocol or interpretative materials concerning its meaning and application. As this Paper shows, this lack of clarity has implications for how harbouring is understood, particularly at the national level and across different languages. In this context, this Paper examines how and to what extent the meaning of ‘harbouring’ differs across languages, as well as its relationship with the other act elements in the trafficking definition. It further explores questions regarding the scope of ‘harbouring’, including whether it requires concealment or simply accommodation of victims, whether a victim must be harboured for a minimum period of time, and whether there is a requirement of ‘substantiveness’ to a place of harbouring. This paper also addresses the role of ‘harbouring’ in obviating the need for movement as a component of trafficking.

All Issue Papers to date have adopted a broadly similar methodology, including (1) a desk review of literature, legislation, and case law; (2) a survey of the laws and case law of selected States representing different regions and legal traditions including interviews with practitioners; (3) preparation of a draft paper; (4) review of the draft paper at an expert group meeting; and (5) finalisation of the Issue paper and any additional material. Though this Issue Paper follows this methodology, some aspects were modified due to the impact of COVID-19.

This Issue paper comprises six parts. Part 1 explains the background and context of this Paper. Part 2 explores the ordinary meaning of ‘harbouring’, interpretation in various language versions of the Protocol, relevant international legal and policy materials, and case law concerning the meaning of ‘harbouring’. Part 3 of this Issue Paper looks at terms used in domestic laws to cover the act of ‘harbouring’ in trafficking legislation, based on examination of some 100 jurisdictions. Part 4 analyses contexts relevant to acts of ‘harbouring’. It sets out illustrative case examples of harbouring drawn from a range of jurisdictions and makes observations regarding the scope of the concept. Part 5 sets out national laws, policies, and practice concerning the act of ‘harbouring’ in the 10 States formally surveyed. Part 6 identifies key findings from the examination of national law and practice in Part 5, in combination with observations drawn from Parts 2, 3, and 4.

The following conclusions emerge from the analysis of this paper in Parts 2 through 4 of this Paper.

The understanding of ‘harbouring’ varies across different languages. The second edition of the *Legislative Guide* for the Trafficking in Persons Protocol notes that ‘harbouring’ may be understood differently in different jurisdictions.⁵ In English, ‘harbouring’ broadly refers to the sheltering of persons, but may also attract negative connotations (including an element of concealment) as a result of the word’s commonly dyslogistic meaning. The French word ‘hébergement’ (or the verb form ‘héberger’) means accommodation or to provide with a house or shelter. The Spanish word ‘acogida’ means ‘to take in’ or ‘shelter’ someone, as does the Arabic word *إيواءهم*. These words have broadly positive meanings and eschew any dyslogistic connotations. The Russian word ‘укрывательство’, on the

¹ The full definition of trafficking in persons is set out in Article 3 of the Protocol and is extracted below in Part 1.

² Trafficking in Persons Protocol, Article 3(b)–(c).

³ As of April 2021, the Protocol has 178 States Parties.

⁴ Working Group on Trafficking in Persons, *Report of the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010*, UN Doc CTOC/COP/WG.4/2010/6 (17 February 2010) [31(b)].

⁵ UNODC, *Legislative Guide For The Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime* (2020) 29–30.

other hand, translates more closely to ‘conceal’ or ‘hide’. The Chinese term ‘窝藏’ appears to bear the closest meaning to ‘harbouring’ in English, combining words meaning ‘shelter’ and ‘conceal’. The different (and sometimes multifaceted) meanings of ‘harbouring’ across the Arabic, Chinese, English, French, Russian, and Spanish versions of the Protocol indicate that States Parties have a degree of latitude in how the act element of ‘harbouring’ is implemented in national legislation. They also explain the variety of approaches taken to this act element at the domestic level.

There is little attention to the concept in international law and policy. It is clear that ‘harbouring’ is an act element in the definition of trafficking, and thus requires proof of physical conduct. Like the other act elements, the term was not subject to substantive discussion during drafting of the Trafficking in Persons Protocol and interpretive materials have since given it limited attention. Academic and judicial commentary on the meaning and application of ‘harbouring’ is also scant. Nonetheless, the leading view is that ‘harbouring’ in the Protocol is a flexible concept that should be afforded its ordinary meaning of providing accommodation or shelter. It can also encompass, but is not restricted to, the concealing or holding of persons. Importantly, the ordinary meaning of ‘harbouring’ does not limit the types or character of places in which victims can be harboured, nor is there any need for the condition of the place of harbouring to be poor, inhumane, degrading, or exploitative in and of itself. It should be stressed that it is only the combination of harbouring with the purpose and means elements (and only the purpose element for children) that makes the act of harbouring trafficking.

There are a wide range of approaches to ‘harbouring’ in national trafficking legislation. Broadly, these approaches can be summarised as follows:

- 1) English-language States that only use the English word ‘harbouring’.
- 2) Other-language States that only use a word that closely translates to ‘harbouring’.
- 3) English-language States that use the English word ‘harbouring’ in combination with other words, including, inter alia, ‘conceal’, ‘hold’, and ‘maintain’.
- 4) Other-language States that only use words meaning ‘accommodate’, ‘shelter’, ‘lodge’ or ‘house’ in their respective languages.
- 5) Other-language States that use the words ‘accommodate’, ‘shelter’, ‘lodge’ or ‘house’ in combination with words meaning ‘concealment’ or ‘detain’ in their respective languages.
- 6) Other-language States that only use words meaning ‘concealment’.
- 7) Other-language States that only use words meaning ‘detain’.
- 8) States that do not use ‘harbouring’ or any equivalent act element.

In addition, ‘harbouring’ and similar terms are very rarely defined in national legislation.

In practice, ‘harbouring’ may occur in one of three general scenarios. These are, first, where the victim is harboured prior to exploitation and where harbouring is not the sole act; second, where the victim is harboured during exploitation itself, following recruitment, transportation, transfer, or receipt into the situation of exploitation; and, third, where harbouring occurs during or prior to exploitation, absent any other trafficking acts. In the third scenario, harbouring is the sole ‘act’ of trafficking and a person may become a victim of trafficking without any movement. On this point, the Working Group on Trafficking in Persons has stated that trafficking does not require any transportation or transit of victims. It may be noted that, while the majority of trafficking cases will include an act or acts of harbouring, some foreseeably may not.

Harbouring may be linked to any ‘means’ element and any ‘purpose’ of exploitation. While any ‘means’ may be used to carry out harbouring, in practice harbouring is commonly linked to some restriction of the victim’s liberty, which acts to keep them in the place of ‘harbouring’ for the purpose of exploitation. It is difficult to conceive of an exploitative purpose that could not entail the harbouring of a victim.

The survey of national law and practice in Part 5 confirms that ‘harbouring’ is a non-technical and flexible term defined according to its ordinary meaning. It further confirmed that the minimal attention afforded to ‘harbouring’ in international law and policy is reflected

at the national level, and that it may be interpreted differently in different languages and jurisdictions. The following major points crystallise from the findings of the survey.

Harbouring can take place at any stage of a trafficking process, either before or during exploitation of the victim. In practice, however, acts of harbouring are more commonly prosecuted where they occur concurrently with exploitation itself. This is reflected in the available case law. This appears to be because, first, trafficking is more often discovered once exploitation has occurred and, second, it is (as a matter of evidence) difficult to prove that a harbourer had an exploitative purpose prior to exploitation occurring.

The act of 'harbouring' does not necessarily require the physical presence of the harbourer. It is sufficient that the trafficker exerts control over the place of harbouring, such as where a trafficker owns, but is not on, a fishing vessel where exploitation takes place (and knows this). It should be noted that, in contrast, the question of control over the victim at the place of harbouring, whether or not the trafficker is physically present, is referable to the means element.

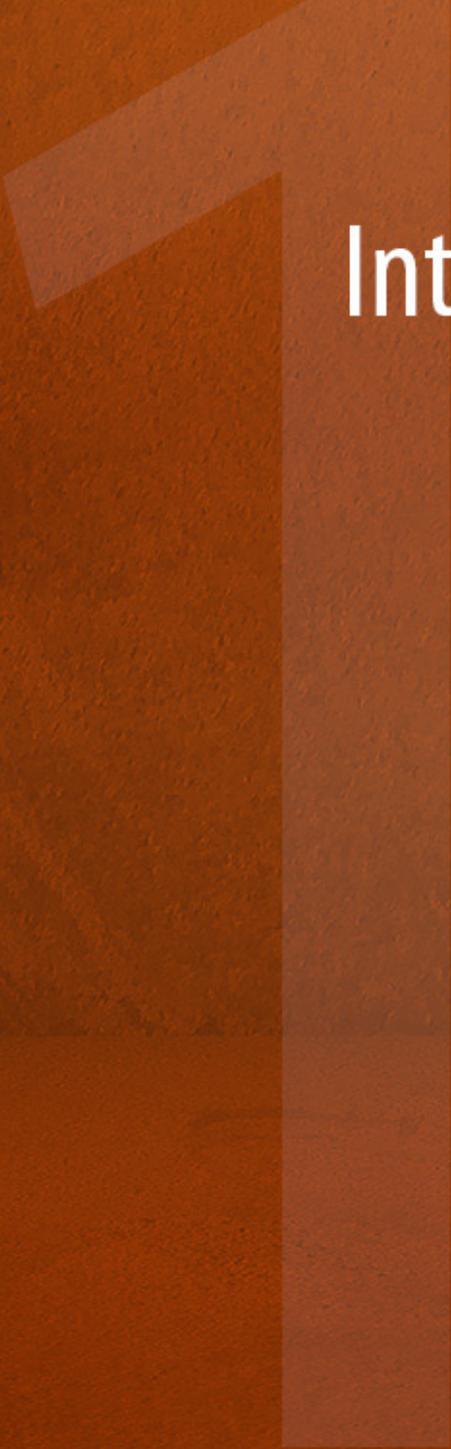
There is very little judicial consideration of the meaning of 'harbouring' in reported case law. The act elements, including 'harbouring', are very rarely a focus of the jurisprudence on trafficking in any of the countries surveyed. Other issues, particularly the existence (or not) of the means element and proof of the exploitative purpose, are more commonly discussed in judicial decisions. Very few cases examining the meaning or application of 'harbouring' were located; those that did consistently accorded the word its ordinary meaning in the relevant language.

There is inconsistency across jurisdictions as to whether harbouring must occur for a minimum time. In some jurisdictions, harbouring requires the victim to stay at a place for a substantial time period. This period is not specified, though may be taken to be a 'longer sojourn' or at least enough time to sleep in a place. In other jurisdictions, there is no minimum period in which a victim of trafficking can be harboured.

Some jurisdictions require a minimum 'substantiveness' to the place of harbouring. In some jurisdictions, the view was expressed that a victim must actually be 'accommodated' (i.e. given a place where they can lodge or sleep) in order for the act of harbouring to be complete. The alternative view is that 'harbouring' only requires concurrence of the means and purpose elements with shelter of the victim at a particular location (even if very brief). In this case, for example, a victim may potentially be harboured in any place of exploitation, even if they are not 'accommodated' there. This latter interpretation of 'harbouring' appears more common in English-speaking jurisdictions and may be due to the fact that 'harbouring' (in English) is not analogous to 'accommodation' (in the sense of providing a person with a place to live or sleep).

The relationship between 'harbouring' and other act elements varies. Like 'harbouring', the meanings of other act elements are non-technical, flexible, and may be interpreted differently in various languages. One example is that the correlative of 'receipt' in French is 'accueillir', which also means 'host' and can refer to any place where the victim can be sheltered. Thus, conduct which may be 'harbouring' in English language jurisdictions may fall within the meaning of 'receipt' in French language jurisdictions. The key point is that, while the scope of individual act elements may vary in different States Parties, taken together they should cover the full range of trafficking conduct criminalised by the Trafficking in Persons Protocol.

Harbouring conduct may often be prosecuted under standalone exploitation offences or via complicity. Interviewees from most States surveyed observed that, where harbouring occurs concurrently with exploitation, standalone exploitation offences may be charged (such as forced labour or sexual exploitation offences). In many such cases, both types of offence may be applicable and it will be a matter of prosecutorial discretion as to which is charged. Similarly, and in cases involving multiple traffickers, offenders who have harboured victims may be charged via complicity. A number of interviewees noted that this may be an easier avenue of prosecution, given that it obviates the need to prove primary liability in relation to multiple separate offenders.



Introduction

This Issue Paper concerns the concept of ‘harbouring’ in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (‘Trafficking in Persons Protocol’). The Protocol is the ‘principal, legally binding global instrument’ addressing trafficking in persons.⁶ It places various obligations on States Parties, including to criminalise trafficking, protect victims, prevent the trafficking, and cooperate in combating it.⁷ Article 3 of the Protocol sets out the first international legal definition of trafficking in persons. It states that trafficking in persons is

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.

The definition adopts a three-pronged approach, combining act, means, and purpose elements. Harbouring of persons is one of five alternate actions that comprise the ‘act’ element in the definition of Trafficking in Persons. The other four are recruitment, transportation, transfer, and receipt of persons. A combination of act, means, and purpose elements are required to constitute trafficking in persons, except in cases where the trafficked person is a child, in which case the means element is obviated. Where any of the stipulated means are present (or where the trafficked person is a child) any consent of a victim of trafficking to his or her exploitation is irrelevant.⁸

As with other terms in the definition of trafficking in persons, the interpretation, meaning, and application of ‘harbouring’ has significant implications for the scope and understanding of trafficking. It points to the types of conduct that may attract liability, as well as the relationship between different ‘acts’ of trafficking and the ‘act’, ‘means’, and ‘purpose’ elements. It helps guide the prosecution of perpetrators, identification of those who have been ‘harboured’ as victims of trafficking, and collection of data concerning the scale and typology of trafficking offences. Analysis of the concept of ‘harbouring’ is important for a number of reasons, not least because there is very little guidance in the Protocol or interpretative materials concerning its meaning and application. As this Paper shows, this lack of clarity has implications for how harbouring is understood, particularly at the national level and across different languages.

On this background, this Paper investigates the ordinary meaning of ‘harbouring’ in English and other languages, understanding of the term in international law and policy, implementation of ‘harbouring’ in national legislation and its interpretation in domestic case law, and in what contexts harbouring occurs. It draws on a global desk review of relevant literature, examination of the trafficking legislation of some 100 States, and in-depth surveys of ten countries.

The analysis in this Paper highlights and addresses a number of key issues regarding the concept of harbouring. These include:

1. How does the term used for the concept of ‘harbouring’ in different languages affect its meaning?
2. Is ‘harbouring’ simply the accommodation or shelter of victims, or does it require concealment or encompass other conduct?
3. In what places can a victim be ‘harboured’, and must a trafficker be physically present at, or have ownership of, the place of harbouring?
4. Is there a temporal minimum to the act of ‘harbouring’?
5. Can the act of ‘harbouring’ be the sole act of trafficking and, relatedly, does it bring the purpose of trafficking—exploitation itself—within the scope of the crime?

⁶ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of Parties to the United Nations Convention on Transnational Organized Crime on its fourth session, held in Vienna from 8 to 17 October 2008*, UN Doc CTOC/COP/2008/19 (1 December 2008).

⁷ Trafficking in Persons Protocol, Article 2.

⁸ Trafficking in Persons Protocol, Article 3(b)–(c).

1.1 Context of the Review

Adoption of the Trafficking in Persons Protocol in 2000 was a major step towards creating a common understanding of the phenomenon of human trafficking. It set out a framework for cooperation between States in combating the crime. Since the Protocol's entry into force, there have been significant improvements in its implementation. The vast majority of States are parties to it and many core elements of the Protocol have been incorporated into national, regional, and international laws and policies.⁹ Indeed, most States have enacted or revised laws in response to trafficking and the requirements of the Protocol. The definition of trafficking in Article 3 is central to the Protocol underpins this progress.

Despite the critical importance of the definition, the precise meaning of several of its constituent parts are not firmly established. The Working Group on Trafficking in Persons has drawn attention to the fact that '[n]ot all concepts and terms expressed in the Protocol are fully defined, and national interpretation and experience varies widely'.¹⁰ In the absence of definitional clarity, the exact ambit of trafficking has been interpreted in different ways. This ambiguity is significant; how trafficking is characterised has consequences for States, perpetrators, and victims. For States, it determines whether obligations under international law to criminalise, protect, and cooperate are activated. For victims, it determines whether they are deemed 'victims of trafficking' and thus owed the special assistance and protection measures mandated under the Protocol and many national laws. For perpetrators, it determines whether they are identified as 'traffickers' and liable to the penalties that attach to the offence of trafficking. A clear definition of trafficking in persons is also crucial for the purposes of data collection and understanding the nature and extent of trafficking.

Consequently, substantial tensions exist between various stakeholders and States regarding the definition of trafficking. In many cases, these relate to just how restrictively, or broadly, it should be interpreted. As recognised in a previous UNODC Issue Paper on the definition of trafficking: '[t]he complex and fluid definition contained in the Trafficking in Persons Protocol has contributed to ensuring that such tensions remain unresolved'.¹¹ For example, disagreement persists over the severity of exploitation required for conduct to fall within the scope of trafficking, and State practice varies with regard to the 'means' element and the role of victim consent.

The Conference of the Parties to the United Nations Convention against Transnational Organized Crime ('COP'), established under Article 32(1) of the Convention, established a Working Group of States Parties to the Trafficking in Persons Protocol in 2008 ('Working Group'). In 2010, the Working Group explicitly noted the lack of clarity in the definition of trafficking. It recognised this as an obstacle to implementation of the Protocol and recommended that

[t]he Secretariat should prepare, in consultation with States parties, issue papers to assist criminal justice officers in penal proceedings, on subjects such as consent; harbouring, receipt and transport; abuse of a position of vulnerability; exploitation; and transnationality.¹²

In response to these recommendations, the COP requested the Secretariat (UNODC) to continue its analysis of key concepts within the Protocol. Between 2012 and 2015, UNODC produced three issue papers concerning abuse of a position of vulnerability, the role of consent, and the concept of exploitation. In December 2018, a fourth issue paper presented a consolidation of the findings of the first three papers and reflections on issues raised. Each of these four issue papers involved the use of national surveys to gather information regarding how criminal justice agencies interpret and apply domestic definitions of trafficking in persons. This included interviews with prosecution authorities, defence lawyers, judges, and investigators to gain insight into domestic applications of trafficking laws. The issue papers also examined how the relevant provisions of the Protocol should be understood by States Parties from the perspective of international law. Most recently, in 2020, a fifth issue paper concerning interlinkages between trafficking in persons and marriage was published.

⁹ As at 20 January 2021, the Protocol had 178 States Parties.

¹⁰ Working Group on Trafficking in Persons, *Analysis of key concepts of the Trafficking in Persons Protocol*, UN Doc CTOC/COP/WG.4/2010/2 (9 December 2009) [5].

¹¹ UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised* (Issue Paper, 2018) 2-3

¹² Working Group on Trafficking in Persons, *Report of the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010*, UN Doc CTOC/COP/WG.4/2010/6 (17 February 2010) [31(b)].

This Issue Paper continues the analytical work of UNODC on the definition of trafficking in the Trafficking in Persons Protocol. It responds to the recommendation of the Working Group to examine the concept of ‘harbouring’. The fourth issue paper on the international definition of trafficking observed that ‘harbouring’ merits further analysis.¹³

Unlike previous issue papers, this Issue Paper is an output of a new cooperative agreement between UNODC and the US Department of State Office to Monitor and Combat Trafficking in Persons (US/TIP Office). This project forms part of UNODC’s Global Programme against Trafficking in Persons (GLOT59).

1.2 Purpose and Terms of Reference

The purpose of this Issue Paper is to provide guidance on the interpretation, meaning, and application of the concept of ‘harbouring’ in the Trafficking in Persons Protocol. While the focus of the Paper is on the domestic interpretation and application of ‘harbouring’ as an ‘act’ element of trafficking, it also explains, from the point of view of international law, and with reference to the drafting history of the Convention, how the concept should be understood by States Parties. The guidance provided in this Paper is based primarily on an initial global desk review, which surveyed the use of ‘harbouring’ and related terms in legislation concerning trafficking in persons and analysed the interpretation and application of the term ‘harbouring’ in case law and other sources. The information in the global desk review is supplemented with the results of questionnaires shared with 12 countries and interview responses from selected experts.

1.3 Methodology

The methodology for this Issue Paper broadly follows that used for previous issue papers on the international definition of trafficking in persons, with some differences. These departures from the previous methodology were necessary due to the ongoing impact of COVID-19 during drafting of this Issue Paper. Among other things, in-country visits and interviews were not possible following restrictions on international travel. The timeline for drafting of this Paper was also condensed.

Initial Desk Research

The first step in producing this Issue Paper was a global desk review. This review involved:

1. Collation of legislation on trafficking in persons, including assessment of which national laws include ‘harbouring’ (or related term) as an act element and which do not. UNODC’s Database of Legislation of the Knowledge Portal on Trafficking in Persons was used as a starting point, followed by more targeted searches of national databases.
2. Research and collation of case law where harbouring is discussed as a relevant ‘act’ of trafficking. UNODC’s Database of Case Law of the Knowledge Portal on Trafficking in Persons was used as a starting point, followed by other reputable databases.
3. Collation of other sources providing analysis of the term ‘harbouring’, including, inter alia, policy and other government documents, materials of international bodies, and academic publications.

The global desk review examined the trafficking legislation of some 100 countries. These countries were selected based on the fact their legislation on trafficking in persons was readily locatable and, together, they represented a broad cross-section of countries from different regions, legal traditions, and language groups.

Following analysis of the initial findings of the global review, and consultation with the donor for this project, a long list of 20 countries suitable for further study was identified. From this long list, 12 countries were selected for in-depth analysis in this Issue Paper: Argentina, Bangladesh, Cameroon, Fiji, France, Jordan, Kyrgyzstan, Malaysia, Namibia, Peru, the United Kingdom, and the United States. These countries were chosen for the following reasons:

¹³ UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised* (Issue Paper, 2018) 21.

- They comprise a diversity of languages, legal systems, and geographic regions. Two African, five Asian and Pacific, two Latin American, and three Western European and Other countries are included. English, French, Arabic, Russian, and Spanish speaking countries are included.
- Many of these countries have not been examined in previous UNODC Issue Papers on trafficking in papers.
- There is some case law across the jurisdictions examining the meaning of the term 'harbouring', particularly in the United Kingdom and the United States. While this is often in 'non-trafficking' contexts, it is likely useful.
- Together, the countries represent various ways in which the harbouring act element has been interpreted and implemented in legislation. This includes countries where it has been directly placed in legislation as it is in the Protocol (in its English, French, Russian, and Spanish versions).
- Several countries include definitions of the word 'harbouring' in their trafficking legislation (Bangladesh and Malaysia).
- One of the countries does not include the term harbouring or a similar concept in its trafficking offences (Fiji).
- Various forms and situations of harbouring occur across the 12 countries, based on case law and other information. This includes, inter alia, harbouring in the context of domestic work, sexual exploitation (brothels), fishing vessels, agricultural work, mining, construction, child sex offences, armed conflict, hospitality services, forced marriage, and drug production.
- There is evidence that investigation, prosecution, and conviction of trafficking offences occurs in each of the countries. The UNODC Knowledge Portal on Trafficking in persons¹⁴ contains cases for each of these countries.
- They include countries that may be deemed, broadly, as origin and destination countries for trafficking in persons (in the context of international trafficking).

Questionnaires and Interviews

A short questionnaire was prepared to gather preliminary information from the 12 countries selected for further analysis. The questionnaire contained questions addressing general aspects of 'harbouring' in the countries' domestic laws. It also sought to identify appropriate persons for participation in interviews.

A survey instrument was then developed, with the aim of capturing further and in-depth information on the legislation, case law, and practice of the 12 selected countries through interviews with national experts. The views of interviewees on some of the issues raised by the global desk review were also sought. The survey instrument (included below in Annex Two) guided the interviews carried out for the Issue Paper. 11 practitioners and experts from 10 countries were interviewed, including Argentina, Bangladesh, Fiji, France, Jordan, Kyrgyzstan, Malaysia, Namibia, the UK, and the US.¹⁵ These interviews were carried out remotely over the internet due to the impact of COVID-19. Interpretation was used for two interviews (with practitioners/experts from Jordan and Kyrgyzstan); all others were conducted in English.

Drafting the Issue Paper

The information from the global desk review, the questionnaire data, and the responses from the interviews were consolidated and combined with additional materials provided by UNODC. The collated information was utilized in the drafting process of this Issue Paper. A full draft was provided to UNODC and to the US/TIP Office for comment.

Review by Expert Group

UNODC convened an expert group meeting on 5 March 2021, held online. The draft Issue Paper was provided to expert group participants prior to the meeting. The purpose of the meeting was to verify the findings of the country surveys and improve the Paper where appropriate.

Finalisation of the Issue Paper

The draft issue paper was revised in light of the findings of the expert group meeting and additional comments by UNODC, other UN agencies, and the US/TIP Office. The feedback received is reflected in this final version.

¹⁴ Available from: <https://sherloc.unodc.org/cld/v3/htmls/>.

¹⁵ Two of the initial 12 countries identified by the global desk reviewed (Cameroon and Peru) did not participate in the survey and interview process.

1.4 Limitations

There are a number of limitations to the methodology for this Issue Paper. First, and importantly, there is a significant lack of available information concerning trafficking and relevant and up-to-date law for many countries, which impacted the background desk research for this project. This is due to, *inter alia*, deficits in publicly accessible case law, government policy documents, and other data, language barriers, and few prosecutions of trafficking in persons. Academic and NGO research into trafficking also tends to focus on countries in the 'Global North', with more limited analysis of laws and policies in countries from Latin America, Africa, and Asia and the Pacific. Many databases contain small amounts of case law on trafficking (or none at all) and, of the cases available, few contain detailed discussion of the act elements of trafficking offences (including the act of 'harbouring').¹⁶ It is worth noting that the majority of cases in UNODC's Knowledge Portals, and most of the ones that contain more detailed information, come from a small number of jurisdictions (such as Argentina, the United Kingdom, and the United States). There are comparatively much fewer cases from African and Asian countries. Furthermore, several countries did not return questionnaire responses.

To a moderate extent, language barriers were a further limitation during the research for this Issue Paper. The initial global desk review endeavoured to include a broad cross-section of languages (and, indeed, legislation in over 20 languages was included). Nonetheless, the majority of legislation, case law, and other materials analysed were in English. Translation tools and discussions with native speakers permitted more detailed analysis of the term 'harbouring' in the six UN official languages: Arabic, English, Spanish, French, Russian, and Chinese. Five UN official languages were represented in the 12 survey countries selected, as well as the 10 analysed in greater detail in this Issue Paper. Interpretation was used for several interviews.

COVID-19 had a significant impact on the development of this Issue Paper and necessitated deviations from the methodology adopted for previous issue papers. Most significantly, fewer interviews were undertaken and those conducted were carried out remotely over the internet. In-country visits were not possible due to restrictions on international travel. The expert group meeting that reviewed this Issue Paper was also conducted remotely and time difference impacts required shorter meeting times.

1.5 Structure of this Paper

This Issue Paper is divided into six parts, preceded by an Executive Summary setting out the Paper's major findings. The first and present part is an introduction that explains the background and context of this Paper, its purpose and terms of reference, methodology, limitations, and structure.

In its second part - 'The Concept of Harbouring' - this Paper first examines the ordinary meaning of 'harbouring' and some general insights into the term, including use of 'harbouring' in non-trafficking criminal law and explores how the term is translated and interpreted in the other official language versions of the Protocol (part 2.1). The Paper then turns to an analysis of 'harbouring' in international legal and policy materials in part 2.2. It explores the introduction of the term in the drafting of the Protocol and looks at subsequent materials concerning its interpretation and scope. Part 2.3 examines case law that has commented on the meaning of 'harbouring' and Part 2.4 sets out some general conclusions.

Part 3 of this Issue Paper provides a broad overview of the terms used in various laws to cover the act of 'harbouring' in domestic trafficking legislation. This is based on a survey of some 100 jurisdictions carried out as part of the desk review for this Paper.

Part 4 concerns contexts relevant to acts of 'harbouring'. It sets out illustrative case examples of harbouring drawn from a range of jurisdictions and makes a number of observations on the scope of the concept.

Part 5 sets out national laws, policies, and practice concerning the act of 'harbouring' in the 10 States formally surveyed, including Argentina, Bangladesh, Fiji, France, Jordan, Kyrgyzstan, Malaysia, Namibia, the United Kingdom, and the United States. The section on each country includes a summary, overview of the relevant legal framework, analysis of case law (where available), and a set of key observations based on the information gathered.

¹⁶ Case law databases searched included Westlaw, Lexis Advance, HeinOnline, Austlii, Bali, Worldlii, and national databases where available. Note: access to some databases is limited due to paywalls or language barriers.

Part 6 identifies key findings from the examination of national law and practice in Part 5, in combination with observations in Parts 2, 3, and 4. It makes observations based on differing legislative approaches, understandings, and definitions of 'harbouring' (and related terminologies in various languages).

The Concept of 'Harbouring'

2.1 Ordinary Meaning in various Languages

Official texts of the Trafficking in Persons Protocol are published in Arabic, Chinese, French, Russian, Spanish, and English. Each of these versions of the Protocol uses a term for the word 'harbouring', the precise meanings of which vary. The following section features the ordinary meaning of the concept of 'harbouring' as used in various languages by most notably highlighting their interpretation in the official languages of the Protocol.

2.1.1 English

The ordinary meaning of the English word 'harbouring' has developed over time and outside the legal context. It is derived from the Old English 'herebeorgian' and can be compared to the German and Dutch 'herbergen' ('heribergôn' in Old High German) and the French 'héberger' ('herberger' in Old French). Early forms of the word in English texts meant '[t]o provide a lodging or lodging-place for; to shelter from the weather or the night; to lodge, entertain' or, generally, to 'show hospitality'.¹⁷ Contemporary, predominant usage of the word includes, first, its figurative use, such as a person harbouring bad thoughts. Second, it can be used to describe the act of sheltering/giving shelter to a person or thing. The Oxford English Dictionary notes that it was formerly used 'often in a good sense: to keep in safety or security, to protect', but now mostly has negative connotations/is used dyslogistically: as in 'to conceal or give covert to noxious animals or vermin; to give secret or clandestine entertainment to noxious persons or offenders against the laws'.

Other English dictionaries provide similar definitions of 'harbouring'. The Cambridge English Dictionary defines 'harbouring' as to 'protect someone or something bad, especially by hiding that person or thing when the police are looking for him, her, or it: e.g. to harbour a criminal'. The Macquarie Dictionary defines it as 'to give shelter to' or 'to conceal; give a place to hide'. Merriam-Webster defines it as 'to give shelter or refuge to (e.g. harbouring a fugitive)' and, in a legal sense, as 'to receive secretly and conceal (a fugitive from justice)'. The MacMillan Dictionary states that it is used for 'referring to a place or situation that provides safety or protection'. The Collins English Dictionary gives an example of usage: '[i]f a person or country harbours someone who is wanted by the police, they let them stay in their house or country and offer them protection'.

Legal dictionaries offer similar definitions. The 10th edition of Black's Law Dictionary defines 'harboring' as '[t]he act of affording lodging, shelter, or refuge to a person, esp. a criminal or illegal alien'. It contains a further definition for 'harboring a fugitive' and notes that '[i]f the fugitive is suspected of committing a felony or has been convicted of a felony and had violated his or her parole or probation conditions, the term harboring a felon is commonly used'. It also defines 'harboring an illegal alien', with reference to the United States offence in 8 USC § 1324.¹⁸

The Penguin Dictionary of Law provides a definition for 'harbouring an offender', with reference to s 22(2) of the United Kingdom's *Criminal Justice Act 1961*. It states that 'it is an offence . . . to knowingly harbour (i.e. give shelter to, or hide) a person who has escaped from a prison or . . . is unlawfully at large'.¹⁹ As these legal definitions indicate, in the legal context the term 'harbouring' generally comports with its ordinary meaning (in the dyslogistic sense). The act of 'harbouring' is made criminal by the status of the person harboured.

Of note is that the act of 'harbouring' in the Trafficking in Persons Protocol is not made criminal by the quality of the person harboured (the victim of trafficking). Victims may be sheltered for entirely positive reasons (such as where they are provided accommodation by shelters for trafficked persons). Rather, 'harbouring' in the Protocol is rendered an offence by the exploitative purpose of the harbourer and, where applicable, the means they employ to carry out the act.

The English word 'harbouring' has a somewhat complex meaning. It can attract several connotations and may encompass simply providing shelter or, when used dyslogistically, an added element of concealment. While it is often used in the context of sheltering persons who have committed crimes/are otherwise hiding from authorities (particularly in a legal sense), it is capable of a positive

¹⁷ The word 'harbinger', interestingly, also derives from the Old French and originally meant someone who provided a place to stay or someone sent ahead by a party to find accommodation. It now denotes a person or thing that brings change or a sign of a future happening. See Joseph Piercy, *A Word a Day: 365 Words to Augment Your Vocabulary* (Michael O'Mara Books, 2019).

¹⁸ See Part 5.10 below.

¹⁹ Julian Webb (ed), *Dictionary of Law* (Penguin, 2009) 244.

meaning. A person may harbour refugees, for instance, or a country may harbour a person seeking asylum. The multifaceted and often contextual nature of the word 'harbouring' makes it difficult to translate neatly into other languages.

Several initial observations can be made thus far with regard to the concept of 'harbouring' in English. First, the ordinary meaning of 'harbouring' broadly encompasses sheltering a person. This may, but does not necessarily have to, include concealing or secreting them. Some element of 'protection', usually from law enforcement authorities, may be implied in the word also, depending on its context. Second, the act of 'harbouring' can itself be neutral, or may even be positive; in most cases it is the person or thing that is harboured that gives the word its negative connotation (for example, a fugitive, criminal, or, figuratively, bad thoughts). It appears that the word's contemporary meaning, based on a review of dictionary definitions, most commonly relates to the sheltering of criminals.

2.1.2 Spanish

Article 3(a) of the Spanish version of the Trafficking in Persons Protocol states:

Por "trata de personas" se entenderá la captación, el transporte, el traslado, la acogida o la recepción de personas, recurriendo a la amenaza o al uso de la fuerza u otras formas de coacción, al rapto, al fraude, al engaño, al abuso de poder o de una situación de vulnerabilidad o a la concesión o recepción de pagos o beneficios para obtener el consentimiento de una persona que tenga autoridad sobre otra, con fines de explotación. Esa explotación incluirá, como mínimo, la explotación de la prostitución ajena u otras formas de explotación sexual, los trabajos o servicios forzados, la esclavitud o las prácticas análogas a la esclavitud, la servidumbre o la extracción de órganos.

The word used for 'harbouring' is 'acogida'. The verb form—'acoger'—translates broadly to 'take in/to give someone shelter'. It may also mean to 'welcome' or 'receive'. It has a positive connotation and has no connection to concealment.

2.1.3 French

In French, Article 3(a) of the Trafficking in Persons Protocol states:

L'expression "traite des personnes" désigne le recrutement, le transport, le transfert, l'hébergement ou l'accueil de personnes, par la menace de recours ou le recours à la force ou à d'autres formes de contrainte, par enlèvement, fraude, tromperie, abus d'autorité ou d'une situation de vulnérabilité, ou par l'offre ou l'acceptation de paiements ou d'avantages pour obtenir le consentement d'une personne ayant autorité sur une autre aux fins d'exploitation. L'exploitation comprend, au minimum, l'exploitation de la prostitution d'autrui ou d'autres formes d'exploitation sexuelle, le travail ou les services forcés, l'esclavage ou les pratiques analogues à l'esclavage, la servitude ou le prélèvement d'organes.

The word used for 'harbouring' is 'hébergement', which translates as a noun to 'accommodation' or 'lodging'. The verb 'héberger' means 'to accommodate' or 'to provide with a house, accommodation, or shelter'. It does not have a negative connotation and has no connection to concealment. It is closely related to the older, more positive meaning of the word 'harbour' in English (see Part 2.1 above). In the context of its ordinary meaning, a person may 'héberger' a friend or visitor, while a tourist may stay in an 'auberge' (such as a hostel or 'bed and breakfast').

2.1.4 Russian

Article 3(a) of the Russian version of the Trafficking in Persons Protocol is:

"торговля людьми" означает осуществляемые в целях эксплуатации вербовку, перевозку, передачу, укрывательство или получение людей путем угрозы силой или ее применения или других форм принуждения, похищения, мошенничества, обмана, злоупотребления властью или уязвимостью положения, либо путем подкупа, в виде платежей или выгод, для получения согласия лица, контролирующего другое лицо. Эксплуатация включает, как минимум, эксплуатацию проституции других лиц или другие формы сексуальной эксплуатации, принудительный труд или услуги, рабство или обычаи, сходные с рабством, подневольное состояние или извлечение органов

The word used for 'harbouring' is 'укрывательство', which can be translated to 'concealment', 'covering-up' or 'hiding'. It can also mean 'abetting' in a criminal context. The verb form—'укрывать'—means to 'hide someone or something bad'. 'Укрывательство' differs in meaning from the Arabic, French and Spanish terms in particular; it centres on the act of concealing something. Its meaning is dyslogistic.

2.1.5 Chinese

The Chinese text of Article 3(a) of the Trafficking in Persons Protocol is:

“人口贩运”系指为剥削目的而通过暴力威胁或使用暴力手段，或通过其他形式的胁迫，通过诱拐、欺诈、欺骗、滥用权力或滥用脆弱境况，或通过授受酬金或利益取得对另一人有控制权的某人的同意等手段招募、运送、转移、窝藏或接收人员。剥削应至少包括利用他人卖淫进行剥削或其他形式的性剥削、强迫劳动或服务、奴役或类似奴役的做法、劳役或切除器官。The word used for 'harbouring' is '窝藏' (in Pinyin: wōcáng). Of the official UN languages, it arguably bears the closest meaning to the English 'harbour'. It combines the sign for '窝'(wō), broadly meaning 'shelter', with the sign '藏'(cáng) which can be translated to 'conceal' or 'hide away'.

2.1.6 Arabic

Article 3(a) of the Arabic version of the Trafficking in Persons Protocol is:

الاتجار بالأشخاص "تجنيد أشخاص أو نقلهم أو تنقيلهم أو إيواؤهم أو استقبالهم بواسطة التهديد بالقوة أو استعمالها أو غير ذلك من أشكال القسر أو الاختطاف أو الاحتيال أو الخداع أو استغلال السلطة أو استغلال حالة استضعاف، أو بإعطاء أو تلقي مبالغ مالية أو مزايا لنيل موافقة شخص له سيطرة على شخص آخر لغرض الاستغلال. ويشمل الاستغلال، كحد أدنى، استغلال دعارة الغير أو سائر أشكال الاستغلال الجنسي، أو السخرة أو الخدمة قسراً، أو الاسترقاق أو الممارسات الشبيهة بالرق، أو الاستعباد أو نزع الأعضاء؛

The word used for 'harbouring' is إيواؤهم (iiwawuhum). The word can be translated to 'shelter', 'lodging', or 'accommodate' and, like the Spanish and French terms, is most often used in a positive sense. It can also mean to 'give refuge'.

2.1.7 Other Languages

A number of other languages and the relevant words for 'harbouring' used in anti-trafficking legislation were examined for this Issue Paper. While this legislation is explored in more detail in Part 3 below, the following observations can be made. First, some languages, including German (beherbergt), Portuguese (alojar), Romanian (adăpostirea), Finnish (majoittaa toisen), and Italian (ospita), use words meaning accommodation/lodge/shelter, similar to the French, Spanish, and Arabic versions of the Protocol. Second, others use words incorporating a connotation of concealment, including Vietnamese (chứa chấp), Croatian (skriva), Czech (ukryje), and Bulgarian (укрива). Third, and interestingly, some countries use multiple terms meaning accommodation and concealment, perhaps with the intention of covering the varied meanings of 'harbouring'. In Estonia, accommodate (majutamise) and concealment (varjamise) are used, as are slēpšana (conceal) and izmitināšana (accommodate) in Latvia and elszállásol (accommodate) and elrejt (conceal) in Hungary. Finally, in a few languages—including Lithuanian (laikė nelaisvėje žmogu) the term used for harbouring more closely translates to detaining or holding a person captive.

2.2 International Law and Policy

The definition of trafficking in the Trafficking in Persons Protocol comprises three elements: two physical elements (the *actus reus*) and one mental element (the *mens rea*). The first physical element requires that the accused engaged in one of five acts, including recruitment, transportation, transfer, harbouring, or receipt. The acts are disjunctive (alternatives) to one another and only one must be established. The second physical element requires (except in the case of children) that the act, the first physical element, must have been accomplished through any of the following means: use of force, threat of force, coercion, abduction, fraud, deception, abuse of power, or abuse of a position of vulnerability. As with the first element, only one means must be established. The third element of trafficking requires that the act/s of the accused were done for the purpose of exploiting the victim. While certain examples of exploitation are identified by the Protocol, the list provided is non-exhaustive. Importantly, this element does not require that the accused exploited the victim, nor that actual exploitation takes place. Only the *purpose* of exploitation is required, either by the accused or another person/s. Thus, trafficking will take place if the accused intended or had knowledge that their action/s, made possible (in the case of adults) through one of the stipulated means, would result in exploitation of the victim. This makes trafficking a crime of specific or special intent (*dolus specialis*).²⁰

The acts listed in Article 3(a) of the Trafficking in Persons Protocol (recruitment, transportation, transfer, harbouring, or receipt of persons) are not further defined. The second edition of the *Legislative Guide For The Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime* (2020) notes that the acts 'are understood in their natural meaning; they are not further defined in the Protocol and the interpretative material provides no further guidance. The terms are not mutually exclusive, and it may not be necessary to define them in domestic legislation'.²¹ The Guide goes on to provide brief comments on the ordinary meaning of each term, as follows:

"[R]ecruitment" refers to the act of drawing a person into a process and can involve a multitude of methods, including orally, through advertisements, or online through the internet. In transnational cases, recruitment can involve activities in the country of origin, of transit or of destination, for example, involving legal or semi-legal private recruitment agencies.

"Transportation" would cover the acts by a carrier by land, sea, or air by any means or kinds of transportation. Transportation may occur over short or long distances, within one country or across national borders.

"Transfer", too, can refer to transportation of a person but can also mean the handing over of effective control over a person to another. This is particularly important in certain cultural environments where control over individuals (mostly family members) may be transferred to other people.

"Harbouring" may be understood differently in different jurisdictions and may refer, for instance, to accommodating a person at the point of departure, transit, or destination, before or at the place of exploitation, or it may refer to steps taken to conceal a person's whereabouts. Harbouring can also be understood to mean holding a person.

"Receipt" of a person is the correlative of "transfer" and may refer to the arrival of the person, the meeting of a person at an agreed place, or the gaining of control over a person. It can also include receiving persons into employment or for the purposes of employment, including forced labour. Receipt can also apply to situations in which there was no preceding process, such as inter-generational bonded labour or where a working environment changes from acceptable to coercively exploitative.²²

Aside from these brief comments, however, the meaning of the term 'harbouring' is not further elucidated in other explanatory materials to the Protocol. Gallagher confirms this, noting that '[n]one of the available interpretative material provides guidance on how these terms [the action element] should be interpreted or applied'. She points also to the 'fluidity and breadth' of all the act elements.²³

²⁰ See UNODC, *Legislative Guide For The Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime* (2020) 29-34; UNODC, *Model Law, Model Legislative Provisions Against Trafficking In Persons* (2020) 35-36.

²¹ See UNODC, *Legislative Guide For The Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime* (2020) 29.

²² *Ibid* 29-30.

²³ Anne Gallagher, *The International Law of Human Trafficking* (OUP, 2010) 29-30.

Chuang also comments that 'harbouring' is not defined in international law.²⁴ Regional trafficking instruments, including the Council of Europe Convention on Action against Trafficking in Human Beings, the EU Directive on Trafficking in Human Beings, the ASEAN Convention against Trafficking in Persons, or the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution provide no definition of 'harbouring'. Explanatory materials to these other Trafficking Instruments, including EU Directive 2011/36/EU, do not further elucidate the meaning of 'harbouring'.

Little attention appears to have been given to 'harbouring' during the drafting of the Protocol. Documents of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime show that the term 'harbouring' was introduced in the Draft Protocol proposed by the United States in the Committee's first session.²⁵ It was included in Article 2 of the Draft—'Scope of Application'—in paragraph 2: '[f]or the purpose of this Protocol, "trafficking in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons'. A Draft Protocol proposed by Argentina in the first session did not use the term 'harbouring', instead referring to various acts including 'holding' and 'concealment'.²⁶ Rolling drafts of the Protocol maintained the respective options of Argentina and the United States until the ninth session,²⁷ at which point all options for the definition of trafficking in persons included 'harbouring', in addition to the other act elements of recruitment, transportation, transfer, and receipt.²⁸ Gallagher notes that 'the United States had the greatest single impact on the evolution of an international consensus on the definition of trafficking' and made significant efforts to bring the Protocol's definition in line with its national definition in the Trafficking Victims Protection Act (TVPA) (which includes the act of 'harbouring').²⁹ The documents from the sessions of the Ad Hoc Committee do not disclose any further discussions over the meaning of harbouring or the merits of its inclusion.

With regard to other international policy documents, the only guidance located for 'harbouring' during research for this Issue paper is contained in a 2009 Council of Europe and United Nations study concerning 'Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs'. It notes that

[t]he 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. This, of course, also includes the accommodation of persons in a medical clinic or other place where the illegal removal of organs is conducted – and the criminal liability of the individuals involved who use one of the means described below to exploit the victims.³⁰

There are also very few academic materials that provide substantive analysis of 'harbouring' in the Protocol (or, indeed, the other act elements). Of note is a 2007 academic commentary by McClean on the Protocol, which broadly reaffirms the observation in the Legislative Guide that

[n]one of these terms [the act elements] is to be treated as a term of art. So, 'recruitment' has few of the overtones of the use of that word in a military context; it simply means drawing a person into a process. 'Transportation' seems to cover not merely the acts of someone who is technically a carrier, by land, sea, or air, but the activity of those involved in arranging the movement of a person: there are 'fixers' whose activities have something of the character of that of (legitimate) freight-forwarders, arranging the transport. 'Transfer' could again relate

²⁴ Janie A Chuang, 'Contemporary Debt Bondage, "Self-Exploitation," and the Limits of the Trafficking Definition' in Prabha Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (CUP, 2017) 116.

²⁵ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol To Combat International Trafficking In Women And Children Supplementary To The United Nations Convention On Transnational Organized Crime: Proposal Submitted By The United States Of America*, UN Doc A/AC.254/4/Add.3 (25 November 1998).

²⁶ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft elements for an agreement on the prevention, suppression and punishment of international trafficking in women and children, supplementary to the Convention against Transnational Organized Crime: submitted by Argentina*, UN Doc A/AC.254/8 (15 January 1999).

²⁷ See Travaux.

²⁸ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.3/Rev.6 (4 April 2000).

²⁹ Anne Gallagher, *The International Law of Human Trafficking* (OUP, 2010) 22.

³⁰ Council of Europe and United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (2009) 80.

to movement, but also to a handing over of effective control over the person concerned. 'Harbouring' will cover the provision of accommodation and perhaps steps taken to conceal someone's whereabouts. 'Receipt' is the correlative of 'transfer' in this context.³¹

Gallagher makes several observations on the act elements in the course of comments on the international legal definition of trafficking. Importantly, she states that

references to harboring and receipt operate to bring not just the process (recruitment, transportation, transfer) but also the end situation of trafficking within the definition. In other words, whereas buying or otherwise taking possession of an individual through any of the stipulated means for purposes of exploiting would fall within the definition of trafficking, maintaining an individual in a situation of exploitation through any of the stipulated means would, according to the plain meaning of the text, also amount to trafficking. The breadth of the action element has the effect of bringing, within potential reach of the definition, not just recruiters, brokers, and transporters but also owners and managers, supervisors, and controllers of any place of exploitation such as a brothel, farm, boat, factory, medical facility, or household.³²

Thus, the act of 'harbouring' brings exploitative situations themselves within the scope of the international definition of trafficking. 'Harbouring' is not limited to acts occurring prior to exploitation, such as during transportation or transfer of a victim. The Working Group on Trafficking in Persons explicitly notes this:

States parties should pay close attention to the acts of trafficking (recruitment, transportation, transfer, harbouring or receipt of persons) and recognize that the presence of any of those acts could mean that the offence of trafficking in persons had been committed, *even in the absence of transit or transportation*.³³

This is reinforced by the fact that the purpose element of the definition (exploitation) can be held by the 'exploiter' themselves, not just persons who, for example, recruit or transfer victims of trafficking. Indeed, proving the purpose element will likely be easier where the person being prosecuted is involved in the exploitation itself, or has at least a close degree of proximity to it. The aim of the Protocol was not only to prosecute facilitators but also to prosecute exploiters. To this point, the United States, in its 2019 Trafficking in Persons Report, states that:

[a] misunderstanding about human trafficking is that a trafficker must move or transport a victim. Even though the term "trafficking in persons" connotes movement, no language in the definition requires movement to constitute a trafficking crime. Indeed, the Palermo Protocol's definition specifically refers to actions by traffickers that do not entail or require any movement [. . .] Harboring, in particular, has been frequently interpreted to mean the maintenance of an individual in compelled service, including by a United Nations and Council of Europe publication that defined harboring as "accommodating or housing persons," including at their place of exploitation. In such cases, the three elements clearly are met—by the actions of housing or keeping an individual by coercive means for the purpose of exploitation—without the trafficker ever moving the person.³⁴

Though some experts and the laws of several countries depart from this view and maintain that trafficking in persons must entail movement,³⁵ the weight of opinion and state practice is consistent with that the position that no movement of a victim is required.

³¹ David McClean, *Transnational Organized Crime* (2007) 323; see also Muraszkiwicz, who notes that harbouring 'regards 'accommodating/housing the victim': J. M. Muraszkiwicz, *Protecting Victims of Human Trafficking From Liability* (Palgrave, 2019) 24.

³² Anne Gallagher, *The International Law of Human Trafficking* (OUP, 2010) 30.

³³ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Activities of the Working Group on Trafficking in Persons: Report submitted by the Chair of the Working Group*, UN Doc CTOC/COP/2010/6 (10 August 2010) [55] (emphasis added).

³⁴ US Department of State, '2019 Trafficking in Persons Report' (June 2019) 6.

³⁵ See *Modern Slavery Act 2015* (UK), s 2. See further Part 5.9 below. See also Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) *The American Journal of International Law* 609, 630–631 (arguing that '[n]othing in the protocol's structure, the context in which it was developed, or its travaux supports the TIP Office's expansive interpretation of trafficking', but conceding that 'state practice appears to be on a trajectory toward a view of trafficking that deemphasizes movement and that emphasizes exploitation as the core of the harm').

2.3 Case Law

2.3.1 Trafficking Case Law

Examination of trafficking in persons case law from a range of jurisdictions reveals limited judicial consideration of the meaning of 'harbouring' (or similar terms) in the context of trafficking in persons. There appears to be similarly little consideration of other act elements. Judicial analysis of the definition of trafficking is more often concerned with the 'means' and 'purpose' elements of trafficking in persons, as well as issues regarding the consent of the victim. This is consistent with the focus of much of the academic literature, policy, and international documentation on the definition of trafficking in persons.

Where 'harbouring' is explicitly discussed in case law, courts generally state that the term should be given its ordinary meaning. For example, in the Namibian cases of *S v Koch* and *S v Pretorius*, the meaning of 'harbouring' in a dictionary used by the courts was adopted: '[g]ive shelter or refuge to' and 'to provide someone with shelter or sanctuary'.³⁶ These cases are discussed in more detail below at Part 5.8. In the Canadian case of *R v D'Souza*,³⁷ the Ontario Superior Court of Justice discussed whether the act elements in the Canadian trafficking offence were too vague. Relevantly, the Court stated that:

[m]ore important, in my view, the terminology in the impugned provisions is not unduly complicated. The words used have common, ordinary meanings that are generally well known to the citizenry. In the simplest language possible, 'recruit' means to enlist or get someone involved. 'Transport' means to take from A to B. 'Transfer' means to hand over. 'Receive' means to take or accept. 'Hold' means to keep or maintain. 'Conceals' means to hide or keep secret. 'Harbour' means to shelter.³⁸

Courts in both the UK and the US have, in the context of trafficking, given harbour its broad meaning of providing accommodation or shelter. In the UK case of *B, R (on the application of) v The Secretary of State for the Home Department*, the High Court stated that '[h]arbouring is not an everyday concept but I accept that it includes accommodating or holding a person at the place of exploitation or at a place prior to the exploitation'.³⁹ In the US case of *Moulouki v. Epee*,⁴⁰ the District Court for the Northern District of Illinois noted that harbouring can include the giving of 'lodging' for the purpose of exploitation.⁴¹ Of note also is a decision of an Argentinian court in 2010 (case no. 2271), which included the statement (translated to English): '[a] defendant harbours by giving hospitality, lodging, admitting in his environment, hiding or offering the victim physical protection against the discovery of his condition of exploitation'.⁴²

Also instructive is the Dutch 'Diamond City' case.⁴³ In that case, the Supreme Court noted that the ordinary meaning of the relevant Dutch word should be used:

I note from the legislative history that the legislator has not wished to assign a more limited meaning to the Dutch word for "accommodation" – which is derived from the Palermo Protocol that refers to "harbouring" – than the meaning assigned to the word in common parlance.⁴⁴

The Supreme Court also observed that exploitation does not need to occur in the place of 'harbouring', nor does the place need to be abusive or inconsistent with human dignity itself.⁴⁵

³⁶ *S v Koch* [2018] NAHCMD 290, [100]; *S v Pretorius* [2020] NAHCMD 507, [60].

³⁷ *R v D'Souza* [2016] O.J. No. 4992.

³⁸ *Ibid* [145]–[146].

³⁹ [2016] EWHC 786, [49].

⁴⁰ 262 F. Supp. 3d 684, 698 (N.D. Ill. 2017).

⁴¹ See further Parts 5.9 and 5.10 below.

⁴² From the Spanish: 'Acoge quien da hospedaje, aloja, admite en su ámbito, esconde o brinda al damnificado protección física en contra del descubrimiento de su condición de explotado'.

⁴³ Supreme Court, case no 08/03895.

⁴⁴ *Ibid* [19].

⁴⁵ See, eg, *Ibid* [21].

2.3.2 Non-Trafficking Case Law

It is notable that the term 'harbouring' is also employed in non-trafficking criminal offences in a number of English-language countries, many of which predate trafficking offences and the Protocol. This includes, inter alia, offences relating to the harbouring of fugitives or escapees in Australia and the UK,⁴⁶ illegal 'aliens' in the US,⁴⁷ and terrorists in Canada and New Zealand.⁴⁸ In the context of these offences, 'harbouring' has generally been given its ordinary meaning and is rarely defined in legislation.⁴⁹ For example, the Ontario Court of Justice in Canadian case of *Purcell v Taylor* stated

[t]he word 'harbour, in its ordinary sense, means 'to afford lodging to, to shelter, or to give refuge to'. In another sense—its dyslogistic sense—it carries with it a clandestine element with an aura of secrecy or concealment.⁵⁰

Similarly, in the UK case of *Darch v Weight* the Court of Appeal 'the word "harbour" [...] means to shelter a person, in the sense of giving refuge to that person'.⁵¹

Federal Courts in the United States have dealt with the interpretation and application of 'harbouring' in the context of 8 USC § 1324 in a large number of cases.⁵² Though there is some divergence of opinion among courts on this point, the general meaning given to 'harbouring' is broadly consistent with its common dictionary meaning. Inter alia, it has been described as entailing giving 'shelter' or 'refuge',⁵³ or providing or offering a 'secure haven' or 'place to stay' and concealment from authorities.⁵⁴

2.4 General Conclusions on the Concept of 'Harbouring'

Guidance concerning the concept of 'harbouring' in the context of the Trafficking in Persons Protocol is limited. It was not subject to much, if any, substantive discussion during drafting of the Protocol. Interpretive materials published in the 20 years since adoption of the Protocol have also afforded it little attention. Similarly, academic and judicial commentary on the meaning and application of the act element of 'harbouring' is scarce. Based on the materials examined for this paper, this also appears to be the case for the other four act elements in Article 3(a) of the Protocol.

The weight of existing opinion and available materials indicates that 'harbouring' should be given its ordinary meaning. Thus, despite the lack of an international definition, it may be reasonably inferred that 'harbouring' in the Protocol broadly refers to the accommodation or sheltering of victims. While 'harbouring' may be taken to have a connotation of 'concealment' or 'hiding' of victims, drawing on the term's common dyslogistic meaning in English, this is arguably not a requirement of the act in the Protocol.

The meanings of the terms used for 'harbouring' in the other five official language versions of the Protocol vary. The Chinese term is perhaps closest in ordinary meaning to the English 'harbour', combining concepts of 'sheltering' and 'concealment'. The French, Spanish, and Arabic terms are broadly similar and mean 'accommodation' or 'shelter'. They lack any connotation of concealment. In contrast, the Russian term focuses on the act of concealment. The spectrum of meaning across the six official versions of the Protocol indicate that States Parties have a degree of latitude in the terms used for the act element of 'harbouring' in national legislation. This flexibility is evident in the overview of national legislation in Part 3 below, with a range of terms with various meanings used in different jurisdictions. In general, it may be observed that the act elements in the Protocol are intended to be inclusive and not restrictive. The

⁴⁶ See, eg, *See Crimes Act 1914* (Cth) s 48; *Crimes Act 1900* (NSW) s 310G; *Criminal Justice Act 1961* (UK) s 22.

⁴⁷ 8 USC § 1324.

⁴⁸ *Criminal Code 1985* (Canada) s 83.23; *Terrorism Suppression Act 2002* (NZ) s 13A.

⁴⁹ For several rare exceptions, see *Penal Code 1860* (Bangladesh) s 52A and *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* (Malaysia) s 22. These statutes are examined below in Parts 4.2 and 4.7.

⁵⁰ [1994] O.J. No. 2845, [12].

⁵¹ [1984] 2 All ER 245, 247. See also the case of *Peri v Emsden* [1987] Lexis Citation 1135, where the Court held that 'harbouring anyone is made out by establishing that the accused gave shelter to that person. It is not a necessary further ingredient of the offence that the act of giving shelter be intended to impede the apprehension or prosecution of the person assisted'.

⁵² See also Part 5.10 below.

⁵³ *United States v. Lopez* 521 F.2d 437, 440-441 (2nd Cir. 1975).

⁵⁴ *United States v. Vargas-Cordon* 733 F.3d 366, 382 (2nd Cir. 2013); *United States v. Costello* 666 F.3d 1040, 1050 (7th Cir. 2012).

Protocol aims to capture all acts within the trafficking process. Arbitrary limitations to the scope of trafficking conduct (such as excluding liability where an offender accommodates, but does not conceal, a victim for the purpose of exploitation) are undesirable.

Any of the trafficking definition's five act elements, in combination with the means element (except for child victims) and the purpose element, is sufficient to constitute trafficking in persons. A person who, for example, (1) harbours another (2) using coercion (3) to exploit them, has trafficked that person. Thus, 'harbouring' (and arguably 'receipt') brings the end result/purpose of trafficking—the exploitation itself—within the scope of the crime, given that a victim may be harboured while being exploited. For example, a person in control of a place of exploitation, such as a brothel, boat, or household, may accommodate victims (i.e. harbour them) at that place. The conditions of a particular place of work may also transition from being lawful to exploitative, meaning that the workers have not been brought, as such, into the exploitative situation, but rather have remained in a place that has become exploitative. Similarly, a person may obtain control over a place where victims are already in a situation of exploitation. This person may then be taken to be harbouring these persons. UNODC's previous 2018 issue paper on 'The International Legal Definition of Trafficking in Persons' asked 'is inclusion of this act [harbouring] sufficient to enable situations involving no physical movement such as inherited bondage to be characterized as trafficking?'⁵⁵ Though there are a range of views on this point,⁵⁶ the ordinary meaning of 'harbouring' and the prevailing understanding of the Protocol's definition indicates an affirmative answer to this question.

⁵⁵ UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised* (2018) 21. See also Gallagher and Ezeilo who, in a review of the international definition of trafficking, highlight the contention: 'to what extent does the act of "harboring" enable the definition to encompass the maintenance of an individual in a situation of exploitation and not just movement into that situation'.⁵⁵ Anne T Gallagher and Joy Ngozi Ezeilo, 'The UN Special Rapporteur on Trafficking: A Turbulent Decade in Review' (2015) 37 *Human Rights Quarterly* 913, 930.

⁵⁶ See, eg, Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) *The American Journal of International Law* 609.



'Harbouring' in National Legislation

For the purpose of this Issue Paper, a review of national trafficking legislation was conducted. The aim is to provide insight into the extent to which countries have implemented 'harbouring' as an act element in their definitions of trafficking. It identifies the approach taken by a range of countries to this element, including those using both official and non-official UN languages.

This overview encompasses some 100 States from all UN Geographic regions and includes legislation in Arabic, English, French, Spanish, Russian, and Chinese, together with legislation in German, Portuguese, Croatian, Czech, Romanian, Bulgarian, Slovakian, Estonian, Finnish, Latvian, Lithuanian, Hungarian, Italian, Dutch, Polish, Swedish, Turkish, Thai, Cambodian, and Vietnamese. A more detailed overview is contained in Annex One to this Issue Paper; this section highlights key observations.

A first, general point is that definitions of trafficking in persons in legislation vary, sometimes substantially, across different countries. The act elements in the Trafficking in Persons Protocol are often not transferred verbatim into national laws. One or more of the five act elements in the Protocol may be omitted, or other acts not in the Protocol may be included. The rationale for these omissions and additions is rarely clear. Nonetheless, in countries that speak one of the six UN official languages, national laws generally use the word 'harbour' or the equivalent term used in the Arabic, French, Spanish, Russian, and Chinese versions of the Protocol. Countries that do not speak one of these six languages largely adopt language that is broadly concomitant with meaning of 'harbouring'.

Of the English language jurisdictions examined (or those with official English language legislation), the vast majority use 'harbouring' as an act element in their trafficking definitions/offences.⁵⁷ Of these countries, only Fiji, and the Special Administrative Region of Hong Kong do not use 'harbouring' as an act element (though Hong Kong does include 'harbours' in a related offence concerning sexual exploitation under article 130 of its Crimes Ordinance). Many English language jurisdictions take the act elements verbatim from the Protocol's definition (see, for example, Antigua and Barbuda, Barbados, Belize, Botswana, and India), though, in some cases, countries add act elements not in the Protocol, or omit act elements otherwise included in Article 3. For example, The Gambia and Indonesia use the five Protocol act elements but add 'provision of' and 'trading in', and 'sending', respectively. Haiti includes 'recruitment', 'transport', 'harbour', and 'receipt', but omits 'transfer', while Namibia includes 'recruitment', 'transfer', 'harbouring' and 'receipt', but omits 'transport'.

Of particular note is that some English-language jurisdictions add act elements beyond those in the Protocol that have similar or related meanings to 'harbouring' (in addition to 'harbouring'). These include, variously, 'conceal', 'accommodate', 'hold', 'shelter', 'confine', 'detain', 'employ', and 'maintain'.⁵⁸ For example, Canada uses 'harbours', 'holds', and 'conceals' in its trafficking offence under s 279.01 of its *Criminal Code*. The acts of 'accommodation' and 'sheltering' may be seen as overlapping with the ordinary of 'harbouring'. 'Concealment' may be seen as related to 'harbouring', while the acts of 'holding', 'confining', and 'detaining' are separate given that, generally speaking, the ordinary meaning of harbouring does not involve any form of restraint or detention. The acts of 'maintaining' and 'employment' appear broader than the concept of harbouring, involving not only accommodating or sheltering but also provision of the necessities of life or work.⁵⁹

Legislation examined in French, Russian, and Spanish all use the term for 'harbouring' used in the respective language versions of the Trafficking in Persons Protocol. The trafficking laws of French-speaking countries adopt either the noun 'hébergement' as expressly mentioned in the French version of the Protocol (Algeria, Djibouti, Mali, Tunisia), or the verb 'héberger' (Belgium, Canada, France, Niger). Canada is only (examined) jurisdiction with French language legislation to use additional act elements related to 'harbouring'. As noted above, the French text of s 279.01 of the *Criminal Code* uses the words 'cache' and 'détient' as follows ('conceal' and 'hold' respectively in the English text of Canada's *Code*). Russian language legislation examined (Russian Federation, Kazakhstan, Kyrgyzstan, and Uzbekistan) all use the same term as the Russian Version of the Protocol ('укрывательство'). Of the Spanish language jurisdictions examined (Argentina, Colombia, Chile, the Dominican Republic, El Salvador, Mexico, Peru, and Spain), all use 'acogida' or a form of the word (such as *acoja*, *alojar*, *acoge*, *acogiere*) reflecting the terminology of the Protocol. Notably, however, Mexico and Peru also use the Spanish term 'retener'/'retiene', which broadly translates to 'keep', 'detain', or 'hold'.

⁵⁷ Australia, Canada, Gambia, India, Ireland, Kenya, New Zealand, Namibia, Nigeria, Sierra Leone, South Africa, Sri Lanka, Uganda, the United Kingdom, and the United States. Ethiopia, Hong Kong, Indonesia, Malaysia, Pakistan, and the Philippines have official English translations.

⁵⁸ See, eg, the Canadian *Criminal Code*, s 279.01; the Irish *Criminal Law (Human Trafficking) Act 2008*, s 1; the *New Zealand Crimes Act 1961*, s 98D; the Ugandan *Prevention of Trafficking in Persons Act 2009*, s 3(1)(b). the Mozambique *Law no. 6/2008*, article 10.

⁵⁹ Charles Doyle, 'Sex Trafficking: An Overview of Federal Criminal Law' (Congressional Research Service, 2015) 5.

Jordan was the only Arabic language jurisdiction examined. Article 3 of its *Anti-Human Trafficking Law for the Year 2009* uses the word 'harbouring' and no similar terms. The term used for 'harbouring' is 'إيواء' ('iiwa'). This is a form of the word used in the Arabic version of the Trafficking in Persons Protocol (إيواء وهم) (iiwawuhum).

China was the only Chinese language jurisdiction examined. Its trafficking offence, under article 240 of the 中华人民共和国刑法 (Criminal Law of the People's Republic of China) is limited to trafficking in women or children for the purpose of 'selling the victim' without specifying through which acts.⁶⁰

Legislation in languages other than the six UN official languages was also examined for the purposes of this Paper. In some cases, definitions of trafficking in persons contain words that translate closely to 'harbouring', though words broadly translating to 'accommodate', 'conceal', or 'hold' are also commonly used.

Based on the review of national legislation carried out for this Issue Paper, it appears that very few jurisdictions provide definitions of 'harbouring' in their legislation. Only three countries, Bangladesh, Lao, and Malaysia, have definitions of the term. An English translation of Lao's legislation, the *Law on Anti-Trafficking in Persons*, states that 'harbouring' 'shall mean the provision of a place to stay for and hide any person whereby the owner of such place knows by doing so it is for the purpose of trafficking in persons' (under article 4). The Bangladeshi and Malaysian definitions are examined below in Parts 5.2 and 5.7 respectively.

In sum, jurisdictions' implementation of the 'harbouring' act element can be categorised as follows:

- 1) Countries that only use the English word 'harbouring'. Examples include the United Kingdom, Pakistan, and Kenya.
- 2) Countries that only use a word that closely translates to 'harbouring' in their respective languages. Examples include Viet Nam ('chứa chấp') and Slovakia (prechováva).
- 3) Countries that use the English word 'harbouring' in combination with other words, including, inter alia, 'conceal', 'hold', and 'maintain'. These words may be distinct from, or overlap with, the meaning of 'harbouring'. Examples include Canada, the United States, and New Zealand.
- 4) Countries that only use words meaning 'accommodate', 'shelter', 'lodge' or 'house' in their respective languages. Examples include 'l'hébergement' in French, 'beherbergt' in German, or 'ospita' in Italian.
- 5) Countries that use the words 'accommodate', 'shelter', 'lodge' or 'house' in combination with words meaning 'concealment' or 'detain' in their respective languages. Examples include Estonia, which uses the words 'varjamise' and 'majutamise' (meaning 'concealment' and 'accommodate' respectively) and Hungary, which uses the words 'elszállásol' and 'elrejt' (meaning 'accommodate' and 'concealment' respectively).
- 6) Countries that only use words meaning 'concealment', such as 'skriva' (Croatia), 'ukryje' (Czech Republic), 'укрива' (Bulgaria).
- 7) Countries that only use words meaning 'detain', such as Lithuania, which uses the phrase 'laikė nelaisvėje žmogų', meaning 'to hold in captivity'.
- 8) Countries that do not use 'harbouring' or any equivalent act element, such as Fiji and China.

⁶⁰ See generally Bonny Ling, 'Human Trafficking and China: Challenges of Domestic Criminalisation and Interpretation' (2016) 17 *Asia-Pacific Journal on Human Rights and the Law* 148.

'Harbouring' in Context

In the context of trafficking in persons, acts of harbouring may occur in a range of circumstances. Victims may be harboured prior to or during exploitation, or between periods of exploitation. The purpose of harbouring may encompass a range of types of exploitation; consistent with the definition of trafficking in the Protocol, any exploitative purpose suffices. Similarly, harbouring may be carried out through the use of any of the 'means' articulated in the definition of trafficking. In some contexts, the harbouring of a victim may also overlap with other offences including, in particular, the smuggling of migrants. This Part explores the different contexts of 'harbouring', including the circumstances in which it may occur, its relationship to the means and purpose elements of trafficking, and its intersection with other criminal behaviour, in particular smuggling.

4.1 Scenarios of Harbouring

Though it is foreseeable that trafficking may occur absent an act of harbouring,⁶¹ many, if not most, cases of trafficking in persons involve an act of harbouring, given that victims will commonly be kept, accommodated, or held at a particular location at some point during the trafficking process or criminal scheme.

Broadly speaking, 'harbouring' may occur in one of three general scenarios:

- (1) Where the victim is harboured prior to exploitation, and before, following, and/or concurrent with an act/s of recruitment, transportation, transfer, or receipt.
- (2) Where the victim is harboured during exploitation itself, following recruitment, transportation, transfer, or receipt into the situation of exploitation.
- (3) Where harbouring occurs during or prior to exploitation, absent any other trafficking conduct. In this scenario, harbouring is the sole 'act' of trafficking.

Scenario One: Harbouring prior to Exploitation

The harbouring occurs prior to exploitation and may include accommodation of the victim in the place of recruitment or at transit points during a journey. It may be connected with multiple acts of transportation, transfer, or receipt as victims are moved between different locations or come under the control of different persons. Prosecuted cases fitting this first scenario appear to be uncommon, likely due to evidential difficulties of proving an exploitative purpose prior to exploitation occurring. An example is the case of *People of the Philippines v Guarin and Rebollos*, which involved the trafficking of two victims from the Philippines to Malaysia for the purpose of sexual exploitation.⁶² The offenders, who were two sisters, offered the victims employment as salespersons or receptionists in Brunei. They arranged the transportation and accommodation of the victims during their journey to Malaysia. Once in Malaysia, the two offenders transferred the victims to a man referred to as 'Ibrahim', who stated that they would work as 'guest relations officers' in Malaysia. At least one of the victims was later sold to a bar owner. The offenders were prosecuted for recruiting, transporting, and harbouring the victims prior to transferring them to Ibrahim.

A second example is the Australian case of *R v Mclvor & Tanuchit*,⁶³ which involved the harbouring of victims of trafficking both during transit and at the place of exploitation.⁶⁴ The victims were brought from Thailand to Australia; while being transported the victims were accommodated in hotels and accompanied by minders. Once they were received by the offenders Mclvor and Tanuchit, the victims were either accommodated in the brothel they were forced to work in, or alternatively stayed at the offenders' house and were transported to and from the brothel each day.

Scenario Two: Harbouring during Exploitation

The victim is harboured during exploitation following other trafficking acts (i.e. recruitment, transportation, transfer, and/or receipt). This may, for instance, involve receipt of the victim from those transporting them, with the victim then accommodated in a place. The place of harbouring may be the place of exploitation itself, such as a room in a brothel or a house, or quarters on a fishing vessel or in a factory or farm. It may also be a location where the victim is accommodated when they are not at the place of exploitation itself, such as an apartment, dorm, or other living quarters owned or otherwise controlled by the trafficker/s. It should be noted that a victim may be harboured and exploited at one location, prior to further or subsequent exploitation at another location.

Almost all cases examined for this Paper concerned an act or acts of harbouring concurrent with exploitation, and often at the place where exploitation occurs. In the French case *N° de pourvoi: 17-84629*,⁶⁵ the victim was recruited by two offenders who placed her in a situation of forced domestic servitude. The offenders, who were a married couple, had promised the victim that she would receive a salary for the work and would be able to attend French language courses during her employment. Instead, the victim, on her arrival in France, was subjected to accommodation and working conditions contrary to human dignity. Among other charges, the offenders were found guilty of trafficking in persons based on the fact that they had harboured the victim. A similar case is the Dominican Republic case of ‘*Xiomei Y Jose*’.⁶⁶ The offenders, also a married couple, recruited a Chinese national to work in their business in the Dominican Republic. They promised to pay her and provide her with food. On the victim’s arrival in the Dominican Republic, she was not paid, was forced to work, and was subject to abuse. The victim was harboured in the premises of the business where she was exploited.

An example of where ‘harbouring’ took place concurrent with, but in a separate place to, exploitation is the South African case of *The State v Mabuza and Chauke*.⁶⁷ The case involved the trafficking for sexual exploitation of four child victims by two offenders. The victims were accommodated in a house and looked after by the second offender. At various times, the first offender would send for the victims and they would be taken to his residence, where they were sexually abused. The Court observed that the second offender ‘never presented evidence to deny that she was involved in harbouring the children [...] and that she had alerted and prepared them whenever [offender] no 1 phoned her to ask for one of them’.⁶⁸ The Court concluded that ‘[offender] no 1 at times received the children, [offender] no 2 harboured them [...] Both of them were aware of the fact that the sole intention for the children being there, was for their exploitation by [offender] no 1 for sexual purposes’.⁶⁹

Another example is a 2019 German case, involving the trafficking of five Polish nationals to Germany.⁷⁰ An owner of a two-bedroom apartment (referred to as ‘P’) was asked to house three other offenders and five victims. The victims were not allowed to leave the apartment without one of the other three offenders and at night P locked victims inside. At times, P also drove the victims to grocery stores. While P was not directly involved in the exploitation of the victims, the Court held that P accommodated them knowing that they were being exploited. His knowledge could be inferred, inter alia, from the poor living conditions and hygiene of the victims and clear signs of physical abuse. In addition, a victim asked P to contact the police and P refused.

A final example is the New Zealand case of *The Queen and Feroz Ali*, 15 victims of trafficking were brought from Fiji to New Zealand where they were harboured and subject to forced labour. Most of the victims were intercepted by offenders at Auckland airport. One offender operated a construction business in Auckland. Some of the victims went to live at his home, a small unit, and worked in his business. They slept on the floor, or on a sofa in the lounge area of that unit. Others went to work for another offender in Tauranga pruning kiwifruit vines. This group of victims, consisting of three women and one man, were housed in sub-standard rented

⁶¹ For example, a person may be recruited and forced to beg without ever being accommodated by the trafficker. Children may be forced to participate in armed conflict without being provided with shelter or accommodation.

⁶² Regional Trial Court, 9th Judicial Region, Branch 16, Criminal Case Nos. 21800 and 22151.

⁶³ [2010] NSWDC 310.

⁶⁴ It should be noted that the case was charged under Australia’s slavery offences, rather than its trafficking offences. The reason for this is not entirely clear: see Andreas Schloenhardt and Laura-Rose Lynch, ‘McIvor and Tanuchit: A Truly Heinous Case of Sexual Slavery’ (2012) 35(1) *UNSW Law Journal* 175.

⁶⁵ Cour de Cassation, Criminelle, Chambre Criminelle, 24 octobre 2017, 17-84.629.

⁶⁶ Tribunal Judicial de la Provincia de la Altagracia, 21 July 2014. Available from UNODC’s Database of Case Law.

⁶⁷ Regional Court for the Regional Division of Mpumalanga Held at Graskop, Case No. SHG 9/13, 21 November 2014.

⁶⁸ *Ibid* [63].

⁶⁹ *Ibid* [65].

⁷⁰ Landesgericht Berlin, 4 June 2019, Case Reference: (513 Kl) 255 Js 637/18 (38/18) Trb 1.

accommodation near Tauranga. All four were given a single room in which to sleep on the floor in a basement area that was originally a garage.

Scenario Three: Harbouring as the Sole Act of Trafficking

The third scenario encompasses situations where harbouring is the only 'act' of trafficking and there is no preceding or following trafficking conduct. In such cases, a person may become a victim of trafficking without any movement. For example, a person may transition from a non-exploitative to an exploitative situation in a single location, such as where a partner forces his or her spouse into domestic servitude in their home, where an individual in the sex industry is coerced into performing acts they did not agree to, or where a restaurant employee is placed into debt bondage by their employer following a period of non-exploitative employment. In the context of marriage, UNODC's Issue Paper on *Interlinkages between Trafficking in Persons and Marriage* observes that

[where] there may be doubts about the initial intention of the husband or his relatives to exploit the wife, their subsequent actions . . . while "harbouring" the wife may suffice to prove the act. This means that the intent to exploit does not need to be identified at the outset of the marriage but could be seen as a development at a later stage, that is, while . . . harbouring the spouse.

Of course, exploitation itself need not occur as long as the purpose to exploit a victim comes into existence in a location where the victim is harboured. For example, if the owner of a factory decides to imprison a (to that point 'non-exploited') worker in the factory for the purpose of later exploiting their labour, then the worker has transitioned into a situation of trafficking absent actual exploitation and where harbouring is the only act. Here, the act is harbouring, the means element is use of force or coercion, and the exploitative purpose is forced labour.

This third scenario also includes circumstances where the victim is born into a situation where they are under the ownership or control of a trafficker (intergenerational bonded labour), or where a person is sold or traded into bondage (though 'receipt' may also arguably occur in these cases). From the perspective of the victim deserving of protection, the logic of this interpretation is clear and, as noted in Part 2 above, trafficking does not require movement.

4.2 'Harbouring' and 'Means'

An act of harbouring, occurring in any of the three scenarios outlined above, may foreseeably be linked to any of the 'means' elements in the definition of trafficking in persons. These include:

- threat or use of force or other forms of coercion;
- abduction;
- fraud;
- deception;
- abuse of power;
- abuse of a position of vulnerability; and
- giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

In practice, 'harbouring' is likely to be linked to some restriction of the victim's liberty, which acts to keep them in the place of 'harbouring' for the purpose of exploitation. This restriction of liberty, in a physical or psychological sense, may be, for example, achieved through the use or threat of force or coercion.

4.3 'Harbouring' and Types of Exploitation

It is difficult to conceive of a type of exploitation that could not entail the harbouring of a victim. While harbouring in the course of sexual exploitation and forced labour is commonly reported in the available case law, harbouring may also occur, for instance:

- During forced begging, where victims are accommodated when not exploited. In a 2012 Italian case, a child victim was forced to beg by his mother's partner. The victim lived, and was harboured, in the partner's house when not begging.⁷¹
- In the course of exploitation of criminal activities. For example, in the UK case of *L, HVN, THN, and T v R* several victims of trafficking had been harboured in houses where they assisted in the production of controlled drugs.⁷²
- As part of forced or servile forms of marriage. In the South African case of Nvumeleni *Jezile v The State*, for example, the victim was abducted, restrained, and locked in the offender's house, where she was harboured, as part of an arranged customary marriage.⁷³
- During trafficking for removal of organs. In this context, Gawronska observes that 'there will always be an element of an act as defined by the UN Trafficking Protocol . . . an organ donor will have to be admitted to some sort of medical facility for the organ removal and . . . harboured for several days before and after the surgery, either in a hotel, a safe house or a transplant clinic'.⁷⁴
- In the course of trafficking of children for the purpose of adoption. In such cases, children are recruited into and harboured in orphanages, where they are falsely represented as orphans.⁷⁵

4.4 'Harbouring' and the Smuggling of Migrants

The act of 'harbouring', and more broadly trafficking in persons, may overlap with other crimes. A victim of trafficking may be the object of a broad range of other criminal offences while harboured, such as various standalone exploitation offences. For example, a victim of trafficking subject to labour exploitation while harboured may also be the victim of violent offences against the person, forced labour offences, and threat offences.

Of particular relevance in this context are the common intersections between smuggling of migrants and trafficking in persons, given the close relationship between the two phenomena. Smuggling of migrants is defined under Article 3(a) of the *Protocol against the Smuggling of Migrants by Land, Sea, and Air* (a sister instrument to the Trafficking in Persons Protocol) as:

the procurement, in order to obtain, directly or indirectly, a financial or other 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.⁷⁶

Smuggling of migrants involves the facilitation of another person's illegal entry or stay into a country for a financial or other material benefit. Migrant smugglers facilitate the movement of people who wish to cross borders, but do not have the legal means to do so or are prevented from accessing legal pathways due to other barriers, such as corruption. The definitions of trafficking in persons and smuggling of migrants may be distinguished in several aspects:

- 1) The purpose element of each offence. The purpose of trafficking is exploitation, while the purpose of smuggling is to obtain a 'financial or other material benefit'.
- 2) Smuggling of migrants involves the 'illegal entry of a person into a State Party of which the person is not a national or a permanent resident' or enabling the illegal stay of a person in such a State Party.⁷⁷ Trafficking in persons does not require the crossing of an international border and does not require either illegal entry or stay in a state. Unlike smuggling, trafficking may occur completely within one country, and may involve legal border crossings.

⁷¹ Criminal Cassation Court, No. 37638.

⁷² [2013] EWCA Crim 991.

⁷³ High Court of South Africa (Western Cape Division), 23 March 2015, No. 127/2014.

⁷⁴ Sylwia Gawronska, 'Organ Trafficking and Human Trafficking for the Purpose of Organ Removal, Two International Legal Frameworks against Illicit Organ Removal' (2019) 10(3) *New Journal of European Criminal Law* 268, 281 (fn 64).

⁷⁵ See, for an overview of this phenomenon Kate E Van Door, 'Paper Orphans: Exploring Child Trafficking for the Purpose of Orphanages' (2016) 24(2) *The International Journal of Children's Rights* 378.

⁷⁶ Opened for signature 12 December 2000, 2241 UNTS 507 (entered into force 28 January 2004) article 3(a).

⁷⁷ *Smuggling of Migrants Protocol*, Article 3(a).

Nonetheless, while smuggling and trafficking are definitionally distinct, in practice the crimes may be difficult to distinguish.⁷⁸ Smuggled migrants are often subject to instances of exploitation during smuggling operations and, in turn, trafficking may involve a financial or material benefit and the illegal, transnational movement of a victim.⁷⁹ A person may be both a smuggled migrant and a victim of trafficking, either concurrently or consecutively as one crime morphs into the other.

Of particular note in the context of this Issue Paper is that a smuggled migrant may become a victim of trafficking while being 'harboured' and during the smuggling process. For example, a smuggler may coerce sex from a smuggled migrant, who is being sheltered at a place during transit, in return for the guarantee of continued travel. The person remains a smuggled migrant (and indeed the smuggling process may continue following this sexual exploitation); however, the combination of the 'harbouring' of the migrant, coercion, and the purpose of exploitation renders the migrant a victim of trafficking. In this case, the offender may be guilty of both smuggling of migrants (including aggravated smuggling)⁸⁰ and trafficking in persons.

⁷⁸ As noted in Conference of States Parties to the United Nations Convention against Transnational Organized Crime, *Working Group on the Smuggling of Migrants, Challenges and Good Practices in the Criminalization, Investigation and Prosecution of the Smuggling of Migrants*, UN Doc CTOC/COP/WG.7/2012/2 (21 March 2012) [6].

⁷⁹ Joseph Lelliott, 'Smuggled and Trafficked Unaccompanied Minors: Towards a Coherent, Protection-Based Approach in International Law' (2017) 29(2) *Internationaal Journal of Refugee Law* 238, 244: '[d]istinguishing smuggling and trafficking offences necessitates identification of not only the conduct elements of each offence, but also the purpose and intent of the offender. Practically, this is difficult, particularly in situations where offenders intend to gain a financial or material benefit from transporting a migrant, and also intend to exploit them'.

⁸⁰ That smuggled migrants may suffer exploitation or abuse is recognised by article 6(3)(b) of the Smuggling of Migrants Protocol, which punishes a migrant smuggler for exploiting or subjecting a smuggled migrant to inhuman or degrading treatment.



National Law and Practice in Surveyed Countries

This Part provides information on the national laws, policies, and practice concerning the act element of ‘harbouring’ in the 10 States formally surveyed for this Issue Paper. Participating States were Argentina, Bangladesh, Fiji, France, Jordan, Kyrgyzstan, Malaysia, Namibia, the United Kingdom, and the United States. In combination with the material set out above in Parts 2 and 3, it lays the groundwork for the analysis of key findings in Part 5 below.

Though these 10 States represent a range of different languages, legal systems, legislative approaches to criminalising trafficking in persons, and experiences of the crime, it should be stressed that the survey is limited in both scope and depth. The findings set out here should not be understood as general State practice with regard to the Trafficking in Persons Protocol.

The amount and quality of the information available for each of these countries varied significantly. For most of the countries, very little or no relevant case law was available, either because there have been (to date) few trafficking prosecutions, it was not accessible during drafting of this Paper, or due to the fact that ‘harbouring’ is very rarely afforded judicial consideration. The roles, capacities, and experiences of interview participants themselves varied and this was reflected in the depth and type of information obtained during the interviews. Official English translations of legislation and case law were not available for all of the non-English speaking countries.

5.1 Argentina

Summary

Argentina is a civil law country in Latin America. It is a State Party to the Trafficking in Persons Protocol and criminalises trafficking under its Criminal Code (in Spanish: Código Penal). The offence of trafficking was originally inserted by the 2008 legislation (Ley Nacional 26.364) and included act, means, and purpose elements. Following a 2012 amending law (Ley Nacional 26.842), the offence was modified in several respects. The means element was removed and is now an aggravation to the basic offence. New types of exploitation and aggravating factors were added and the act element of ‘offering’ was inserted, as well as language explicitly affirming the irrelevance of consent to criminal and civil liability for trafficking.

Argentina’s trafficking offence contains the act element of ‘harbouring’. The term ‘acogida’ is used, consistent with the Spanish version of the Trafficking in Persons Protocol. It is not defined in legislation. While there are a significant number of trafficking prosecutions in the country each year, and harbouring is often factually involved in trafficking cases, there is little substantive discussion in the jurisprudence. Interview data and survey responses from Argentina were consulted for this Issue Paper.

Legal Framework

The crime of trafficking is included in Article 145 bis of the Argentine Criminal Code and states, in English and in part:

Trafficking in persons is understood to be the offer, recruitment, transfer, reception or harbouring of people for the purpose of exploitation, within the national territory as well as from or to other countries.

From the Spanish:

Se entiende por trata de personas el ofrecimiento, la captación, el traslado, la recepción o acogida de personas con fines de explotación, ya sea dentro del territorio nacional, como desde o hacia otros países.

Types of exploitation are also set out, including slavery or servitude, forced labour, prostitution, child pornography, forced marriage, and organ/tissue removal. Article 145 ter articulates aggravating means elements including threats, deceit, fraud, violence, or any other means of intimidation or coercion, abuse of authority or of a situation of vulnerability, and concession or reception of payments or benefits to obtain the consent of the victim. Article 145 ter also includes a range of other aggravating circumstances.

The term used for ‘harbouring’ is ‘acogida’, consistent with the Spanish version of the Protocol. The other four act elements (offer, recruitment, transfer, and reception) reflect those in the Protocol, with the addition of ‘offer’. The act of ‘transfer’ may be seen as incorporating the act of transportation, noting that the Spanish version of the Protocol includes the act of ‘transporte’.

The Argentine Criminal Code contains, in addition to the trafficking offence, a range of provisions criminalising specific types of exploitation. This includes an offence of slavery, servitude, forced labour, and forced marriage under Article 140.

Case Law

A number of trafficking in persons cases in Argentina discuss the act of ‘harbouring’ (acogida). Of particular note is the decision in a 2010 case (*No 2271*), where the Court stated that (translated to English): ‘[a] defendant harbours by giving hospitality, lodging, admitting in his environment, hiding or offering the victim physical protection against the discovery of his condition of exploitation’.⁸¹

A focus of the relevant jurisprudence is on the relationship and distinction between the acts of harbouring and receiving (la recepción), including their temporal differences. Given there is no definition of these terms in the legislation, their meaning is a matter of judicial interpretation. Based on the case law reviewed for this study, the prevailing position appears to be that receiving generally precedes harbouring and, as an action, is quickly completed. Harbouring is, in contrast, often a prolonged form of conduct and generally follows from an act of receiving (it may be conceived as a continuation of the act of receiving). Further, the act of harbouring is often concurrent with the exploitation itself.⁸² In a 2017 case, a Court described the act of harbouring as providing a place wherein the exploitative purpose could be fulfilled.⁸³

An example of harbouring in Argentina is a 2013 case involving the trafficking of two female victims for the purpose of sexual exploitation.⁸⁴ The two offenders had, over several days, kept the victims first in an apartment, then in a hotel room for the purpose of exploitation of prostitution. The Court held that these actions constituted harbouring and, in doing so, stated that there was no need for the prosecution to prove that the accommodation had ‘permanence’. There is no time requirement linked to the act of ‘harbouring’.

A second example is a 2014 case involving 13 defendants and a large number of victims.⁸⁵ The victims were transported from Bolivia to Argentina, where they were subject to forced labour in weaving workshops. They were harboured at the workshops themselves in some cases; in others they were harboured at separate locations. Several of the defendants were responsible for harbouring victims in their private residences.

Key Observations

An interviewee stated that Argentina’s trafficking offence is sufficient to prosecute all forms of trafficking conduct. The interviewee continued that the omission of a means element in the offence is seen as making it easier to prosecute offenders. The

⁸¹ From the Spanish: ‘Acoge quien da hospedaje, aloja, admite en su ámbito, esconde o brinda al damnificado protección física en contra del descubrimiento de su condición de explotado’.

⁸² See case references: Tribunal Oral En Lo Criminal Federal De La Plata NRO. 2 FLP 56000924/2008/TO1; Tribunal Oral Federal De Posadas FPO 11015228/2009/TO1; Sentencia N° 44/19, FRO 32608/2016/TO1 (MS).

⁸³ Case reference Cámara Federal de Casación Penal, Causa N° FGR 81000828/2012//CFC1.

⁸⁴ Case reference: Tribunal Oral Federal De Paraná, Sentencia N° 033/13.

⁸⁵ Case reference: Tribunal Oral en lo Criminal Federal N° 5 de la Capital Federal, Causa N° 1740.

national definition also contains an additional act element of ‘offering’. No specific reasons were given for the act of ‘offering’, other than a general desire to cover all potential acts of trafficking.

The meaning of ‘acogida’ is to provide accommodation, shelter, or a place to stay. A survey response referred to a definition of ‘acoge’ provided in a Spanish language commentary on Argentina’s trafficking laws (translated to English): ‘whoever shelters, lodges, admits, hides or provides the victim with physical protection against the discovery of their exploited condition’.⁸⁶ A survey response stated that the shelter provided may be of a temporary or permanent character, though typically it would be provided for a substantial period of time. It was noted during the practitioner interview that the term ‘acogida’, absent the purpose of exploitation (or means), has a positive connotation.

Simply exercising control over a victim in a place of exploitation may not fall within the scope of the term ‘acogida’. An interviewee observed that the victim must be ‘accommodated’ in the place in some sense. To illustrate the distinction, if a victim labours in one location, but sleeps in another, they may not be taken to be ‘harboured’ in the place of labour.

Concealment of the victim, or restriction of their liberty, is not necessary. Nonetheless, where some limit on the victim’s liberty is present, this may indicate existence of ‘means’ (which is an aggravating circumstance in Argentinian law).

The terms ‘acodiga’ and ‘recepción’ (receiving) may cover similar conduct in practice. A survey response stated that the act of receiving can be distinguished on the basis that any sheltering of the victim is not necessary; mere personal contact with the victim would be sufficient. Unlike acogida, which may persist for a prolonged period, recepción is an ‘instantaneous’ act. An interviewee noted, in this context, that the act of receiving is potentially more problematic than that of harbouring, given that there is no clear minimum limit on the scope of the act (i.e., would simply opening a door to a victim substantiate the act?)

Acts of harbouring commonly overlap with the exploitation itself. The circumstances of the harbouring itself may be indicative of the existence of exploitation and, during an interview, it was observed that poor or degrading conditions or confinement of the victim may be evidentially important. Less commonly, harbouring may also exist in cases where the victim is present at the place of exploitation, but the exploitation itself has not yet occurred, as well as cases where the victim is sheltered en route to the place of exploitation. An interviewee noted that there are substantial evidential difficulties in proving trafficking prior to the exploitation itself taking place, especially with regard to proving that the offender had the purpose to exploit.

A person may ‘harbour’ a victim absent any direct physical control over them. As long as they exercise control over the place of shelter, and the relevant mens rea is evident, a person may be guilty of trafficking. In addition, it was noted during interviews for this project that persons providing accommodation to victims, but not directly involved in their exploitation, may be prosecuted on the basis of complicity.

An interviewee observed that there is some inconsistency in the interpretation of ‘acogida’ by lower courts. Some courts have required movement to precede the harbouring of a victim on the basis that all other act elements require movement, holding that trafficking is the process of ‘transporting’ a victim to a place of exploitation. The interviewee stressed that they disagreed with this interpretation of the trafficking offence.

5.2 Bangladesh

Summary

Bangladesh is a common law country in South Asia. It is a State Party to the Trafficking in Persons Protocol, following ratification on 12 September 2019. Nonetheless, Bangladesh has had laws criminalising trafficking in persons for a number of years. The current legal framework pertaining to trafficking is contained primarily in the *Prevention and Suppression of Human Trafficking Act 2012*, an official

⁸⁶ From the Spanish: ‘Acoge quien da hospedaje, aloja, el que admite en su ámbito, esconde o brinda al damnificado protección física en contra del descubrimiento de su condición de explotado’.

version of which is available in English.⁸⁷ Prior to this 2012 law, trafficking was addressed by a range of other legislation including, inter alia, the *Penal Code of 1860*, the *Suppression of Immoral Trafficking Act of 1933*, the *Children Act of 1974* and the *Prevention of Repression against Women and Children Act of 2000*.

Bangladesh's definition of trafficking contains the act element of 'harbouring' and defines the term in its legislation. No case law relevant to the meaning or application of 'harbouring' is available. Interview data from Bangladesh was consulted for this Issue Paper.

Legal Framework

The *Prevention and Suppression of Human Trafficking Act 2012* contains a definition of trafficking in persons under s 3(1):

Human Trafficking means the selling or buying, recruiting or receiving, deporting or transferring, sending or confining or harbouring, either inside or outside of the territory of Bangladesh of any person for the purpose of sexual exploitation or oppression, labour exploitation or any other form of exploitation or oppression by means of

- (a) Threat or use of force; or
- (b) Deception, or abuse of his or her socio-economic or environmental or other types of vulnerability; or
- (c) Giving or receiving money or benefit to procure the consent of a person having control over him or her.

Where the victim is a child, the means set out in subs (a) through (c) are not required. The definition contains act, means, and purpose elements. A further 'explanation' of the definition is provided in s 3, which states that:

For the purposes of this section, if any person induces or assists any other person through deception and for bad intention to move, migrate, or emigrate for work or service, either inside or outside of the territory of Bangladesh, though he knows that such other person would be put into any other form of exploitation or oppression as mentioned in sub-section (15) of section 2, such act of the person shall be included as an act within the meaning of "human trafficking" as defined in sub-section (1).

Section 6 of the Act includes a basic offence of trafficking, consistent with the definition in s 3.

The act elements in the definition of trafficking under the *Prevention and Suppression of Human Trafficking Act 2012* extend beyond those in the Trafficking in Persons Protocol. They include selling, buying, recruiting, receiving, deporting, transferring, sending, confining, and harbouring. Pertinently, the Act includes, under s 2(2), a definition of 'harbouring' (it is the only act element defined). This is:

'Sheltering' or 'harbouring' means to harbour, provide with shelter to or assist in any other means, any person in order to sell or traffic that person inside or outside of the country, and shall also include the meanings for which the term 'harbour' has been used in section 52A of the Penal Code, 1860.

This definition references the Bangladesh *Penal Code 1860*, which itself contains a definition of 'harbour' in s 52A. This definition is aimed at the harbouring of criminal offenders for the purposes of assisting them in evading apprehension. It states that

the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension.

The act element of 'confining' appears to overlap to some extent with 'harbouring'. As a form of conduct, its ordinary meaning is broadly to keep or restrict someone within a place.

Additional ancillary offences in the *Prevention and Suppression of Human Trafficking Act 2012* target acts related to trafficking, including for, inter alia, forced labour, sexual exploitation, and kidnapping, concealing, or confining persons. Certain conduct related to prostitution is also criminalised.

⁸⁷ The legislation is also published in Bangla. In the case of any conflict between the Bangla and English texts, the former prevails. See *Prevention and Suppression of Human Trafficking Act 2012*, s 48(2).

Key Observations

An interviewee observed that Bangladesh’s definition of trafficking englobes the entire spectrum of trafficking conduct. It was noted that the *Prevention and Suppression of Human Trafficking Act 2012* was heavily informed by the Trafficking in Persons Protocol, notwithstanding the fact that Bangladesh had not ratified the Protocol during drafting of the Act. The view was expressed that the act elements covered all forms of trafficking conduct in practice and that the Act expands on the Protocol by including types of exploitation not included in Article 3.

‘Harbouring’ has a long-standing technical meaning. It is defined under the *Penal Code 1860* and this definition is adopted in the definition of harbouring, pursuant to s 2 of the *Prevention and Suppression of Human Trafficking Act 2012*. An interviewee described the definition as very broad and ‘all-inclusive’. As noted above, it includes the giving of money or food to the victim. There is, furthermore, no need to prove any concealment of the victim or restriction on their liberty to prove the act of harbouring. It was stated during interviews for this project that the term used in the Bangla version of the Act for harbouring better translates to ‘sheltering’ and encompasses the meaning of the word accommodate. This explains the inclusion of the word ‘shelter’ in the definition of harbouring in s 2 of the Act. It was noted by an interviewee that they knew of no relevant jurisprudence on the term ‘harbouring’; most cases rely on the act of ‘transportation’.

Persons who ‘harbour’ victims may also attract liability under s 8 of the Act. This section extends liability to those who instigate, conspire, attempt, or abet trafficking in persons. An interviewee observed that, for example, an offender who provides shelter to a victim, with knowledge of their trafficking and with the intention of abetting it, may be prosecuted under s 8.

‘Harbouring’ may occur during or prior to exploitation. An interviewee observed that a victim of trafficking may be harboured at any time during or before situation. Notably, however, the view was expressed that a single act of exploitation of a victim, while they are ‘harboured’ by and under the control of an offender, would not amount to trafficking. In other words, to constitute trafficking the exploitation must be systematic; trafficking was noted to involve more of a ‘process’, as opposed to ‘one-off’ instances of exploitation more appropriately captured by other offences (such as sexual offences).

5.3 Fiji

Summary

Fiji is a common law country in the Pacific. It is a State Party to the Trafficking in Persons Protocol, following ratification in 2017. Fiji has incorporated trafficking offences into its criminal law under the *Crimes Decree 2009*. The *Decree* sets out a large range of trafficking offences, which are divided broadly into offences covering domestic trafficking (within Fiji) and international trafficking (into or out of Fiji). These offences target various aspects of trafficking conduct, different ‘means’ of trafficking, and different types of exploitation. Some of the individual offences do not require a means element, while others do not require the purpose of exploitation.

The act elements of ‘harbouring’ (as well as ‘transfer’ and ‘recruitment’) are not included in Fiji’s trafficking offences. There have been few prosecutions of trafficking in Fiji and only a few court decisions are published. Given the absence of ‘harbouring’ from Fiji’s offence, these decisions do not discuss the meaning of application of the term. Interview data from Fiji was consulted for this Issue Paper.

Legal Framework

Fiji’s *Crimes Decree 2009* does not contain a single definition of trafficking in persons. Instead, the *Decree* contains a large range of trafficking offences. These are set out in ss 112 through s 117, with some sections listing a number of separate offences. Some of these offences do not require a mens rea element relating to exploitation of the victim. For example, s 115(1) states:

A person (the first person) commits an indictable offence of domestic trafficking in persons if—

- (a) the first person organises or facilitates the transportation or proposed transportation of another person from one place in Fiji to another place in Fiji; and
- (b) the first person uses force or threats; and

(c) that use of force or threats results in the first person obtaining the other person's compliance in respect of that transportation or proposed transportation.

Other offences require a mens rea that falls below a purpose (or intention) to exploit. For example, s 115(2) requires proof of recklessness, stating:

A person (the first person) commits an indictable offence of trafficking in persons if—

(a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Fiji; and

(b) in organising or facilitating that entry or proposed entry, or that receipt, the first person is reckless as to whether the other person will be exploited, either by the first person or another, after that entry or receipt.

Aggravated offences of domestic and international trafficking in persons criminalise the purpose of exploitation, as well as cases where the victim is subjected to 'cruel, inhuman, or degrading treatment', or where the victim is exposed to the risk of death or serious harm. There are separate offences for domestic and international trafficking of children; these include either an intention to exploit or recklessness as to exploitation.

Importantly, all of Fiji's adult and child trafficking offences, both basic and aggravated, do not use the term 'harbouring' or any similar term. Of further note is that all these offences require movement of the victim. The international trafficking offences require that the offender organised or facilitated the victim's entry into, or exit from, Fiji. The domestic trafficking offences require that the offender organised 'the transportation or proposed transportation of another person'. This language is also included in the international and domestic child trafficking offences.

In addition to its trafficking offences, Fiji's *Crimes Decree 2009* also contains offences covering specific forms of exploitation. This includes offences of debt bondage, slavery, and sexual servitude.⁸⁸

Key Observations

Fiji's trafficking offences do not contain the term 'harbouring'. According to the expert interviewed, the reason for this omission is unclear as is the rationale for the many separate trafficking offences contained in the *Crimes Decree 2009*. Nonetheless, an interviewee expressed the view that Fiji's law is seen as covering all trafficking conduct. The view was further expressed that the lack of the harbouring 'act element' is immaterial in practice. To the knowledge of the interviewee, 'harbouring' is not used elsewhere in Fijian law.

Situations where a person provides accommodation to a victim (i.e. 'harbours' them) may be charged pursuant to secondary liability. Such an offender may be aiding, abetting, or conspiring with the primary offender in such a case. The same would potentially apply to persons providing basic necessities to a victim, such as food. Key to establishing secondary liability would be the offender's knowledge of the primary offending. During interviews for this project, it was stressed that the lack of a 'harbouring' element is not seen to be an issue for prosecutors. This statement should, of course, be viewed in the context of the small number of trafficking cases prosecuted to date in Fiji.

An interviewee observed that 'harbouring', in a general sense, involves accommodation or sheltering of a person. It is the view of the interviewee that the term does not connote any concealment of a person or restriction on their liberty.

Trafficking in Fiji requires movement of the victim by the offender (or that the offender organises or facilitates that movement in some way). As noted above, 'domestic trafficking' offences in Fiji are predicated on the act of transportation, while the 'international trafficking' offences require that the victim is moved into or out of Fiji. The consequence of this is that certain offending that falls within the definition of trafficking in the Trafficking in Persons Protocol is not covered by Fiji's trafficking offences. If an offender controls a place of exploitation but has no role in the movement of the victim into that place, then they fall outside the ambit of the trafficking offences. Also not covered are offenders who coerce victims into situations of exploitation in one location (such as

⁸⁸ *Crimes Decree 2009*, ss 103, 106, 108, 118, and 119.

where their working conditions evolve from lawful to exploitative and the purpose of exploitation only manifests once the person is at the location). Ordinarily, pursuant to the Protocol's definition, the relevant act in such a situation could be harbouring.

In practice, exploitation itself is likely to be prosecuted under other charges within the Fijian legal system where evidence of acts such as harbouring does not need to be established. An interviewee noted that periods of exploitation are likely to be charged using other Fijian offences such as slavery or sexual servitude. An example of this is the case of *State v Werelagi*.⁸⁹ Put briefly, in that case the offender transported a 15-year-old female from Nausori to Samabula and forced her to have sexual intercourse with adult males in exchange for payment. This occurred on three occasions in total, over four days. The victim accompanied the offender to his home on at least one occasion also. The offender was found guilty of three counts of domestic trafficking, related to each of the three times the offender transported the victim. The exploitation itself was charged under one count of aggravated sexual servitude. While discussing this case, an interviewee noted that the key focus for the trafficking charges was the transportation of the victim. Absent the victim's movement, trafficking charges would not be available.

5.4 France

Summary

France is a civil law country in Europe. It is a State Party to the Trafficking in Persons Protocol and criminalises trafficking in its Criminal Code (in French: *Code Pénal*). France's trafficking offence contains act, means, and purpose elements and closely follows the definition of trafficking in the Protocol.

France's trafficking offence includes the act element of 'harbouring'. Consistent with the French version of the Protocol, the relevant term used is 'héberger'. It is not defined in French legislation and has not been extensively discussed in national jurisprudence.

Legal Framework

An offence of trafficking in persons is set out in France's *Code Pénal*, under article 225-4-1. It includes act, means, and purpose elements and may, in part, be translated as:

Trafficking in human beings is the act of recruiting a person, transporting him, transferring him, harbouring or receiving him for the purpose of exploitation in any of the following circumstances.

From the French:

La traite des êtres humains est le fait de recruter une personne, de la transporter, de la transférer, de l'héberger ou de l'accueillir à des fins d'exploitation dans l'une des circonstances suivantes.

The definition sets out four alternative means elements including, put broadly: threats and coercion, abuse of authority, abuse of a position of vulnerability, and the promise of some advantage or benefit. It also includes a list of types of exploitation. The definition specifies that the 'means' element is not required where the victim is a child.

Reflecting the French version of the Protocol, the term used for harbouring is 'héberger'. The other four act elements are the same as those in the Protocol, broadly translating to recruitment, transport, transfer, and receiving.

The term 'harbouring' also applies to other offences. This includes, inter alia, a specific offence under article 225-14 of the *Code Pénal* which criminalises subjecting vulnerable or dependant persons to working or accommodation conditions inconsistent with human dignity. This offence can be charged if the elements of trafficking in persons are not met, or in addition to the offence of trafficking where the constituent conduct is distinct. In French, the offence states:

Le fait de soumettre une personne, dont la vulnérabilité ou l'état de dépendance sont apparents ou connus de l'auteur, à des conditions de travail ou d'hébergement incompatibles avec la dignité humaine est puni de cinq ans d'emprisonnement et de 150 000 euros d'amende.

⁸⁹ [2019] FJHC 1145.

In addition, the offence of assisting the entry, movement and illegal stay of a foreigner in France under article 622-5 of the Code of Entry and Stay of Foreigners and the Right of Asylum (punishable by 5 years' imprisonment and a fine of EU 30,000) is aggravated where victims are subjected to living, transport, working or accommodation conditions inconsistent with human dignity. The aggravated offence carries a penalty of up to 10 years' imprisonment and a fine of EU 750,000.

Case Law

A number of French cases of trafficking in persons have concerned the harbouring of victims. A survey respondent to this study drew attention to a 2016 case, which involved exploitation of the prostitution of several victims.⁹⁰ The offenders provided the victims with housing where they stayed when not working, as well as vans in which the prostitution took place. The housing of the victims constituted harbouring (*héberger*); the provision of the van fell within the act of receiving (*accueillir*). Also noted was a 2020 case involving the trafficking of persons for forced labour. The victims were kept in shelters in overcrowded conditions inconsistent with human dignity, including degrading and unsuitable sanitary facilities, lack of hot water, and insufficient and spoiled food.⁹¹

Some cases have involved charges under articles 225-4-1 and 225-14. In case *N° de pourvoi: 17-84629*, a victim of trafficking in persons had been recruited to work in France with the promise that she would receive an appropriate salary and be allowed to attend French-language courses. The victim was, however, placed in a situation of forced domestic servitude in the offenders' house and accommodated in very poor conditions. The Court of Cassation held that the victim had been harboured and forced to work in degrading conditions. Recalling the need to characterize the constituent elements specific to each offence, the Court further held that, where articles 225-4-1 and 225-14 are charged in relation to the same act of harbouring, only the more serious charge (trafficking in persons) should proceed.⁹²

Key Observations

An interviewee stated that France's trafficking offence is seen to be fully adequate and as covering all aspects of trafficking in practice. Harbouring is seen as an uncontroversial and well-understood concept and is, as such, rarely commented on in judicial decisions.

'Héberger' means the provision of a place to 'live' for victims of trafficking. In other words, it is a place where they can be 'sheltered' or 'sleep'. Survey responses and an interviewee observed that there is a need for temporary accommodation at the place of shelter. Thus, the act element '*héberger*' does not cover, for instance, a place of exploitation where the victim is not also accommodated, or a place where a victim is held for a few hours during transport. A person can be 'harboured' in a place of exploitation only where they are accommodated (i.e. where they live/sleep) in that same location. An interviewee stated that, in some cases for standalone exploitation offences, persons providing shelter to victims may be prosecuted by way of secondary liability.

The term 'accueillir', however, can refer to any place where the victim can be sheltered, even temporarily and without sleeping there. It is much broader and means more than 'receive' (the equivalent act in the English version of the Protocol). It also means 'host'. It can refer to places where victims are held, whether or not it is the place of exploitation. Furthermore, '*accueillir*' encompasses any form of 'care' for a victim of trafficking or provision of necessities. This can extend to acts such as the purchasing of bus tickets for a victim, or the renting of an apartment for them. An interviewee for this project explained that, for example, if a victim is held in the back of a stationary van for an hour then this would be covered by '*accueillir*', but likely not by '*héberger*'. If that victim was then accommodated in a house where the victim slept, however, this would be covered by '*héberger*'. The actions of a person responsible for providing food to the victim in the house could, in turn, be captured by '*accueillir*'.

The acts 'héberger' and 'accueillir' do not require any concealment of the victim, or restriction on their liberty. An interviewee noted that, nonetheless and in practice, the means element employed for these acts generally entails some control over the victim's movement, either through threat, force, or coercion.

⁹⁰ Case submitted by the French Government through the questionnaire.

⁹¹ Case submitted by the French Government through the questionnaire, referred to as judgment of the Tribunal Judiciaire de Reims of 11 September 2020.

⁹² The basis for this decision was legal principle of non bis in idem, often referred to as part of the double jeopardy rule in common law jurisdictions.

In prosecutions of trafficking, ‘héberger’ is often pleaded together with other act elements. To an interviewee’s knowledge, there are no cases where ‘héberger’ was pleaded as the sole act. However, in a structured criminal network, some traffickers may be prosecuted only for harbouring victims, with a view of their exploitation by other members of the network. It was also observed that the easiest way to prove a trafficking offence is to show that the victim has been harboured during the exploitation itself. Conversely, proving harbouring absent exploitation (i.e. where only a purpose to exploit in the future is alleged) may be challenging given the difficulty of substantiating the requisite mens rea of the trafficking offence.

The act of ‘héberger’ does not require physical presence. An interviewee noted that a person may ‘harbour’ a victim by having control over the place where they are sheltered, regardless of whether the ‘harbourer’ is physically present.

5.5 Jordan

Summary

Jordan is a West Asian country with a mixed legal system.⁹³ It is a State Party to the Trafficking in Persons Protocol and criminalises trafficking under its *Anti-Human Trafficking Law for the Year 2009*. Jordan’s trafficking offence contains act, means, and purpose elements and broadly follows the definition of trafficking in the Protocol.

Jordan’s definition of trafficking includes the act element of ‘harbouring’. The term ‘إيواء’ (‘iwa’) is used, consistent with the Arabic version of the Trafficking in Persons Protocol. Relevant case law was not available. Interview data and survey responses from Jordan were consulted for this Issue Paper.

Legal Framework

Trafficking in persons is defined under Article 3 of the *Anti-Human Trafficking Law for the Year 2009* (in English):

The recruitment, transportation, 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 those/such persons, for the purpose of exploitation.

Trafficking in children is defined as:

The recruitment, transportation, harbouring or receipt of persons under the age of 18 for the purpose of exploitation even if this does not involve any of the means set forth in subparagraph (1) of this article.

Pursuant to Article 13 of the Law, the consent of victims is irrelevant. Exploitation is defined in Article 3(B) as including forced labour, slavery or practices similar to slavery, servitude, the removal of organs, the prostitution of others or other forms of sexual exploitation.

Reflecting the Arabic version of the Trafficking in Persons Protocol, the term used for harbouring is ‘إيواء’ (‘iwa’). The other three act elements match those in the Protocol, with the exception of ‘transfer’.

Key Observations

Jordan is currently in the process of amending the *Anti-Human Trafficking Law for the Year 2009*. During interviews conducted for this project, it was noted that the amendment, if put into force, will create additional act elements (including ‘selling’). It will retain the act of harbouring.

Interviewees observed that Jordan’s trafficking offences does contain language that is equivalent to ‘harbouring’. The term used for ‘harbouring’ is not defined in the Law. The Arabic word employed in Jordan’s legislation is ‘إيواء’ (‘iwa’). In unofficial translations of the Law, this is sometimes translated to ‘lodging’. Interviewees and survey respondents confirmed that ‘iwa’ means to

⁹³ Jordan’s legal system comprises a mix of civil, Islamic, and customary law.

give someone shelter or accommodation. In its ordinary usage, the word has a generally positive connotation and is also used in the context of the protection of victims of trafficking. It does not entail any concealment of the victim or restriction of their liberty.

The act of harbouring may take place in several contexts. This includes in places en route to the place of exploitation (such as safehouses during transportation), at the place of exploitation, or in separate accommodation during the period of exploitation. During interviews, it was noted that persons that harbour victims, particularly outside the place of exploitation, may be held liable through complicity.

The ‘harbourer’ does not need to be physically present at the place of harbouring. It is enough that they have control over the place.

5.6 Kyrgyzstan

Summary

Kyrgyzstan is a civil law country in Central Asia. It is a State Party to the Trafficking in Persons Protocol and criminalises trafficking in persons under its *Criminal Code* (in Russian: уголовный Кодекс Кыргызской Республики). Prior to reform of the *Criminal Code* in 2019, the offence of trafficking was contained in Article 124. This offence required force, fraud, or coercion to prove a child trafficking offence. The current trafficking offence, legislated in 2019 and now contained in Article 171, removed the means element in the case of child victims.

Kyrgyzstan’s trafficking offence contains the act element of ‘harbouring’. The term ‘укрывательство’ is used, consistent with the Russian version of the Trafficking in Persons Protocol. No case law relevant to the meaning of application of ‘harbouring’ was available. Interview data and survey responses from Kyrgyzstan were consulted for this Issue Paper.

Legal Framework

The offence of trafficking in persons is contained in Article 171 of the *Criminal Code*. It states, in part and translated to English:

Trafficking in persons, that is, their recruitment, transportation, harboring, receipt or transfer, carried out with their consent or without consent, by means of threat, use of force or other forms of coercion, blackmail, abduction, fraud, deception, with or without the purpose of exploitation or other benefit.

From the Russian:

Торговля людьми, то есть их вербовка, перевозка, укрывательство, прием или передача, осуществленная с их согласия или без согласия, путем угрозы, применения силы или других форм принуждения, шантажа, похищения, мошенничества, обмана, с целью эксплуатации или получения иной выгоды либо без таковой.

The offence contains act, means, and purpose elements. The act and means elements align closely with the definition of trafficking in the Trafficking in Persons Protocol. A similar definition of trafficking in persons is also included in Article 1 of Kyrgyzstan’s *Act to Prevent and Combat Trafficking in Persons*, which contains provisions concerning prevention of trafficking, protection of victims, and international cooperation.⁹⁴

Article 171 of the *Criminal Code* sets out relevant types of exploitation in sub-clause (4), including coercion of persons into prostitution or other forms of sexual exploitation, forced labor or services, slavery and servitude, forced participation in armed conflicts, and debt-bondage. Sub-clause (4) also defines the act element of recruitment;⁹⁵ definitions of other act elements are not provided.

⁹⁴ This definition is not relevant to criminal liability. It states (translated to English): ‘recruitment, transportation, harboring, receiving, transfer, purchase and sale of the person or other illegal transaction with his/her consent or without consent, carried out by coercion, abduction, fraud, deception, stealing, for the purpose of exploitation or benefits’.

⁹⁵ Translated to English: ‘[r]ecruitment refers to the activity of individuals or legal entities in the search, selection, recruitment and hiring of people for material reward to perform any work or provide services in the interests of the employer or other persons’.

The relevant Russian word for harbouring in the offence is ‘укрывательство’; this is the same term used in the Russian version of the Protocol. It should be noted that, though Kyrgyzstan publishes its legislation in both Russian and Kyrgyz, only the Russian version was available for review for this Issue Paper.

Aside from its trafficking offence, Kyrgyzstan’s *Criminal Code* also contains offences relating to specific types of exploitation. Article 173, for example, criminalises ‘forced use of labour (slave labour)’ (in Russian: ‘Принудительное использование труда (рабский труд)’).

Key Observations

Survey responses and interviews for this project described ‘укрывательство’ in Kyrgyzstan’s legislation as meaning the ‘hiding’ or ‘concealment’ of a victim. This is broadly consistent with the ordinary Russian meaning of the word ‘укрывательство’ (see above at 2.1.3). While no definition is provided in the legislation, a survey respondent noted that a definition of harbouring is provided in a training manual on effective investigation of human trafficking, developed by the General Prosecutor’s Office of the Kyrgyz Republic. This is, in English:

Harbouring involves the hiding of the victim (for example, keeping a person in the basement of the house) until a favorable moment for his/her transportation, transfer arises or in order to avoid the victim’s discovery. Harbouring a person forms any actions aimed at hiding, concealing the victim from interested persons-relatives, relatives, other persons interested in the fate of the hidden person, as well as law enforcement agencies in controlled premises (staging apartments, brothels, industrial or residential premises, etc.) or in controlled territory (for example, the residence of persons exploited in agriculture directly in the field).

During interviews carried out for this project, reference was also made to Article 348 of the Kyrgyzstan Criminal Code. This Article creates the offence of ‘concealment of a crime’ (in Russian: ‘Укрывательство преступления’). Of note is that the language used in this offence—укрывательство—is the same as that used in the offence of trafficking in persons. As noted by one interviewee, a person who ‘harbours’ is perceived as concealing and facilitating the crimes of another offender. To this point, Article 43 of the Code was also referenced, which sets out the types of accomplices to offences (in Russian: ‘Виды соучастников преступления’). Sub-clause five of Article 43 pertains, in part, to the concealment of offenders as a form of complicity and also uses the term укрывательство.

An implication of the meaning of ‘укрывательство’ in Kyrgyz legislation is that mere accommodation of sheltering of a victim, without concealment, does not constitute ‘harbouring’. Indeed, it appears that harbouring may be satisfied absent accommodation or sheltering. An interviewee indicated that any conduct meant to conceal a victim of trafficking may be taken to be harbouring. Nonetheless, harbouring conduct often overlaps with accommodation of victims. It was also noted that harbouring may occur, and indeed often does, at any stage of trafficking, giving that victims are often concealed. This would include harbouring during the transportation of victims as well as during exploitation itself.

Persons accommodating, but not concealing, victims may still be liable for trafficking. Although ‘укрывательство’ may require concealment of the victim, this does not mean that persons accommodating (but not concealing) victims would necessarily escape liability for trafficking. In these cases, and dependant on proof of the requisite mens rea, such persons may still be captured by provisions creating secondary liability. Persons assisting another to conceal a victim, such as through the provision of premises or the basic necessities needed to keep them there, may also attract secondary liability.

The act element ‘укрывательство’ does not require any restriction of liberty. Nonetheless, an interviewee noted that, with regard to the means element of the Kyrgyz trafficking offence, ‘harbouring’ often occurs in combination with some restriction on the victim’s liberty though force, threats, or coercion.

5.7 Malaysia

Summary

Malaysia is a country in Southeast Asia with a mixed legal system.⁹⁶ It is a State Party to the Trafficking in Persons Protocol and criminalises trafficking under its *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* (amended in 2010 and 2015). Malaysia is currently amending the Act to bring its definition of trafficking more in line with the Protocol, particularly with regard to the ‘means’ element.

Malaysia’s trafficking offences contain the act element of ‘harbouring’.. A definition of ‘harbouring’ in the context of an offence of ‘Harbouring Persons’ is included in the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*. This offence does not, however, concern the harbouring of victims of trafficking; rather, it concerns harbouring of persons who have, are planning, or are likely to commit an act of trafficking. Several cases relevant to ‘harbouring’ were consulted for this Issue Paper, in addition to interview data and survey responses from Malaysia.

Legal Framework

The definition of trafficking in the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* is contained under s 2 (‘interpretation’):

“trafficking in persons” means all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act.

This definition only contains the means element of ‘coercion’ and is limited to ‘acquiring or maintaining the labour or services’ of the victim. It does not require a purpose of exploitation. The act elements mentioned in the offence do mention all required act elements, including ‘harbouring’.

The offence of trafficking in s 12 appears to draw on the definition above, but includes the purpose of exploitation:

Any person, who traffics in persons not being a child, for the purpose of exploitation, commits an offence.

The offence in s 13 is identical, but adds the following means elements: threat, coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, the giving or receiving of payments or benefits to obtain consent. The offence of trafficking in children in s 14 includes the purpose of exploitation and omits the means element. The act elements in ss 12-14 are drawn from the s 2 definition and include ‘harbouring’. A definition of exploitation is also included in s 2.⁹⁷

In relation to the trafficking offences in the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*, ss 16 and 17 specify that the consent of a trafficking person is irrelevant, as well as past sexual behaviour (evidence of which is rendered inadmissible). Section 17A also explicitly states that in a prosecution of the offences ‘the prosecution need not prove the movement or conveyance of the trafficked person’. The Act also contains a number of offences related to trafficking, including, inter alia, crimes for transporting victims of trafficking, profiting from exploitation, and providing financial services or facilities to aid trafficking.⁹⁸

While the act elements in the definition of trafficking are not defined, s 22 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* contains an offence of ‘Harbouring Persons’. This offence states:

⁹⁶ Common law and Islamic law influence its legal system. It is, however, predominantly a common law system.

⁹⁷ It is defined as: ‘all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs’. A previous UNODC issue paper states, with regard to this definition, that ‘[t]here is no umbrella definition of exploitation and none of these stipulated forms of exploitation are defined in the trafficking law or elsewhere. The list of exploitative forms appears to be exhaustive but the reference to “any illegal activity” was likely intended to accommodate additional forms of exploitation’. See UNODC, *Issue Paper: The Concept of Exploitation in the Trafficking in Persons Protocol* (2015) 42.

⁹⁸ *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*, ss 15, 15A, and 21.

Any person who— (a) harbours a person; or (b) prevents, hinders or interferes with the arrest of a person, knowing or having reason to believe that such person has committed or is planning or is likely to commit an act of trafficking in persons, commits an offence.

Section 22, subsection (2), further defines ‘harbouring’ to mean ‘supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of conveyance, or assisting a person in any way to evade apprehension’.

Case Law

One survey respondent to this study observed that, on their facts, most cases of trafficking in persons in Malaysia involve harbouring. Though there does not appear to be case law analysing the meaning of ‘harbouring’ itself, many cases are indicative of situations constituting harbouring in practice.

The case of *PP v Tan Chan Keong* involved the harbouring of victims of trafficking at a care centre for elderly persons, where they were forced to work as caregivers.⁹⁹ They were not paid and were frequently subject to physical abuse. The owner of the care centre provided the victims with a place to sleep on the premises (the ‘harbouring’), as well as basic necessities.

In *PP v Koay Wooi Chew*, three victims were found locked in an apartment unit.¹⁰⁰ They had been brought to Malaysia on the basis that they would work as dancers and singers. Once in Malaysia, they were forced to work in the sex industry and sexually exploited. The victims were transported each day by the offender from the apartment, where they were harboured, to the place of exploitation (a spa).

In the case of *PP v Hasrul Bin Abd. Hamid & Siti Nurain Binti Abd Malik*, the Court found that the offenders had harboured victims.¹⁰¹ The harbouring includes accommodating the victims at several location during their transport from the place of recruitment to the place of exploitation, as well as at the place of exploitation itself. The victims were subject to forced labour in a karaoke bar.

Lastly, in the case of *PPV v Wong Tak Leong*, the offender was found to have harboured 13 victims in an apartment.¹⁰² The offender would arrange individuals paying for sexual services provided by the victims. The victims would be transported to and from the apartment to hotels, where they would meet these individuals. The Court found that, while the offender did not have ‘exclusive control’ of the apartment (which he rented from a landlord), he was present there with the victims. The Court went on to hold that ‘presumption of fact also arose at the very least that the place was used as a place of harbouring, if not as accommodation for the [victims]’.¹⁰³

Key Observations

Malaysia is currently engaged in a review of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007*.

Survey responses and an interview carried out for this project confirmed that there is an intention to amend the definition of trafficking in s 2 to increase consistency with the definition in the Trafficking in Persons Protocol. This will include, inter alia, inclusion of more ‘means’ beyond coercion and specification that means are irrelevant in the case of trafficked children. No change to the act elements in the definition was forecast. It was the view of interview and survey responses that the act elements in Malaysia do not pose a problem in prosecutions of trafficking, and that there is no need for further domestic guidance or a definition.

Absent a general definition of ‘harbouring’ in relation to the trafficking offences, the view was expressed that the term’s ordinary meaning applies. Broadly, this is the accommodation or shelter of trafficked persons, with an accused providing some place for the person to stay. An interviewee for this project stated that there is no temporal minimum for the act of harbouring; accommodating a victim in a place for a very small amount of time, even several minutes, may be harbouring. The understanding of harbouring is consistent, and it was noted that there is rarely a focus in prosecutions of trafficking on the act element.

An interviewee stated that the definition of ‘harbouring’ in s 22 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* (set out above) does not apply to the trafficking offences. As it is included in s 22, and not in the

⁹⁹ Case reference: NO.JA 62ATIP-9-05/2018, NO.JA 62ATIP-10-05/2018, NO.JA 62ATIP-11-05/2018, NO.JA 62ATIP-12-05/2018.

¹⁰⁰ Case reference: BKI – 62ATP – 10/11 – 2015 & BKI – 62PT – 4637/12 – 2015.

¹⁰¹ Case reference: BKI-62ATP-12/2-2018, BKI-62ATP-13/2-2018, BKI-62ATP-14/2-2018 & BKI-62ATP-15/2-2018

¹⁰² Criminal Case No. SC-62-56-2010-II.

¹⁰³ Ibid [21].

‘interpretation’ section of the Act, it is restricted to s 22. It was noted, in addition, that due to the lack of controversy over the meaning of harbouring in the definition of trafficking, any recourse to the definition of harbouring in s 22 would not be needed.

As the s 22 definition does not apply, actions relevant to ‘maintaining’ a victim, such as providing basic necessities like food, do not fall within the meaning of ‘harbouring’. Nonetheless, it was stressed that persons who do carry out such conduct, but do not accommodate or shelter the victim, may be captured by secondary liability (i.e. complicity, aiding or abetting).

‘Harbouring’ does not necessarily involve concealment or restriction of a victim’s liberty. An interviewee for this project stated that, while cases of harbouring often involve concealment of the victim, there is no need for the prosecution to prove this. Similarly, there is no need to prove any restriction of the victim’s liberty, notwithstanding that the means of trafficking (where relevant) may entail this.

‘Harbouring’ generally occurs in combination with other acts (particularly ‘receiving’). An interviewee observed that, in practice, trafficking ventures often involve a process of moving victims between different locations. As such, there are commonly multiple instances of harbouring during a trafficking process, together with other forms of conduct.

An interview stated that acts of ‘harbouring’ are generally prosecuted in cases where they occur concurrent with exploitation. Examples given in this context include the keeping (i.e. harbouring) of domestic workers and individuals in the sex industry in the place of exploitation. The difficulty of prosecuting acts of harbouring prior to exploitation was stressed, noting the need to present evidence of an exploitative purpose.

There is no need to prove any physical presence of the harbourer. Control over the place of harbouring, even if maintained remotely, is sufficient.

5.8 Namibia

Summary

Namibia is a country in Southern Africa with a mixed legal system.¹⁰⁴ It is a State Party to the Trafficking in Persons Protocol and criminalises trafficking under its *Combating of Trafficking in Persons Act 2018* (which entered into force on 14 November 2019). The 2018 Act supersedes trafficking offences in the *Prevention of Organised Crime Act 2004*.¹⁰⁵

Namibia’s definition of trafficking contains the act element of ‘harbouring’. It is not defined in legislation. Several cases relevant to the meaning of harbouring were consulted for this Issue Paper, in addition to Interview Data from Namibia.

Legal Framework

Section 3(1) of the *Combating of Trafficking in Persons Act 2018* sets out the definition of trafficking in Namibia:

A person commits an offence of trafficking in persons if he or she intentionally recruits, transports, delivers, transfers, harbours, sells, exchanges, leases or receives a person by means of (a) threat; (b) use of force or other forms of coercion; (c) abduction; (d) fraud; (e) deception; (f) kidnapping; (g) abuse of power or abuse of position of vulnerability; or (h) giving or receiving of payments or benefits to obtain the consent of a person who has control over another person, for the purposes of exploitation.

Trafficking in children is separately defined in s 3(2) of the Act as:

The recruitment, transportation, transfer, harbouring or receiving of a child for the purposes of exploitation is trafficking in persons even if this does not involve any of the means set out in paragraph (a), (b), (c), (e), (f), (g) or (h) of subsection (1).

¹⁰⁴ Namibia’s legal system is a mix of civil law, common law, and customary law. Its criminal law primarily resembles a common law system.

¹⁰⁵ See s 28, which amends the *Prevention of Organised Crime Act 2004* by deleting the definition of trafficking in persons (in s 1) and trafficking offences in ss 15 and 16.

An open-ended list of types of exploitation is included in s 1 of the Act.¹⁰⁶ Some types of exploitation (forced labour or services, forced marriage, prohibited child labour, removal of organs or body parts, servitude, and sexual exploitation) are also defined in s 1. Consent is rendered explicitly irrelevant under s 11. The adult trafficking offence contains act, means, and purpose elements, while the child trafficking offence omits the means element. The adult offence contains act elements additional to those in the Protocol (delivering, selling, exchanging, and leasing), while the child offence does not. The rationale for this is unclear. The act elements, including harbouring, are not defined.

The *Combating of Trafficking in Persons Act 2018* also contains several offences related to trafficking, including offences for using the services of victims of trafficking and debt bondage.¹⁰⁷ Relevantly, an offence of ‘facilitating trafficking in persons’ under s 4 makes it an offence where a person:

- (a) leases, subleases, uses or allows to be used any room, house, premises, building or structure for the purpose of facilitating or promoting trafficking in persons;

[or]

- (b) subsequent to the lease or sublease of any room, house, premises, building or structure, becomes aware or ought reasonably to have known or suspected that it is being used to facilitate or promote trafficking in persons and fails to report that knowledge to a police officer;

This offence may create liability for persons who harbour victims of trafficking and overlaps with conduct criminalised by the primary trafficking offence in s 3.

Case Law

Two cases of trafficking in persons are of particular relevance to the meaning of ‘harbouring’ in Namibia. Each of these cases was prosecuted under the *Prevention of Organised Crime Act 2004*, as the criminal offending occurred prior to the coming into force of the *Combating of Trafficking in Persons Act*. Nonetheless, the offences in each Act use similar language, including ‘harbouring’. The High Court of Namibia has observed that ‘the jurisprudence on trafficking in persons developed through [*Prevention of Organised Crime Act 2004*] is still valid and applicable under the *Combating of Trafficking in Persons Act*’.¹⁰⁸ The first is the case of *S v Koch*, which involved charges against one offender of child trafficking and rape against five female victims.¹⁰⁹ The victims and the offender lived in an informal settlement in Swakopmund. The offender had sent the victims to purchase items for him and, on their return, would lock them in his house and sexually exploit and abuse them. The prosecution alleged that the offender had harboured and/or received the victims in his house while he committed the sexual offences: this constituted the trafficking offence.

The High Court, in the course of considering whether the offender was guilty of trafficking, stated that:

A precondition for a trafficking in children conviction in the context of the present case, is that the accused must have harboured or received the complainants. The words ‘harbour’ or ‘receive’ are not defined in POCA or the Protocol. The Shorter Oxford Dictionary gives the following possible meaning of the word harbour: ‘Give shelter or refuge to’. It defines ‘receive’ as ‘be visited’. In my view, an act of harbouring or receiving a child would be complete if there is evidence to show that the accused allowed or tolerated the presence in his dwelling of the minors to facilitate the pursuit of his unlawful intention with them.¹¹⁰

The Court went on to describe in some detail the presence of pornography in the offender’s home and the victims’ exposure to it, observing that it had ‘no doubt that had the complainants’ parents been aware that these minor girls regularly had sight of these pictures, they would not have permitted them to enter the accused’s room’.¹¹¹ The impact of this on the Court’s reasoning is not clear; the Court later noted that if harbouring or receiving is present the relevant question is whether it was ‘for a purpose outlawed in the

¹⁰⁶ It may be noted that types of exploitation not specified in the Trafficking in Persons Protocol are included (for example, ‘the impregnation of a female person against her will for the purpose of selling the child when the child is born’).

¹⁰⁷ *Combating of Trafficking in Persons Act 2018*, ss 5 and 8.

¹⁰⁸ *S v Pretorius* [2020] NAHCMD 507, [38].

¹⁰⁹ *S v Koch* [2018] NAHCMD 290.

¹¹⁰ *S v Koch* [2018] NAHCMD 290, [100].

¹¹¹ *S v Koch* [2018] NAHCMD 290, [101]–[103].

law. In other words, was it with the intention to exploit the complainants?¹¹² On this point, the Court concluded that ‘the offence of trafficking a child “for sexual exploitation” is committed if the child is “harboured” or “received” for the commission of any sexual offence known either to statute law or the common law’.¹¹³

The second relevant case is the 2020 case of *S v Pretorius*.¹¹⁴ The offender was found guilty of six counts of trafficking in persons and six counts of rape. Put briefly, the case involved the bringing of two child victims by others to the house of the offender, where he offered them money in return for sexual services. The sexual exploitation occurred in the bedroom of the offender. The offender pleaded not guilty to the trafficking charges on the basis that they voluntarily attended his house in exchange for being paid for sexual services. The offender stated that he ‘did not detain any girl at my house against her will’.¹¹⁵ These arguments were disregarded by the Court.

The prosecution argued that the offender had ‘received’ the victims into his house and had ‘harboured’ them there during the sexual exploitation. While the Court found that the offender had received the victims (holding that ‘the word ‘receive’ conveys an act of admitting a person in someone’s house for whatever purpose’),¹¹⁶ it did not find that harbouring had occurred:

I am not satisfied that on the evidence before me the State has proved beyond reasonable doubt that the accused harboured the victims at his house. To my mind the import and meaning of the word ‘harbouring’ means a longer sojourn at a place. According to the Oxford Dictionary ‘harbour’ means: to provide someone with shelter or sanctuary. The evidence before me together with the admissions by the accused proved that on each separate occasion the victims were at the accused’s house for a short sojourn starting from them arriving and going to the bedroom shortly followed by the accused; then a sexual act and leaving the accused’s house shortly thereafter.¹¹⁷

While Court in *Pretorius* explicitly stated that it adopted the definition of ‘harbouring’ set out in *Koch*,¹¹⁸ it appears to have deviated from the earlier decision, insofar as it requires some minimum period of time before harbouring could be said to have taken place. It is unclear, however, what would constitute ‘short’ and ‘long’ sojourns, using the language of the Court. It should be noted that the decisions in *Pretorius* and *Koch* were given by Courts of equal jurisdictions. Both decisions stand in lieu of guidance from the Supreme Court of Namibia.

Key Observations

An interviewee stated that Namibia’s trafficking offence is considered to be comprehensive, covering all aspects of trafficking in practice. The act elements of country’s trafficking offences broadly match those in the Protocol, though some extra acts are included in the adult trafficking offence. These extra acts appear to overlap with the five act elements in the Protocol, particularly transferring and receiving.

The view was expressed by an interviewee that ‘harbouring’ means the accommodation or sheltering of victims of trafficking. The Namibian courts, in the cases of *S v Koch* and *S v Pretorius*, have stated that ‘harbouring’ means ‘to give shelter or refuge to’ a person. No concealment or restriction of the victim’s liberty is required, though in practice the ‘means’ element may entail some degree of control over or detention of the victim while they are harboured. The provision of food or other necessities alone is not harbouring, though persons carrying out such conduct may be captured by secondary liability.

A key contention emerging from Namibian case law is the degree of time for which harbouring must take place. The Court in *S v Koch* did not put a minimum time on harbouring, noting that the act would be complete if an ‘accused allowed or tolerated the presence in his dwelling . . . to facilitate the pursuit of his unlawful intention’. As noted above, the Court in *S v Pretorius* (a later case) held that harbouring required a ‘longer’ time period. Where victims are present at an accused’s house for a short time, starting from them arriving, followed by sexual exploitation, and then leaving the accused’s house shortly thereafter, this is not harbouring according to the Court.

¹¹² *S v Koch* [2018] NAHCMD 290, [105].

¹¹³ *S v Koch* [2018] NAHCMD 290, [107].

¹¹⁴ *S v Pretorius* [2020] NAHCMD 507.

¹¹⁵ *S v Pretorius* [2020] NAHCMD 507, [4].

¹¹⁶ *S v Pretorius* [2020] NAHCMD 507, [63].

¹¹⁷ *S v Pretorius* [2020] NAHCMD 507, [60].

¹¹⁸ *S v Pretorius* [2020] NAHCMD 507, [57]–[58].

‘Harbouring’ is generally charged where it occurs in the place of exploitation and is combined with the act of receiving.

An interviewee noted that harbouring may also involve accommodation during a journey, en route to the place of exploitation, and it would be open to a prosecution to bring a charge of trafficking in such circumstances.

An interviewee noted that harbouring does not require the physical presence of the harbourer. It is enough that they have control over the place where the victim is harboured.

5.9 United Kingdom

Summary

The United Kingdom (UK) is a common law country in the European region. It is a State Party to the Trafficking in Persons Protocol. Since 2015, its trafficking offence is contained in its *Modern Slavery Act 2015*. This Act replaced a range of trafficking offences formerly spread across the *Sexual Offences Act 2003*, *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*, and *Coroners and Justice Act 2009*. The UK’s trafficking offence contains act and purpose elements. Only the exploitative purpose of ‘securing services etc by force’ requires proof of ‘means’.

The UK’s trafficking offence uses the term ‘harbouring’. This is not defined in legislation. Of note is that the offence of trafficking in the *Modern Slavery Act 2015* is specifically restricted to ‘arranging or facilitating travel with a view to the victim’s exploitation’.¹¹⁹ Thus, ‘harbouring’ must be done for the purpose of arranging or facilitating travel; trafficking cannot occur without some form of movement of the victim. While there are many prosecutions of trafficking in the UK each year, very little case law discusses the meaning of application of the act of ‘harbouring’. Interview data from the UK was consulted for this Issue Paper.

Legal Framework

The offence of ‘human trafficking’ in s 2 of the *Modern Slavery Act 2015* states that:

- (1) A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.

The ambit of the offence is clarified as follows:

- (3) A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.
- (4) A person arranges or facilitates V’s travel with a view to V being exploited only if—
 - (a) the person intends to exploit V (in any part of the world) during or after the travel, or
 - (b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.

Section 2 explicitly states that the consent of a victim is irrelevant. ‘Travel’ is defined as entering, departing, or travelling within any country. Exploitation is defined non-exhaustively in s 3 of the Act to include slavery, servitude, forced or compulsory labour, sexual exploitation, the removal of organs, securing services etc by force, threats or deception, and securing services etc from children and other vulnerable persons. The trafficking offence in s 2 does not contain a ‘means’ element. On the face of the statute, only the exploitative purpose of securing services etc by force, threats or deception requires proof of ‘force, threats or deception’.¹²⁰

‘Harbouring’ is one of the act elements in the s 2 offence, together with the other act elements specified in the Trafficking in Persons Protocol. The acts of exchanging or transferring control are added to the offence, though these arguably overlap with the act elements of transferring and receiving in the Protocol. None of the act elements is defined in the Act. Importantly, harbouring must be done as part of the arranging of facilitating of the travel of a victim. Travel, and thus movement, is a component of the UK’s trafficking offence.

¹¹⁹ Explanatory Notes, *Modern Slavery Act 2015* (UK) 6.

¹²⁰ See also Jason Haynes, ‘The Modern Slavery Act (2015): A Legislative Commentary’ (2016) 37(1) *Statute Law Review* 33, 38–39.

The *Modern Slavery Act 2015* also contains an offence of ‘slavery, servitude, or compulsory labour’ under s 1. This offence does not require movement of the victim.

Case Law

Several cases in the UK have commented on the meaning of ‘harbouring’ in the context of trafficking. It should be noted that these cases relate to administrative proceedings (judicial review of government decision-making regarding recognition of victim of trafficking status), as opposed to criminal prosecutions. The case of *B, R (on the application of) v The Secretary of State for the Home Department* involved a female victim originally from Albania, who had been forced into a situation of sexual exploitation in Tirana by a former partner. She travelled to the UK where she claimed asylum. The High Court stated that ‘the boyfriend’s behaviour was indicative of grooming and the claimant had been harboured and moved in Tirana for the purposes of sexual exploitation. There is no need for trafficking to occur across borders and she had quite clearly been trafficked within Albania’.¹²¹ The Court went on to state that ‘Harbouring is not an everyday concept but I accept that it includes accommodating or holding a person at the place of exploitation or at a place prior to the exploitation’.¹²²

Of some additional relevance are decisions of UK courts in the context of other offences. The case of *R v Mistry*,¹²³ which concerned harbouring irregular migrants pursuant to s 25(2) of the *Immigration Act 1971*, gave ‘harbour’ its ordinary meaning: if the applicants knew that the persons to whom they gave ‘shelter’ were undocumented migrants then they were harbouring those persons. Another case, that of *Darch v Weight*, involved harbouring of fugitives under s 22 of the *Criminal Justice Act 1961*. The Court in that case stated ‘I am of the opinion that the word “harbour” in this context means to shelter a person, in the sense of giving refuge to that person. This is an ordinary dictionary meaning of the word’.¹²⁴ In the case of *Peri v Emsden*, also involving s 25(2) of the *Immigration Act 1971*, the Court noted that

harbouring anyone is made out by establishing that the accused gave shelter to that person. It is not a necessary further ingredient of the offence that the act of giving shelter be intended to impede the apprehension or prosecution of the person assisted . . . it is necessary for the Crown to establish that the accused provided a shelter in the sense of providing a refuge and that the offence was not committed if the accused had not carried out any positive act towards the provision of shelter.¹²⁵

Key Observations

Interviewees consulted for this project considered that the UK’s trafficking and related offences in the *Modern Slavery Act 2015* allow to prosecute the conduct criminalised by the *Trafficking in Persons Protocol*. According to the expert, no particular issues were identified with the definition of trafficking in the UK. It was noted that the act element of harbouring is rarely at issue in practice; the focus of prosecutions and courts is more often on the ‘purpose’ element of the offence.

In the view of interviewees, ‘harbouring’ in the trafficking offence means the provision of accommodation or shelter to a victim. It was noted that this may be seen as somewhat inconsistent with its ordinary, dictionary meaning in English, wherein harbouring implies a place of safety. This inconsistency may occasionally cause difficulties when describing the act of harbouring, and what it entails, to judges or juries. Harbouring does not require proof of any concealment of the victim or restriction of their liberty. Harbouring does not include conduct such as the provision of food or other necessities, though this may fall within the scope of secondary liability (i.e. conspiracy, complicity).

It is rare for cases of trafficking to be prosecuted as ‘harbouring’ alone. To some degree, this is a result of the requirement for movement of a victim of trafficking in the UK’s offence. An interviewee noted the need for a ‘process’ of trafficking that will often involves acts of transport, transfer, receipt etc, in addition to harbouring. On this point, the interviewee observed that there may be difficulties in some cases regarding when trafficking ‘ends’. For example, if a victim is escorted from one point to another, then travels

¹²¹ *B, R (on the application of) v The Secretary of State for the Home Department* [2016] EWHC 786, [48].

¹²² *Ibid* [49].

¹²³ [1980] Crim LR 177.

¹²⁴ *Darch v Weight* [1984] 2 All ER 245, 247.

¹²⁵ *Peri v Emsden* [1987] Lexis Citation 1135.

independently for a distance, and is then harboured: the question may arise as to whether the act of harbouring is sufficiently connected to the earlier movement of the victim. If not, then the requirement of ‘travel’ may not be present.

Harbouring may be seen as more than just a place where victims are held; it is a place where victims are accommodated or sheltered. An interviewee noted that victims may not necessarily be ‘harboured’ at a place of exploitation if they do not also stay there when not working. Harbouring is, for example, more about the ‘housing’ at the ending of the trafficked movement, as opposed to simply the place where victims are exploited. It was observed that offences such as that of ‘slavery, servitude, or compulsory labour’ may often be more appropriate for conduct occurring at the place of exploitation itself.¹²⁶

There is no ‘de minimis’ value to harbouring (or the other act elements). A person could be harboured for several minutes. An interviewee observed that, nonetheless, it will be easier to prove the act of harbouring where a victim is kept at a place for a substantial period of time, such as where a victim is housed at a staging post overnight en route to the place of exploitation, or in accommodation during the exploitation phase.

Harbouring does not require the physical presence of the harbourer. It is enough that they have control over the place where the victim is harboured.

5.10 United States

Summary

The United States (US) is a common law country in North America and a State Party to the Trafficking in Persons Protocol. Two trafficking offences in US federal law contain the act of ‘harbouring’, as do definitions of ‘severe forms of trafficking’ and ‘sex trafficking’. The US’s trafficking provisions contain act, means, and purpose elements in accordance with the requirements of the Protocol.

The US’ trafficking offence contains the act element of ‘harbouring’. It is not defined in legislation. The US prosecutes substantial numbers of trafficking cases each year, though court decisions very rarely discuss the application or meaning of ‘harbouring’. There is, however, some relevant jurisprudence in the context of other offences including, in particular, ‘Bringing in and harboring certain ‘aliens’’.¹²⁷ Interview data and survey responses from the US were consulted for this Issue Paper.

Legal Framework

The offences of ‘Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor’ and ‘Sex trafficking of children or by force, fraud, or coercion’, under 18 U.S.C. § 1590 and 18 U.S.C. § 1591 respectively, both contain the act element of ‘harbouring’. 18 U.S.C. § 1590 states, in part:

Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

18 U.S.C. §1591 states, in part:

Whoever knowingly-(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person [...]

While the act elements in each offence do not perfectly match those in the Trafficking in Persons Protocol, they cover the conduct criminalised in Article 3. The act elements are not defined in US federal law.

The term ‘harbouring’ is also included in the definition of ‘severe forms of trafficking in persons’ under 22 U.S.C § 7102(11), which states:

¹²⁶ *Modern Slavery Act 2015*, s 1.

¹²⁷ 8 U.S.C. § 1324.

The term "severe forms of trafficking in persons" means--

[...]

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

And in the definition of 'sex trafficking under 22 U.S.C § 7102(12):

The term "sex trafficking" means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.

US federal law contains a range of offences related to trafficking including, inter alia, 'forced labour', 'sale into involuntary servitude', and 'peonage'.¹²⁸

Case Law

As noted above, the act element of 'harbouring' has been discussed in very few published federal trafficking cases in the US. In the federal appellate case of *Ricchio v. McLean*,¹²⁹ the Court held, with regard to the meaning of 'harbouring' under § 1590, that the defendants knowingly harboured plaintiff victim at a hotel by continuing to rent a room to the victim's trafficker after the trafficking conduct became known to the defendants. The defendants were hotel operators. In the case of *Moulouki v. Epee*,¹³⁰ District Court for the Northern District of Illinois found that harbouring under § 1590 can include 'providing lodging to someone for the purposes of obtaining her labor or services against her will'. In the District Court of Kansas case of *Ross v. Jenkins*,¹³¹ noted that, relevantly, the defendants had trafficked the victim as they had 'harbored her in UNOI [religious organization] homes where they forced her to perform childcare, cooking, and cleaning services without pay for most of her childhood'.

In addition to cases of trafficking in persons, the term 'harbouring' is more frequently discussed by courts in the context of offence of 'Bringing in and harboring certain aliens' under 8 U.S.C. § 1324. While the body of case law concerning this offence sheds some light on the general meaning of 'harbouring', it is part of immigration law and distinct from the US' trafficking statutes. It may be noted, however, that in the case of *Samirah v. Sabhnani* the District Court for the Eastern District of New York held that convictions for harbouring aliens under 8 U.S.C. § 1324 (and for forced labor under 18 U.S.C. § 1589(a)) satisfied the elements of § 1590, indicating that the definition of harbouring under § 1324 may be similar to the definition of harbouring under § 1590.¹³²

There is disagreement among the Federal Circuit Courts of Appeal as to interpretation of 'harbouring' in the context of the 8 U.S.C. § 1324 offence. With regard to general meaning, courts have made a number of comments. The Second Circuit case of *Lopez* noted that it may mean 'to receive clandestinely and conceal' or, more broadly, 'to give shelter or refuge to'.¹³³ In the more recent case of *Vargas-Cordon*, the Second Circuit Court held that, to prove 'harbouring', an accused must 'substantially help an unlawfully present noncitizen remain in the United States — such as by providing him with shelter, money, or other material comfort — and also help prevent the detection of the noncitizen by the authorities'.¹³⁴ The Seventh Circuit Court, in *Costello*, defined harbouring as 'providing (or offering . . .) a known illegal alien a secure haven, a refuge, a place to stay in which authorities are unlikely to be seeking him'.¹³⁵

Based on recent federal appellate case law, it may be said as a general proposition that to harbour under 8 U.S.C. § 1324 is, at a minimum, to hide or shelter from detection. To this point, the decision of the District Court for the Eastern District of New York in the

¹²⁸ 18 U.S.C. §§ 1581, 1584, and 1589.

¹²⁹ 853 F.3d 553, 556 (1st Cir. 2017).

¹³⁰ 262 F. Supp. 3d 684, 698 (N.D. Ill. 2017).

¹³¹ 325 F. Supp. 3d 1141, 1165 (D. Kan. 2018).

¹³² 772 F. Supp. 2d 437, 448 (E.D.N.Y. 2011).

¹³³ *United States v. Lopez* 521 F.2d 437, 440-441 (2nd Cir. 1975).

¹³⁴ *United States v. Vargas-Cordon* 733 F.3d 366, 382 (2nd Cir. 2013).

¹³⁵ *United States v. Costello* 666 F.3d 1040, 1050 (7th Cir. 2012).

case of *United States v. Estrada-Tepal* should be noted.¹³⁶ It held that, under 18 U.S.C. § 1591(a)(1), the act elements of ‘harbor’, ‘transport’, and ‘maintain’ can include harmless and charitable acts and that there is not need for any secrecy of hiding of the victim.¹³⁷

Relatedly, the alien harbouring and trafficking offences may be charged together. The 2014 case of *United States v. Campbell* serves as an example of this, where victims of sex trafficking were harboured.¹³⁸ In that case, the offender provided housing, confiscated the victims’ documents, forced them to work under fake names, controlled their working and living environment, and prevented communication with anyone outside his control.¹³⁹ The Seventh Circuit Court of Appeals upheld the District Court’s judgement, finding that the evidence was sufficient to conclude Campbell sheltered his victims to, among other things, prevent detection by the authorities.¹⁴⁰

Key Observations

Interviews and survey responses for this project observed that the US’ trafficking offences are seen as covering all aspects of trafficking in persons. It was noted that the exploitative purpose of the offender is generally the focus of prosecutions and the case law; if this can be established the act elements are broad enough to cover relevant conduct. ‘Harbouring’, in the context of trafficking, is seen as an uncontroversial and well-understood concept and is, as stated above, rarely commented on in the case law.

In the absence of a statutory definition of ‘harbouring’, the ordinary meaning should be referred to. This is a matter of statutory interpretation. The interviewee noted that, while the ordinary meaning of ‘harbouring’ may be to shelter or hide someone, it may also be broad enough to encompass accommodation of a person/s. It was stressed that the other act elements of trafficking do not have an inherently negative connotation (for example, transportation); absent the means or purpose elements harbouring may also be seen as neutral act.

The act of ‘harbouring’ does not require any restriction of the victim’s liberty, nor does it require any proof of concealment. An interviewee observed that, if concealment was required (hypothetically), it would need to be clear who the victim was being concealed from. Proof of some restriction of the victim’s liberty or their concealment would, however, tend to help prove the ‘means’ or ‘purpose’ elements, depending on the facts of a particular case. It was further observed that situations of harbouring often correlate with ‘means’ relating to restricting liberty (such as through use of threats, force, or coercion).

‘Harbouring’ is not seen as encompassing the provision of food or other necessities. Such conduct may, however, come within the ambit of the act of ‘maintaining’ (under 18 U.S.C. § 1591). It could also establish secondary liability through the aiding or abetting of a primary offender.

In prosecutions of trafficking, ‘harbouring’ is often combined with other ‘act’ elements (i.e. transport, receipt, etc.) Less commonly, cases may solely concern the act of harbouring (e.g. *United States v. Campbell*). Harbouring may be prosecuted together with alien harbouring and slavery and forced labour offences. Indeed, it was noted by an interviewee for this project that acts of ‘harbouring’ are often contemporaneous with exploitation, with the victim harboured in the place where they are being exploited. An example would be the harbouring of a victim in a hotel where they are forced to provide sexual services to individuals willing to pay for it. It was further observed that there are not many cases (that the interviewee was aware of) where the act of ‘harbouring’ occurred prior to exploitation. Proving the purpose of exploitation would likely entail evidential difficulties in such cases.

There is no temporal minimum for the act of harbouring. An interviewee observed that a person could potentially be guilty of harbouring a victim for mere minutes. Similarly, there is no minimum time for exploitation to occur. Nonetheless, harbouring encompassing a pattern or multiple instances of exploitation would likely make trafficking offences more likely to be prosecuted. On this point, single instances of sexual abuse occurring in a place controlled by the offender (such as their house) may be less likely to be prosecuted as trafficking as a matter of prosecutorial discretion (though this is of course possible).

An interviewee noted that harbouring does not require the physical presence of the harbourer. It is enough that they have control over the place where the victim is harboured.

¹³⁶ 57 F. Supp. 3d 164, 169 n.4 (E.D.N.Y. 2014).

¹³⁷ Thus finding the *United States v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir.2013) on this point inapplicable.

¹³⁸ 770 F.3d 556 (7th Cir. 2014).

¹³⁹ Ibid 570.

¹⁴⁰ Ibid 570-571.



Key Findings

The analysis of ‘harbouring’ in this Issue Paper highlights a number of issues concerning the meaning, scope, and application of the concept, together with its relationship to the other act, means, and purpose elements in the definition of trafficking in persons. It is clear that the understanding of ‘harbouring’ as an act element of trafficking varies across different languages and, in turn, its application to trafficking conduct differs when comparing certain jurisdictions. This may have implications for whether certain criminal conduct is deemed to be harbouring. For example:

- Understanding of ‘harbouring’ as requiring substantive accommodation (as in France) or concealment (as in Kyrgyzstan), or in countries where the correlative term means ‘hold’ or ‘detain’, may mean that the act is more restrictive compared to some other jurisdictions (such as Malaysia or the US).
- Similarly, where the term may be interpreted more broadly (such as in Bangladesh), it may encompass conduct that in other jurisdictions would not constitute harbouring.
- In some jurisdictions (including Fiji), harbouring is not an act element, while in others (such as the UK) harbouring must be linked to movement of a victim.

Nonetheless, and while these differences have consequences for what is, and what is not, harbouring in different States, it must be stressed that it is the combination of all the alternative act elements in the Protocol (and in national laws) that sets the boundaries of trafficking. A key and overarching finding of the surveys is that what is deemed (and prosecuted as) trafficking is very rarely limited by the act element. In particular, broader interpretations of other act elements (such as ‘receive’ in France) may cover gaps created by more restrictive definitions of ‘harbouring’, while recourse to forms of accessorial (secondary) liability can ensure criminalisation of offenders in jurisdictions where harbouring is not an element or where their conduct falls outside the scope of the harbouring concept. With some limited exceptions, proof of the ‘means’ and ‘purpose’ elements of trafficking remain the greatest barriers to prosecution of offenders and protection of victims.

Against this background, set out here are further key findings that crystallise from the discussion in Parts Two through Five of this Paper.

‘Harbouring’ as a Flexible Term

The second edition of the *Legislative Guide for the Trafficking in Persons Protocol* notes that ‘harbouring’ may be understood differently in different jurisdictions.¹⁴¹ In English, ‘harbouring’ broadly refers to the sheltering of persons, but may also attract negative connotations (including an element of concealment) as a result of the word’s commonly dyslogistic meaning. The French word ‘hébergement’ (or the verb form ‘héberger’) means accommodation or to provide with a house or shelter. The Spanish word ‘acogida’ means ‘to take in’ or ‘shelter’ someone, as does the Arabic word إيواؤهم. These words have broadly positive meanings and eschew any dyslogistic connotations. The Russian word ‘укрывательство’, on the other hand, translates more closely to ‘conceal’ or ‘hide’. The Chinese term ‘窝藏’ appears to bear the closest meaning to ‘harbouring’ in English, combining words meaning ‘shelter’ and ‘conceal’. The different (and sometimes multifaceted) meanings of ‘harbouring’ across the Arabic, Chinese, English, French, Russian, and Spanish versions of the Protocol indicate that States Parties have a degree of latitude in how the act element of ‘harbouring’ is implemented in national legislation. They also explain the variety of approaches taken to this act element at the domestic level.

It should be stressed that the act elements in the Protocol are intended to be inclusive; nothing in the Protocol or related materials suggests a restrictive interpretation. The Protocol aims to prevent and combat trafficking in persons in its entirety and thus capture all acts within the trafficking process. To this end, arbitrary limitations to the scope of trafficking conduct are undesirable.

International Law and Policy

‘Harbouring’ is an act element and part of the ‘actus reus’ of trafficking in persons. It requires proof of physical conduct. ‘Harbouring’ is not defined in the Trafficking in Persons Protocol or other regional trafficking instruments. Gallagher observes that ‘[n]one of the available interpretative material provides guidance on how these terms [the action element] should be interpreted or applied’.¹⁴² Academic and judicial commentary on the meaning and application of ‘harbouring’ is also very limited. The leading view is that

¹⁴¹ UNODC, *Legislative Guide For The Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime* (2020) 29-30.

¹⁴² Anne T Gallagher, *The International Law of Human Trafficking* (OUP, 2010) 29.

'harbouring' in the Protocol is not a term of art;¹⁴³ rather, it is a flexible concept that should be afforded its ordinary meaning of providing accommodation or shelter. It can also encompass, but is not restricted to, the acts of concealing or holding persons. The ordinary meaning of 'harbouring' does not limit the types or character of places in which victims can be harboured, nor is there any need for the condition of the place of 'harbouring' to be poor, inhuman, degrading, or exploitative in and of itself. It should be stressed that it is only the combination of harbouring with the purpose and means elements (and only the purpose element for children) that makes the act of harbouring trafficking.

'Harbouring' in National Legislation

Approaches to the act elements of trafficking vary widely across jurisdictions. While some States directly transcribe the five acts in the Protocol's trafficking definition into national law, many omit one or more of these acts or add others. The rationale for these omissions or additions is rarely clear. With very few exceptions, however, jurisdictions do use the word 'harbouring', the equivalent term used in the official language versions of the Protocol, or, for non-Protocol language jurisdictions, a word that means 'accommodate' and/or 'concealment'. The approaches of different States can be summarised as follows:

- 1) English-language States that only use the English word 'harbouring'.
- 2) Other-language States that only use a word that closely translates to 'harbouring'.
- 3) English-language States that use the English word 'harbouring' in combination with other words, including, inter alia, 'conceal', 'hold', and 'maintain'.
- 4) Other-language States that only use words meaning 'accommodate', 'shelter', 'lodge' or 'house' in their respective languages.
- 5) Other-language States that use the words 'accommodate', 'shelter', 'lodge' or 'house' in combination with words meaning 'concealment' or 'detain' in their respective languages.
- 6) Other-language States that only use words meaning 'concealment'.
- 7) Other-language States that only use words meaning 'detain'.
- 8) States that do not use 'harbouring' or any equivalent act element.

Legislative Definitions

Of the jurisdictions examined for this project, only three were identified as having legislative definitions of 'harbouring'. Bangladesh and Lao define the act element of 'harbouring' in its legislation. While Malaysia's law does define 'harbouring', this is not in relation to its trafficking offence.

Bangladesh's definition is very broad. Its trafficking legislation states that "[s]heltering' or 'harbouring' means to harbour, provide with shelter to or assist in any other means'. Read together with its *Penal Code*, harbouring also means 'supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means'. Thus, a person who feeds a victim of trafficking, without providing any accommodation or shelter, may be taken to have harboured them. Based on interview responses, such conduct would not fall within the meaning of 'harbouring' in the other jurisdictions examined, though it may attract secondary liability (aiding, abetting, conspiracy etc). In France, it may fall within the act element of 'accueillir', which encompasses any form of 'care' for a victim of trafficking or provision of necessities.

An English translation of the Laotian Law on Anti-Trafficking in Persons defines 'harbouring' under article 4 as 'the provision of a place to stay for and hide any person whereby the owner of such place knows by doing so it is for the purpose of trafficking in persons'.

Situations of 'Harbouring' and its Relationship to Exploitation

Broadly, situations of 'harbouring' appear to occur in three situations. First, during the movement of a victim from one place to another (either within one country or transnationally). Harbouring in this context generally involves the accommodation of victims in locations while they are in the process of being transported. Second, harbouring of a victim may occur following their transportation and concurrent with exploitation (for example, a victim is transported from one country to another and placed into a workshop where

¹⁴³ David McClean, *Transnational Organized Crime* (2007) 323.

exploitation occurs, or is accommodated in an apartment close to a brothel where they are exploited). Third, harbouring may occur where exploitation of a victim takes place in one location without any preceding transportation (such as where a situation of voluntary and non-exploitative employment transitions into one of forced labour).

With the exception of Fiji (which does not have the act of harbouring), all interviewees commented that harbouring can take place at any stage of a trafficking process, either before or during exploitation of the victim. In practice, however, acts of harbouring are more commonly prosecuted where they occur concurrent with exploitation, either at the place of exploitation itself or at a separate location where the victim is accommodated. This is reflected in the available case law. This appears to be because, first, trafficking is more often discovered once exploitation has occurred and, second, it is difficult to prove that a harbourer had an exploitative purpose prior to exploitation occurring.

It is clear that harbouring may be linked to any form of exploitation. Interviewees commented that while, broadly speaking, forced labour and sexual exploitation are most commonly prosecuted, harbouring is conceivable in relation to any exploitation of a person criminalised under countries' respective trafficking offences.

'Harbouring' Brings Exploitation Itself within the Scope of Trafficking

Any of the trafficking definition's five act elements, in combination with the means element (except for child victims) and the purpose element, is sufficient to constitute trafficking in persons. A person who, for example, (1) harbours another (2) using coercion (3) to sexually exploit them, has trafficked that person. Thus, 'harbouring' (and arguably 'receipt') brings the end result/purpose of trafficking—the exploitation itself—within the scope of the crime, given that a victim may be harboured while being exploited. For example, a person in control of a place of exploitation, such as a brothel, boat, or household, may accommodate victims (i.e. harbour them) at that place. The conditions of a particular place of work may also transition from being lawful to exploitative, meaning that the workers have not been brought, as such, into the exploitative situation, but rather have remained in a place that has become exploitative. Similarly, a person may obtain control over a place where victims are already in a situation of exploitation. This person may then be taken to be harbouring these persons. UNODC's previous 2018 issue paper on 'The International Legal Definition of Trafficking in Persons' asked 'is inclusion of this act [harbouring] sufficient to enable situations involving no physical movement such as inherited bondage to be characterized as trafficking?'¹⁴⁴ Though there are a range of views on this point,¹⁴⁵ the ordinary meaning of 'harbouring' and the prevailing understanding of the Protocol's definition indicates an affirmative answer to this question.

Relationship to the 'Means' Element

The act of harbouring may be carried out through any of the 'means' included in the definition of trafficking in the Trafficking in Persons Protocol. The majority of interviewees commented that, where the means element is applicable in the country's legislation, it will often concern some restriction of a victim's liberty in the place where they are harboured. This may be through, for example, the threat or use of force or coercion. It was noted by all interviewees that the act of harbouring itself does not require any restriction on a person's liberty.

The Understanding of 'Harbouring' in the Surveyed Countries

Understanding of the concept of 'harbouring' is, for the most part, consistent across the countries examined. Interviewees from Argentina, France, Jordan, Malaysia, Namibia, the UK, and the US all viewed the term's ordinary meaning as encompassing the accommodation or shelter of victims of trafficking. This was also the case in survey responses from those countries, where relevant. Argentina, France, and Jordan use terms for 'harbouring' in their legislation that have definitions according with accommodation or shelter. This includes 'acogida' in Spanish, 'héberger' in French, and 'إيواء' in Arabic. Though Fiji does not include 'harbouring' or an equivalent term in their trafficking offences, it was the view of an interviewee that the term means accommodation or shelter. The

¹⁴⁴ UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised* (2018) 21. See also Gallagher and Ezeilo who, in a review of the international definition of trafficking, highlight the contention: 'to what extent does the act of "harboring" enable the definition to encompass the maintenance of an individual in a situation of exploitation and not just movement into that situation': Anne T Gallagher and Joy Ngozi Ezeilo, 'The UN Special Rapporteur on Trafficking: A Turbulent Decade in Review' (2015) 37 *Human Rights Quarterly* 913, 930.

¹⁴⁵ See, eg, Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) *The American Journal of International Law* 609.

legislated definition of harbouring in Bangladesh is broader than the ordinary meaning of the term, but still encompasses accommodation or shelter.

The exception to the above is Kyrgyzstan. The term used for harbouring in the (Russian version) of its Criminal Code, ‘укрывательство’, requires the concealment of victims as opposed to mere accommodation or shelter. Materials from the General Prosecutor’s Office in Kyrgyzstan confirm that ‘[h]arbouring involves the hiding of the victim [...] Harbouring a person forms any actions aimed at hiding, concealing the victim from interested persons’. While, in practice, the act element of ‘укрывательство’ may often involve some form of sheltering of a victim (as a means of concealment), this does not appear to be necessary.

Physical Presence

The act of ‘harbouring’ does not necessarily require the physical presence of the harbourer. It is sufficient that the trafficker exerts control over the place of harbouring, such as where a trafficker owns, but is not on, a fishing vessel where exploitation takes place (and knows this). It should be noted that, in contrast, the question of control over the victim at the place of harbouring, whether or not the trafficker is physically present, is referable to the means element.

‘Harbouring’ and its Relationship to Other Acts

The relationship between ‘harbouring’ and other act elements varies. Like ‘harbouring’, the meanings of other act elements are non-technical, flexible, and may be interpreted differently in various languages. One example is that the correlative of ‘receipt’ in French is ‘accueillir’, which also means ‘host’ and can refer to any place where the victim can be sheltered. Thus, conduct which may be ‘harbouring’ in English language jurisdictions may fall within ‘receipt’ in French language jurisdictions. The key point is that, while the scope of individual act elements may vary in different States Parties, taken together they should cover the full range of trafficking conduct criminalised by the Trafficking in Persons Protocol.

A further observation is that ‘harbouring’ appears to be rarely used as the sole act element in prosecutions of trafficking. Sources and interviewees consulted for this project broadly suggested that a combination of act elements is often used to establish the offence.

Judicial Interpretation

Most interviewees for this project stated that the act elements, including ‘harbouring’, are very rarely a focus of the jurisprudence on trafficking in their respective countries. Other issues, particularly the existence (or not) of the means element and proof of the exploitative purpose, are much more commonly discussed in judicial decisions. Very few cases examining the meaning or application of ‘harbouring’ were located; those that did consistently accorded the word its ordinary meaning: that is, the accommodation or shelter of victims of trafficking.

‘Harbouring’ as Accommodation

One issue that arose during interviews for this project was whether a victim must actually be ‘accommodated’ (i.e. given a place to lodge/sleep) in order to be ‘harboured’. This was the view of interviewees from several countries and is required in France, where both survey responses and an interviewee observed that the act of ‘héberger’ requires temporary accommodation at the place of shelter. On this view, a victim is not ‘harboured’ simply by their presence in a place under the control of a trafficker, even if they are exploited there. For example, if a victim is subject to sexual exploitation at one location, but is accommodated (/lives) at another, they would only be ‘harboured’ in that second location. On the other hand, if a victim is both exploited and accommodated in one place, then they are harboured there. Of course, even if ‘harbouring’ is not present at a particular place, other act elements may apply to the victim’s arrival and presence there (such as ‘receiving’). This interpretation of ‘harbouring’ appears to be more common in Arabic, French, and Spanish language jurisdictions, likely due to the fact that the term used for ‘harbouring’ in these languages is more analogous with ‘accommodation’.

The alternative view is that ‘harbouring’ only requires concurrence of the means and purpose elements with control over the victim at a particular location. In this case, a victim may potentially be harboured in any place of exploitation, even if they are not accommodated there. For example, a victim could be harboured while working in a field at a farm or while providing sexual services to individuals

willing to pay for it at a brothel. This interpretation of harbouring appears more common in English-speaking jurisdictions and may be due to the fact that ‘harbouring’ (in English) is not analogous to ‘accommodation’ (in the sense of providing a person with a place to live or sleep).

The Temporal Minimum

There is some lack of consistency across the jurisdictions examined as to whether ‘harbouring’ must occur for a minimum time. This issue has been subject to judicial comment in Namibia, where a recent court decision held that ‘harbouring’ ‘means a longer sojourn at a place’.¹⁴⁶ It appears that in France, also, ‘harbouring’ entails the victim staying at a place for a certain time period (at least enough time to sleep in the place). Interviewees from some other jurisdictions, including the US and the UK, observed that there is no minimum period in which a victim of trafficking can be harboured.

‘Harbouring’, Exploitation Offences, and Charging Decisions

Interviews conducted for this project noted the overlap between trafficking and standalone exploitation offences, such as forced labour or sexual offences, in situations where a person is ‘harboured’ during exploitation. In many such cases, both types of offence may be applicable and it will be a matter of prosecutorial discretion as to which is charged. Several interviewees expressed the view that, in these circumstances, standalone exploitation offences may be preferable, noting that each case must be dealt with on its unique facts and that, where two charges proceed on the same facts, issues of double jeopardy may arise. The French case *N° de pourvoi: 17-84629* is relevant to this point.¹⁴⁷ Recalling the need to characterize the constituent elements specific to each offence, the Court of Cassation held in that case that, where a charged trafficking offence overlaps with a less serious charge (in that case Article 225-14 of the *Code Pénal*), the trafficking offence should proceed.

It must be stressed that charging standalone exploitation offences, rather than trafficking offences, may have undesirable consequences for the protection of victims. In particular, use of alternatives offences to trafficking may prevent a trafficked person from being identified as a victim of trafficking. Where a person is not recognised as a victim of trafficking, this may in turn preclude the application of appropriate assistance and protection measures, as well as specific mechanisms relating to the compensation and immigration status of such victims. It may also have implications for data collection.

Another point observed by several interviews is the fact that, in cases involving multiple traffickers, offenders who have harboured victims may be charged via the doctrine of complicity. A number of interviewees noted that this may be an easier avenue of prosecution, given that it obviates the need to prove primary liability in relation to multiple separate offenders. Nonetheless, it should be noted that a person that harbours victims of trafficking can attract primary liability and may be charged as such, whether there are other offenders or other acts. A person who ‘harbours’ a victim should be punishable to the same extent as a person who commits any other act (given proof of the other elements of the offence).

‘Harbouring’ Receives Little Attention

The lack of attention to the concept of ‘harbouring’ in international (and academic and judicial) materials was reflected in survey responses and during interviews for this study. The general view of interviewees was that ‘harbouring’ is not seen as a controversial or imprecise term in the context of trafficking. It is rarely subject to comment in the case law of the jurisdictions examined. Where it is not defined in legislation, no need is seen for a legislated definition. Broadly, the ordinary meaning of ‘harbouring’ is seen as sufficient.

¹⁴⁶ *S v Pretorius* [2020] NAHCMD 507, [60].

¹⁴⁷ See 5.4 above.

Select Bibliography

Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol To Combat International Trafficking In Women And Children Supplementary To The United Nations Convention On Transnational Organized Crime: Proposal Submitted By The United States Of America*, UN Doc A/AC.254/4/Add.3 (25 November 1998).

Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft elements for an agreement on the prevention, suppression and punishment of international trafficking in women and children, supplementary to the Convention against Transnational Organized Crime: submitted by Argentina*, UN Doc A/AC.254/8 (15 January 1999).

Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.3/Rev.6 (4 April 2000).

Baleyte et al, 'Dictionnaire Juridique/Legal Dictionary' (Navarre, 1984).

Chuang, Janie A, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) *The American Journal of International Law* 609

Chuang, Janie A, 'Contemporary Debt Bondage, "Self-Exploitation," and the Limits of the Trafficking Definition' in Prabha Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (CUP, 2017)

Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of Parties to the United Nations Convention on Transnational Organized Crime on its fourth session, held in Vienna from 8 to 17 October 2008*, UN Doc CTOC/COP/2008/19 (1 December 2008).

Council of Europe and United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (2009)

Dohrmann, Mary L, 'Hemming in Harboring: The Limits of Liability under 8 U.S.C. Sec. 1324 and State Harboring Statutes' (2015) 115 *Columbia Law Review* 1217

Doyle, Charles, 'Sex Trafficking: An Overview of Federal Criminal Law' (Congressional Research Service, 2015)

Gallagher, Anne, *The International Law of Human Trafficking* (OUP, 2010)

Gallagher, Anne and Joy Ngozi Ezeilo, 'The UN Special Rapporteur on Trafficking: A Turbulent Decade in Review (2015) 37 *Human Rights Quarterly* 913

Gawronska, Sylwia, 'Organ Trafficking and Human Trafficking for the Purpose of Organ Removal, Two International Legal Frameworks against Illicit Organ Removal' (2019) 10(3) *New Journal of European Criminal Law* 268

McClellan, David, *Transnational Organized Crime* (2007)

Muraszkiewicz, J. M., *Protecting Victims of Human Trafficking from Liability* (Palgrave, 2019)

UN Commission on Human Rights, *Report of the Special Rapporteur, Ms. Radhika Coomaraswamy, on violence against women, its causes and consequences, on trafficking in women, women's migration and violence against women*, UN Doc E/CN.4/2000/68 (29 February 2000)

UNODC, *Legislative Guide for The Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime* (2020)

UNODC, *Model Law, Model Legislative Provisions Against Trafficking In Persons* (2020)

UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised* (Issue Paper, 2018)

UNODC, *Global Report on Trafficking in Persons 2018* (2018)

US Department of State, '2019 Trafficking in Persons Report' (June 2019)

Working Group on Trafficking in Persons, *Analysis of key concepts of the Trafficking in Persons Protocol*, UN Doc CTOC/COP/WG.4/2010/2 (9 December 2009)

Working Group on Trafficking in Persons, *Report of the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010*, UN Doc CTOC/COP/WG.4/2010/6 (17 February 2010)

Annex One – Overview of National Legislation

Legislation in English

Countries examined for this Paper with legislation published in English, include Antigua and Barbuda, Australia, Bangladesh, Barbados, Belize, Botswana, Canada,¹⁴⁸ Cameroon,¹⁴⁹ Fiji, Gambia, Ghana, Guyana, Jamaica, India, Ireland, Kenya, Lesotho, Mauritius, Mozambique, New Zealand, Namibia, Nigeria, Sierra Leone, Singapore, South Africa, Sri Lanka, Tanzania, Trinidad and Tobago, Uganda, the United Kingdom, the United States, Zambia, and Zimbabwe. To this list Ethiopia, Haiti, Special Administrative Region of Hong Kong, Indonesia, Malaysia, Pakistan, the Philippines, and Turkey can be added, each of which publishes official legislative text in English or for which official translations are available.¹⁵⁰

The definitions of trafficking in persons in the laws of Antigua, Barbados, Belize, Botswana, Ethiopia, Gambia, Ghana, Guyana, Haiti, India, Indonesia, Jamaica, Kenya, Mauritius, Namibia, Nigeria, Pakistan, Sierra Leone, Singapore, South Africa, Sri Lanka, Tanzania, Trinidad and Tobago, Turkey, the United Kingdom, Zambia, and Zimbabwe all adopt harbouring as an act element. Synonyms or similar acts are not used in their definitions and the word ‘harbouring’ is not defined in the relevant legislation. Three examples of this approach are, first, the Sri Lankan definition, under article 360C of the *Penal Code*:

(1) Whoever-

[...]

(b) recruits, transports, transfers, harbours or receives any person or does any other act [...]

Second, the South African definition, under the *Prevention and Combating of Trafficking in Persons Act 7 of 2013*:

Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of [...]

And third, the United Kingdom definition, under s 2 of the *Modern Slavery Act 2015*:

A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.

[...]

(3) A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.

The laws of Australia, Bangladesh, Canada, Ireland, Lesotho, Mozambique, New Zealand, the Philippines, Uganda, and the United States meanwhile, all use the word ‘harbouring’ in addition to other synonyms or similar acts, including ‘conceal’, ‘hold’, ‘maintain’, ‘shelter’, ‘employ’, and ‘accommodate’. Australia’s federal *Criminal Code* (Cth) contains a separate ‘Harbouring a Victim’ offence under s 271.7F, in addition to the basic trafficking offence (which does not contain ‘harbouring’ as an act element). This offence contains three alternate act elements: ‘harbours’, ‘conceals’, or ‘receives’. A similar approach, using ‘conceal’ and ‘harbour’ as alternatives, is taken by Canada and New Zealand. The definition of trafficking in persons under s 279.01 in the Canadian *Criminal Code* states that

Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty [...]

As can be seen, the Canadian law also uses the word ‘holds’. In New Zealand, s 98D of the *Crimes Act 1961* states that

Every person is liable to the penalty stated in subsection (2) who arranges, organises, or procures:

[...]

the reception, recruitment, transport, transfer, concealment, or harbouring of a person in New Zealand or any other State— (i) for the purpose of exploiting or facilitating the exploitation of the person; or (ii) knowing that the reception, recruitment, transport, transfer,

¹⁴⁸ Canada also publishes official legislative text in French. This is examined below.

¹⁴⁹ Cameroon also publishes official legislative text in French. This is examined below.

¹⁵⁰ In these cases, official English versions/translations of legislation were examined, as opposed to, for example, the Bahasa version of the Indonesian law.

concealment, or harbouring of the person involves 1 or more acts of coercion against the person, 1 or more acts of deception of the person, or both [...]

Uganda's *Prevention of Trafficking in Persons Act 2009* takes a somewhat different approach. The definition of trafficking in persons under s 2(r) states that trafficking means 'the recruitment, transportation, transfer, harbouring or receipt of persons [...]'. While s 3 ('Offence of Trafficking in Persons') adopts this sets of act elements under subsection (a), subsection (b) includes the following acts 'recruits, hires, maintains, confines, transports, transfers, harbours or receives a person or facilitates the aforementioned acts through [...]'. Thus, s 3(b) adds 'confines' and 'maintains' as similar acts to 'harbouring'. Bangladesh's *Prevention and Suppression of Human Trafficking Act 2012* also uses the word 'confining', while Mozambique's law uses 'shelter' and 'accommodate'.

Ireland's *Criminal Law (Human Trafficking) Act 2008* adopts the most extensive list of act elements under s 1, including:

- (a) procures, recruits, transports or harbours the person, or
 - (i) transfers the person to,
 - (ii) places the person in the custody, care or charge, or under the control, of, or
 - (iii) otherwise delivers the person to,
 another person,
- (b) causes a person to enter or leave the State or to travel within the State,
- (c) takes custody of a person or takes a person—
 - (i) into one's care or charge, or
 - (ii) under one's control,
 or
- (d) provides the person with accommodation or employment.

The acts of providing accommodation or employment may be seen as similar acts to harbouring.

The federal law of the United States contains, under § 1590, the offence of 'Trafficking with respect to peonage slavery, involuntary servitude, or forced labor'. This offence contains act elements as follows: '[w]hoever knowingly recruits, harbors, transports, provides, or obtains by any means [...]'. Another offence, under § 1591, is titled 'Sex trafficking of children or by force, fraud, or coercion'. This offence lists the following act elements: 'recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits'. 'Maintains' may include securing food, shelter, or 'other necessities of life'.¹⁵¹ The definitions of trafficking in Lesotho, the Philippines, and Tanzania also use the term 'maintains' in addition to 'harboring' (in Tanzania, 'maintains' is only used in relation to prostitution).¹⁵²

Bangladesh and Malaysia define the term 'harbouring'. Malaysia's *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act* defines trafficking under s 2 as 'all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act'. Section 22 contains the related offence of 'Harbouring Persons' and defines 'harbour' as 'supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of conveyance, or assisting a person in any way to evade apprehension'. This offence does not, however, concern the harbouring of victims of trafficking; rather, it concerns harbouring of persons who have, are planning, or are likely to commit an act of trafficking. It thus resembles traditional harbouring of criminals offences.

Bangladesh's *Prevention and Suppression of Human Trafficking Act 2012* defines 'sheltering or harbouring' under s 2 to mean 'harbour, provide with shelter to or assist in any other means, any person in order to sell or traffic that person inside or outside of the country, and shall also include the meanings for which the term 'harbour' has been used in section 52A of the Penal Code, 1860'. Section 52A of the Penal Code states that 'the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension'.

¹⁵¹ Charles Doyle, 'Sex Trafficking: An Overview of Federal Criminal Law' (Congressional Research Service, 2015) 5.

¹⁵² *Expanded Anti-Trafficking in Persons Act of 2012* (Philippines) s 3(a).

Section 130 of Hong Kong's *Crimes Ordinance* uses the act 'harbours' for offences relating to unlawful sexual acts and prostitution. Fiji's trafficking offences do not use the term 'harbouring' or a similar term.

Legislation in French

Countries examined for this Paper with legislation published in French include Algeria, Belgium, Cameroon, Canada, Djibouti, France, Mali, Niger, and Tunisia. The trafficking in persons laws of each of these countries adopt either the noun 'hébergement' as expressly mentioned in the French version of the Trafficking in Persons Protocol (Algeria, Djibouti, Mali, Tunisia), or the verb 'héberger' (Belgium, Canada, France, Niger). Of them, Canada is the only country to use an additional synonym or similar act element. Like the English text (extracted above) of s 279.01 of the *Criminal Code*, the French text uses the words 'cache' and 'détient' as follows. Of them, Canada is the only country to use an additional synonym or similar act element. Like the English text (extracted above) of s 279.01 of the *Criminal Code*, the French text uses the words 'cache' and 'détient' as follows:

Quiconque recrute, transporte, transfère, reçoit, détient, cache ou héberge une personne, ou exerce un contrôle, une direction ou une influence sur les mouvements d'une personne, en vue de l'exploiter ou de faciliter son exploitation commet une infraction passible [. . .]

These words translate as 'conceals' and 'holds', following the English text of the Canadian Code.

An English translation of Senegal's Act No. 2005-06 of May 10 uses the term 'harbouring'.

Legislation in Spanish

Countries examined for this Paper with legislation published in Spanish include Argentina, Colombia, Chile, the Dominican Republic, El Salvador, Mexico, Peru, and Spain. An example of legislation is the Spanish *Code Penal*, which contains the offence of trafficking in persons under article 177-bis. It is defined as

Será castigado con la pena de cinco a ocho años de prisión como reo de trata de seres humanos el que, sea en territorio español, sea desde España, en tránsito o con destino a ella, empleando violencia, intimidación o engaño, o abusando de una situación de superioridad o de necesidad o de vulnerabilidad de la víctima nacional o extranjera, o mediante la entrega o recepción de pagos o beneficios para lograr el consentimiento de la persona que poseyera el control sobre la víctima, la captare, transportare, trasladare, acogiere, o recibiere, incluido el intercambio o transferencia de control sobre esas personas, con cualquiera de las finalidades siguientes [. . .]

All these countries use 'acogida' or a form of the word (such as *acoya*, *alojar*, *acoge*, *acogiere*). Mexico and Peru also use the word 'retener'/'retiene', which means 'to retain', but may also translate to 'keep', 'detain', or 'hold'. The Mexican definition is under article 10 of the *Ley General Para Prevenir, Sancionar Y Erradicar Los Delitos En Materia De Trata De Personas Y Para La Protección Y Asistencia A Las Víctimas De Estos Delitos* (General Law to Prevent, Sanction and Eradicate Crimes Related to Trafficking in Persons 2012):

Toda acción u omisión dolosa de una o varias personas para captar, enganchar, transportar, transferir, retener, entregar, recibir o alojar a una o varias personas con fines de explotación se le impondrá de 5 a 15 años de prisión y de un mil a veinte mil días multa, sin perjuicio de las sanciones que correspondan para cada uno de los delitos cometidos, previstos y sancionados en esta Ley y en los códigos penales correspondientes.

Legislation in Russian

Countries examined for this Paper with legislation published in Russian include Kazakhstan, Kyrgyzstan, Russia, and Uzbekistan. Each of these countries uses the term from the Russian text of the Trafficking in Persons Protocol: 'укрывательство'. No synonyms or similar acts are used in these four countries' legislation. For example, the Russian *Уголовный кодекс* (Criminal Code) states under article 127.1:

Купля-продажа человека, иные сделки в отношении человека, а равно совершенные в целях его эксплуатации вербовка, перевозка, передача, укрывательство или получение - наказываются принудительными работами на срок до пяти лет либо лишением свободы на срок до шести лет.

Legislation in Chinese

China's legislation under article 240 of the 中华人民共和国刑法 (Criminal Law of the People's Republic of China) was examined for the purposes of the Paper. According to this article, victims may be women or children, no means element is required and the purpose element is restricted to 'selling the victim'.¹⁵³ The act elements included in the definition do not include 'harbouring'. They include 'abducting, kidnapping, buying, trafficking in, fetching, sending, or transferring'. Notably, however, article 241 of the Criminal Law criminalises persons who purchase trafficking women or children and includes the further act element of 'depriving' or 'restricting' the victim's personal freedom. This is subject to a qualification that (translated to English):

if those who buy an abducted women or child but does not obstruct the women from returning to her original place of residence as she wishes or does not maltreat the child nor obstruct his or her rescue may be exempted from being investigated for criminal responsibility.

Legislation in Arabic

Jordan's trafficking in person legislation was examined for this Paper. Its definition of trafficking under Article 3 of the *Anti-Human Trafficking Law for the Year 2009* states (translated to English):

The recruitment, transportation, 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 those/such persons, for the purpose of exploitation.

It uses the word 'harbouring' and no similar terms. In the Arabic version of the definition, the term used for 'harbouring' is 'إيواء' ('iiwa'). This is a form of the word used in the Arabic version of the Trafficking in Persons Protocol (إيواءهم (iiwawuhum)).

Legislation in other languages

Legislation in languages other than the six UN official languages was also examined for the purposes of this Paper. In some cases, definitions of trafficking in persons contain words that translate closely to 'harbouring', though words broadly translating to 'accommodate', 'conceal', or 'hold' are also commonly used.

An English translation of Lao's legislation, the *Law on Anti-Trafficking in Persons*, uses the word 'harbouring'. The legislation also includes a definition of the term, stating that it 'shall mean the provision of a place to stay for and hide any person whereby the owner of such place knows by doing so it is for the purpose of trafficking in persons' (under article 4).

Viet Nam's Criminal Code uses the term 'chứa chấp'. Based on an English translation provided by WIPO, this means 'harbouring'.

The Criminal Codes of Austria and Germany (Strafgesetzbuch) contain trafficking offences under s 104a and s 232 respectively. In both cases the word used for 'harbour' is 'beherbergt'. This word more commonly means 'to accommodate' or 'to house' or 'to shelter'.

The Penal Codes of Brazil and Portugal (Código Penal) contain trafficking offences under articles 149-A and 160^o respectively. In both cases the words used for 'harbour' are 'alojar' and 'acolher'. 'Alojar' translates to 'house' or 'lodge', while 'acolher' may translate to 'welcome', 'receive', 'shelter', and 'harbour'.

The Criminal Code of Croatia (Kazneni Zakon) criminalises trafficking under s 106. The word 'skriva' is used, which translates to 'hides'. Similar words are used in s 168 of the Penal Code of the Czech Republic (trestní zákoník)—'ukryje' meaning 'conceals' or 'hides'—and s 159a-c of the Criminal Code of Bulgaria (Наказателен Кодекс). In the Bulgarian Code, the word used is 'укрива', which may translate to 'secrete' or 'hide'. The Romanian Penal Code (Cod Penal), meanwhile, criminalises trafficking under articles 210 and 211 and uses the

¹⁵³ See generally Bonny Ling, 'Human Trafficking and China: Challenges of Domestic Criminalisation and Interpretation' (2016) 17 *Asia-Pacific Journal on Human Rights and the Law* 148.

word 'adäpostirea', which translates to 'housing'. The Slovakian Criminal Code (Trestný Zákon) uses the word 'prechováva' in its trafficking offence under s 179, which translates to 'harbours'.

Section 133¹ of the Estonian Penal Code (Karistusseadustik) uses the words 'varjamise' and 'majutamise', which translate to 'concealment' and 'accommodation' respectively. The Criminal Code of Finland (Rikoslaki), under s 3 of Chapter 25, uses the words 'majoittaa toisen' which translate to 'providing accommodation' or 'accommodating another'. The Latvian Criminal Law, pursuant to ss 154¹ and 154², uses the words 'slēpšana' and 'izmitināšana' which translate to 'concealment' and 'accommodation' respectively. In Lithuania, under s 147 of the Criminal Code (baudžiamasis kodeksas), the phrase 'laikė nelaisvėje žmogų' is used, which means 'to hold in captivity'.

Hungary's Criminal Code (Büntető Törvénykönyv) contains an offence of trafficking under s 192. It uses the words 'elszállásol' and 'elrejt' which translate to 'accommodate' or 'lodge' and 'hide' or 'conceal' respectively.

The Italian Penal Code (Codice Penale) criminalises trafficking in person under article 601 and uses the word 'ospita', which translates to 'accommodates' or, potentially, to 'hold' or 'lodge'.

A translation of Myanmar's legislation uses the word 'harbour', while a translation of Thailand's legislation uses the words 'detaining' and 'confining' in addition to harbouring.

Annex Two – Table of Survey Country Legislation

Country	Legislation	Extract of Relevant Text [English Language]
Argentina	National Law 26.842 Ley Nacional 26.842 (amending Ley Nacional 26.364)	Trafficking in persons is understood to be the offer, recruitment, transfer, reception or harbouring of people for the purpose of exploitation, within the national territory as well as from or to other countries [...]
Bangladesh	The Prevention and Suppression of Human Trafficking Act 2012, ss 2, 3, and 10	[s 3] Human Trafficking means the selling or buying, recruiting or receiving, deporting or transferring, sending or confining or harbouring, either inside or outside of the territory of Bangladesh of any person for the purpose of sexual exploitation or oppression, labour exploitation or any form of exploitation or oppression by means of [...] [s 2] Sheltering or harbouring means to harbour, provide with shelter to or assist in any other means, any person in order to sell or traffic that person inside or outside of the country, and shall also include the meanings for which the term 'harbour' has been used in section 52A of the Penal Code, 1860 [s 10] any person 'who kidnaps, steals or confines any other person with intent to commit the offence of human trafficking or to put that person into a state of sexual or other exploitation or oppression [...]'
Fiji	Crimes Decree 2009, Part12, Division 6	[Multiple offences are set out in Part 12, Division 6 of the Decree, none of which use the word harbouring or similar terms]
France	Penal Code, art 225-4-1 [Code penal]	Trafficking in human beings is the act of recruiting a person, transporting him, transferring him, accommodating or receiving him for the purpose of exploitation in any of the following circumstances [...]
Jordan	Law on the Prevention of Trafficking in Human, Art 3	The recruitment, transportation, 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 those/such persons, for the purpose of exploitation.
Kyrgyzstan	Criminal Code, art 171 УГОЛОВНЫЙ КОДЕКС КЫРГЫЗСКОЙ РЕСПУБЛИКИ	Trafficking in persons, that is, their recruitment, transportation, harboring, receipt or transfer, carried out with their consent or without consent, by means of threat, use of force or other forms of coercion, blackmail, abduction, fraud, deception, with or without the purpose of exploitation or other benefit [...]

<p>Malaysia</p>	<p>Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s 2, 22</p>	<p>“trafficking in persons” means all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act;</p> <p>[harbouring offence concerns trafficker; not the victim. But it defines ‘harbour’]</p> <p>22 Harboring Persons</p> <p>(1) Any person who— (a) harbours a person; or</p> <p>(b) prevents, hinders or interferes with the arrest of a person, knowing or having reason to believe that such person has committed or is planning or is likely to commit an act of trafficking in persons, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding ten years, and shall also be liable to fine. (2) In this section, “harbour” means supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of convey</p>
<p>Namibia</p>	<p>Combating of Trafficking in Persons Act 2018, s 3</p>	<p>A person commits an offence of trafficking in persons if he or she intentionally recruits, transports, delivers, transfers, harbours, sells, exchanges, leases or receives a person by means of (a) threat; (b) use of force or other forms of coercion; (c) abduction; (d) fraud; (e) deception; (f) kidnapping; (g) abuse of power or abuse of position of vulnerability; or (h) giving or receiving of payments or benefits to obtain the consent of a person who has control over another person, for the purposes of exploitation.</p>
<p>United Kingdom</p>	<p>Modern Slavery Act 2015 (UK), s 2</p>	<p>(1) A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.</p> <p>[...]</p> <p>(3) A person may in particular arrange or facilitate V's travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.</p>

<p>United States</p>	<p>18 USC § 1590 (Trafficking with respect to peonage slavery, involuntary servitude, or forced labor) 18 USC § 1591 (Sex trafficking of children or by force, fraud, or coercion)</p>	<p>(a) Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both [...]</p> <p>(a) Whoever knowingly—</p> <p>(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or</p> <p>(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1) [...]</p>

Annex Three – Survey Instrument

Purpose of this Survey: UNODC is undertaking a study on the concept of ‘harbouring’ contained in the definition of ‘trafficking in persons’, as set out in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime. The purpose of this survey is to learn about your experiences and hear your perspective on understanding and applying this concept in practice in [insert country].

Confidentiality: Responses to questions I ask will only be used for the above-stated purpose. You will not be identified by name or specific position in the study or any other publication released relating to the subject matter of this interview. During the interview, please flag any specific concerns you may have about sharing particularly sensitive information and mention any additional steps you would like me to take to protect confidentiality. The notes that I take in this meeting are only for the purposes of preparing the study. I will not share my notes from this meeting with UNODC or anyone else.

Do you have any questions about this consultation meeting, before we proceed?

I General Questions

Question 1

What is your view of the definition of trafficking in persons in [insert country] and its individual elements?

- Does the definition contain act, means, and purpose elements?
- Has the definition assisted the prosecution of trafficking in persons?
- Are there any problems with the definition?

[Answer]

Question 2

What is your view of the ‘act’ elements in the definition of trafficking in persons in [insert country]?

- Do they align with the ‘act’ elements in the Trafficking Protocol (i.e. recruitment, transportation, transfer, harbouring, receipt)?
- In your opinion, do the ‘act’ elements in [insert country’s] definition cover all aspects of trafficking conduct in practice?

[Answer]

Question 3

In practice, must a specific ‘act’ element be proven to establish trafficking in persons?

[Answer]

II The Concept of Harboursing

Question 4

In a general sense, what do you think the term ‘harbouring’ means?

[Answer]

Question 5

As an ‘act’ element of trafficking, how is the term ‘harbouring’ understood? Do any materials inform this understanding (i.e. legislation, case law, policy documents)?

- Are there different understandings / divergences of opinion regarding the meaning of the act of ‘harbouring’ in [insert country]?

[Answer]

Question 6

In your opinion, does ‘harbouring’ require any of the following: concealment, restrictions on the liberty of the person harboured, or the provision of some form of accommodation?

[Answer]

Question 7

In your opinion, does ‘harbouring’ include the provision of food or other basic necessities, absent any other conduct?

[Answer]

Question 8

Does the concept of ‘harbouring’ a victim of crime exist elsewhere in the criminal law of [insert country] and, if so, does it inform the understanding of ‘harbouring’ in the trafficking context?

- Are there differences between the meaning of ‘harbouring’ in the trafficking context and elsewhere in the criminal law?
- Are there any cases where a person has been convicted for a standalone crime of ‘harbouring’ when a conviction for trafficking could not be achieved?

[Answer]

III Harboursing in Practice

As an 'Act' Element

Question 9

When prosecuting trafficking, do specific 'acts' need to be proven in order to secure a conviction?

- Are any particular acts commonly pleaded in prosecutions?

[Answer]

Question 10

If 'harbouring' is relied on as an 'act' element, is it ever pleaded as the sole act? If so, how often?

- If not, is there any act/s it is commonly pleaded with?

[Answer]

Question 11

How is the act of 'harbouring' proven as an element of the trafficking offence?

- Are there any evidentiary challenges?

[Answer]

Relationship to the 'Means' Element

Question 12

According to the international definition of trafficking, 'acts' are done by use of 'means'. In practice, which 'means' are mostly used for the act of 'harbouring'?

[Answer]

Relationship to the 'Purpose' Element (Exploitation)

Question 13

In what types of circumstances does harbouring occur prior to exploitation?

[Answer]

Question 14

In what types of circumstances does harbouring occur during exploitation?

[Answer]

Question 15

What types of exploitation is the act of harbouring most commonly used for?

[Answer]

Question 16

How is the act of harbouring proven to be ‘for the purpose of exploitation’ when harbouring occurs prior to the exploitation?

- Does the harbourer need to know of the future exploitation? Do they need to know the precise nature of the exploitation?
- What if the harbourer is ‘wilfully blind’ (i.e. never turns their mind) to the risk that the person harboured will be exploited?
- What if the harbourer is reckless as to the risk of exploitation (i.e. knows the person may be exploited but carries out the act of harbouring regardless)?

[Answer]

IV Hypotheticals

Question 17

A man works excessive hours at a farm. He is not given any days off and is paid less than the minimum wage. Part of his wage is deducted to pay for his food and drink during working hours. He sends a large portion of his earnings to his elderly parents. If he refuses to work, or if he does not meet the quotas he is given, he is threatened with violence. There are few employment opportunities where the man lives and he sees no option but to continue to work on the farm to provide money for his parents.

When he is not working, the man stays in a small house not far from the farm. He rents this accommodation from a woman, paying her a small amount of money each week. The woman does not know about the man's working conditions and has no relationship with the owner of the farm.

- Is the act of 'harbouring' present here, either/both on the farm or in the man's accommodation?
- Does it change your answer if the woman knows about the working conditions on the farm?

[Answer]

Question 18

A woman is smuggled from one country to another for the purpose of forced labour as a sex worker. She does not know this and believes she will work as a waitress. During the journey, she stays in a safe house for three days while waiting to cross the border. The safe house is owned by a man who knows that migrants who stay in his house are sometimes trafficked, but he does not know whether or not this specific woman will be exploited. Later, the woman is taken over the border in the back of truck. The truck driver knows the woman will be exploited.

- Is the man who owns the safe house 'harbouring' the woman? Does your answer change if he knows the woman will be exploited?
- Is the truck driver 'harbouring' the woman?

[Answer]

Question 19

A young child is sent by his mother to purchase groceries from a shop. When the child arrives at the shop, the owner takes the child into a backroom. The owner locks the door and sexually exploits the child for approximately four hours. The child is then released, given the groceries, and allowed to return home.

- Was the child 'harboured' while in the backroom of the shop?
- Would your answer change if the child was locked in the room for only 10 minutes or, alternatively, if they were held overnight?
- Would your answer change if the child was sexually exploited outside the shop in an empty side alley?

[Answer]

Question 20

A young boy is in a situation of forced begging. His family owes a debt and the young boy is forced to beg to help pay it off. When he is not begging on the street, he is allowed to stay in a room in a small house. He has a small mat to sleep on. The young boy is free to come and go from the house when he is not begging and, on his day off (Sunday), he is allowed to leave and visit family members.

- Is the owner of the house where the young boy stays 'harbouring' him? Why/Why not?
- Another person (not the owner of the house) is responsible for providing the young boy with food for dinner, as well as several other necessities. Is this person 'harbouring' the boy?

[Answer]

Question 21

A man inherits a fishing vessel and several bonded labourers from his recently deceased father. The vessel is often at sea for months at a time and, even when it returns to shore, the labourers are not permitted to leave. The labourers are kept on the boat by force and all their wages go to paying off a generational debt. The man who inherited the fishing vessel and the labourers does not stay on the vessel himself.

- Is the man 'harbouring' the bonded labourers on the fishing vessel?
- Does the fact that the man is not on the vessel himself make any difference to your answer?

[Answer]

V Final Questions

Question 22

Is there any domestic case law (or other material) that you have not yet mentioned (whether in the trafficking in persons context or not), that can shed light on the meaning of harbouring?

- Can you provide judgments / material? Can you explain its significance?

[Answer]

Question 23

What guidance, if any, do you think practitioners should be given on the concept of ‘harbouring’ in the definition of trafficking in persons?

[Answer]

Question 24

Are there any other matters relevant to the study that you would like to address? Is there anything else I should have asked you?

[Answer]

Thank You for Completing this Survey