

# Detention of trafficked persons in shelters:

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A legal and policy analysis

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## Executive Summary

In countries around the world it is common practice for victims of trafficking who have been “rescued” or who have escaped from situations of exploitation to be placed and detained in public or private shelters.<sup>1</sup> The term “detention”, as used in this context, refers to a very specific situation in which the individual concerned is unable to leave the facility if and when she or he chooses to. In some cases, shelter detention is a short-term measure that may be prompted by concerns about victim wellbeing or safety. In the most egregious situations, victims can be effectively imprisoned in such shelters for months, even years.

This Study considers the international legal aspects of victim detention in shelters and weighs up the common justifications for such detention from a legal, policy and practical perspective. It is based on desk research of shelter practices in a number of countries and more direct exposure to shelters through field based research undertaken principally in South East Asia.

International law does not directly address the specific issue of detention of victims of trafficking. The question of victim detention therefore requires consideration of a broad range of standards. These include trafficking-specific laws as well as more general rules governing human rights and the administration of criminal justice. Of particular relevance are obligations relating to the protection and support of victims of trafficking as well as norms protecting the right to freedom of movement and prohibiting arbitrary detention. The fact that shelter detention appears to disproportionately affect women and children also requires consideration of other norms including those protecting the rights of children and prohibiting sex-based discrimination.

The Study concludes that routine detention of victims or suspected victims of trafficking in public or private shelters violates a number of fundamental principles of international law and is therefore to be considered, *prima facie*, unlawful. Failure of the State to act to prevent unlawful victim detention by public or private agencies

invokes the international legal responsibility of that State. Victims may be eligible for remedies, including compensation, for this unlawful detention.

In certain situations, the State may be able to successfully defend victim detention in shelters on a case-by-case basis with reference to, for example, criminal justice imperatives, public order requirements or victim safety considerations. The internationally accepted principles of *necessity*, *legality*, and *proportionality* should be used to evaluate the validity of any such claim. Application of these principles would most likely only support a claim of lawful detention in relation to a situation where detention is administered as a last resort and in response to credible and specific threats to a victim’s safety. However, even where such basic tests are satisfied, a range of protections should be in place to ensure that the rights of the detained individual are respected and protected. Such measures would include but not be limited to judicial and/or administrative review of the situation to determine its on-going legality and necessity.

The second part of the Study considers the practical and strategic implications of the various policy arguments that are advanced in favour of victim detention. Can victims consent to their own detention? Is it indeed true that detention provides the only – or even the best chance of delivering much needed support and protection to victims of trafficking? Is it reasonable to cite the overwhelming reliance on victim testimony in human trafficking cases as grounds for ensuring these witnesses be prevented from disappearing? Should the situation be different for victims who lack legal migration status? These questions are framed and responded to with particular reference to documented shelter practices in two countries of South East Asia: Cambodia and Thailand. With only minor caveats, the Study concludes that in addition to their weak legal value, the arguments

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<sup>1</sup> The study has adopted the following international legal definition of detention: the condition of “any person deprived of personal liberty except as a result of conviction for an offence”: *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by G.A. res. 43/173 of 9 December, 1988 [Hereafter: Principles of Detention or Imprisonment].

advanced in favour of victim detention are largely devoid of practical or strategic value.

The authors draw readers' attention to the scope, assumptions and limitations of the Study. First, its focus is specifically on the issue of detention of victims of trafficking in government and private shelters. While clear parallels can be drawn with other forms of detention, the Study does not directly consider the legal or policy implications of victims being detained in immigration or criminal justice facilities. Second, the authors take for granted that those providing closed shelter to victims of trafficking may well be motivated by a genuine desire to provide much-needed assistance and support. However, motivation does not impact on the factual question of

whether victims are being detained and whether such detention is permissible under international law. Finally, it is important to note that the Study does not purport to provide a comprehensive and fully authoritative treatment of this issue and the related question of victim detention in non-shelter facilities. The preliminary field research undertaken over the past five years confirmed the existence of a practice that requires careful and in-depth documentation and analysis. It is hoped that the Study provides a useful framework and starting point for this important work.

## I. Introduction to the Issue

In recent years the legal and practical implications of supporting and protecting victims of trafficking have received significant attention. Protection of trafficked persons' rights is now recognised as a vital aspect of an effective national response to this crime.<sup>2</sup> Support for this position comes not just from those convinced of the intrinsic value of a human rights approach. Most criminal justice practitioners now accept protection and support are a vital part of ensuring that victims are able to play an effective role in the investigation and prosecution of trafficking cases.<sup>3</sup>

While there seems to be general agreement on the *need* for victim protection, the precise contours and limits of that protection have not yet been firmly established. This is despite considerable development in the law and policy of human trafficking over the past several years. One matter that remains to be definitively settled concerns the detention of victims – including their detention in shelters. When victims of trafficking are placed in a shelter or safe house, is the State – or anyone else – legally entitled to insist the victim remain in that shelter? If such a prerogative does exist what are its parameters? If there is no legal justification for victim detention are there compelling policy arguments that could justify detention in some or all cases? Is there a different standard of treatment for women as compared to men – or for children as compared to adults? Does the answer change if the trafficked person is also an irregular migrant?

These are not just theoretical questions. Each year many individuals who are known or suspected to be victims of trafficking are detained in police lock-ups; immigration detention centres and prisons. Of direct relevance to the present study is the widespread and under reported practice of victim detention in public and private shelters.<sup>4</sup> In countries and regions around the world including Bosnia and Herzegovina, Cambodia, India, Malaysia, Nepal, Nigeria, Taiwan and Thailand, it is common practice for victims of trafficking to be effectively imprisoned in government or private support facilities,

with no possibility to go outside shelter grounds beyond the occasional supervised excursion or trip to court.<sup>5</sup> In some cases, the shelters concerned are well-established facilities that provide a full range of assistance and support services to victims. In other cases they are little

<sup>2</sup> See, for example, preamble to 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*, adopted by G.A. res. 55/25 of 15 November 2000, entered into force 25 December 2003 [Hereafter: UN Trafficking Protocol]; preamble to the *Council of Europe Convention on Action against Trafficking in Human Beings*, open for signature 16 May 2005, CETS No. 197, entered into force 1 February 2008 [Hereafter: European Trafficking Convention] and its Explanatory Report, available from: <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> [accessed 28 August 2008] [Hereafter: European Trafficking Convention Explanatory Report].

<sup>3</sup> See, for example, International Criminal Police Organization (Interpol), *Trafficking in Human Beings - Best Practice Guidance Manual for Investigators* (2nd ed. 2007); United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* (New York, 2006) [Hereafter: UNODC Toolkit]; A. Gallagher and P. Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line' (2008) 18 *International Criminal Justice Review* (forthcoming) [Hereafter: Gallagher and Holmes].

<sup>4</sup> The most recent Trafficking in Persons Report, issued by the United States Department of State, provides evidence of significant under-reporting in relation to the practice of victim shelter detention. The report considers victim shelter practices in almost every one of the 151 countries reviewed. However, in only one case is there any reference to victims being detained or, as stated, held "under guard". In relation to that situation, the report immediately notes that there were no recorded cases of victims being "inappropriately incarcerated": United States Department of State, *Trafficking in Persons Report* (2008), p198 [Hereafter: USTIP 2008]. Elsewhere, in the context of the need for victim protection, the report somewhat ambiguously notes that: "to the best extent possible, trafficking victims should not be held in immigration detention centers, or other detention". A comprehensive report on global shelter practices, funded by USAID and released in 2007, contains only the following mention of detention: "The practice of holding trafficking victims against their will in shelters is an issue in some places. In a country with a number of shelters, victims may be kept against their will by some shelters and not by others". None of the report's recommendations address this issue. United States Agency for International Development, *The Rehabilitation of Victims of Trafficking in Group Residential Facilities in Foreign Countries* (2007), p9.

<sup>5</sup> See, for example, S. Che "NIA: Trafficked victims detained for protection", *The China Post*, March 26, 2007, available from: <http://www.chinapost.com.tw/news/archives/taiwan/2007324/105390.htm> [accessed 28 August 2008] (defending victim detention in Taiwan); Global Alliance on Trafficking in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) (confirming the practice of shelter detention in Bosnia and Herzegovina, Nigeria and India); M. Dottridge, *Handbook on Planning to Prevent Child Trafficking* (Terre des Hommes, 2007), esp. p21, 31 (noting detention of returned victims of trafficking in Nepalese shelters). On closed shelters and restrictive shelter practices in the Balkans and South East Europe, see A. Brunovskis and R. Surtees, 'Agency or illness – conceptualizing trafficking victims' choices and behaviors' (2008) 1 *Gender, Technology and Development* (forthcoming) [Hereafter: Brunovskis and Surtees 2008]; A. Brunovskis and R. Surtees, *Leaving the past behind: when victims of trafficking decline assistance* (FAFO Institute (Oslo) and Nexus Institute (Vienna), 2007) [Hereafter: Brunovskis and Surtees 2007]; and R. Surtees, *Listening to victims: experiences in identification, return and assistance in South Eastern Europe* (ICMPD-Vienna, 2007) [Hereafter: Surtees, 2007].

more than holding facilities. Either way, victims can languish in such places for months, even years. While there appear to be few examples of legally sanctioned shelter detention,<sup>6</sup> at least one major destination country recently passed a trafficking in persons law that explicitly mandates shelter detention for both national and foreign victims of trafficking. Escaping from the shelter results in an increase in the term of detention equal to the period of escape. The law also criminalizes the act of assisting a victim of trafficking to escape a shelter.<sup>7</sup>

Shelter detention, which appears overwhelmingly directed towards women and girls, is commonly justified with reference to the complexity of the operating environment and the need to protect victims of trafficking. Occasionally, the very fact of detention is denied and service providers assert that victims have agreed to restrictions on their freedom of movement. Often, it is claimed that victims are needed for a criminal prosecution and must be prevented from running away. In the case of migrant victims, their detention may be explained with reference to the fact that they have no legal status in the country of destination so cannot be permitted to leave the shelter compound.

Closed shelters tend to enjoy considerable autonomy in the country of their operation. Whether public or private they are generally not subject to any form of external scrutiny or review. In most cases, victims are unable to challenge the legality of their detention in a court or through any administrative review process.

Detention of victims of trafficking is not a universal practice. In many countries, the right of victims of trafficking to freedom of movement is taken for granted. The provision of support and protection is based on consent. Shelters are open and victims are free to come and go as they please. Such practices do not appear to be based on national or regional particularities. Even in countries where victim detention is the norm, alternative means of looking after trafficked persons exist and appear to function reasonably well. An increasing number of countries are putting in place special visa regimes that seek to avoid the “deport or detain” approach that has typically characterised the treatment of foreign victims.<sup>8</sup>

This study examines the legal and policy implications of shelter-based victim detention with a view to determining whether and, if so under what circumstances, detention of trafficked persons in shelters can ever be justified. The study draws on examples around the world but in relation to the policy analysis, has relied particularly on insights and experiences drawn from field study of shelter practices in Cambodia and Thailand.<sup>9</sup> A short summary of the situation in each of those countries is therefore warranted.

**Cambodia:** Shelter and assistance to trafficked persons in Cambodia is provided through a dense network of non-governmental organizations (NGOs) rather than by the government, which is nevertheless responsible for registering and monitoring those NGOs providing services to victims. Most of the women and children in Cambodian shelters are nationals who have returned from trafficking situations abroad and are unable to

<sup>6</sup> Note however, that in the case of foreign victims, their immigration status may trigger a legal obligation to detain. Detention of victims of trafficking can also be mandated through laws relating to, for example, prostitution and child welfare. See further, discussion of shelter practices in Thailand, below.

<sup>7</sup> Laws of Malaysia, Act 670, Anti-Trafficking in Persons Act, 2007, Articles 42-55.

<sup>8</sup> Australia, Belgium, Canada, Italy, the Netherlands, the United Kingdom (USTIP 2008, *supra* note 4) and the United States (United States Department of Justice, *Attorney General’s Report to Congress on U.S. Government Activity to Combat Trafficking in Persons, fiscal year 2006* (2007) available from: <http://www.usdoj.gov/ag/annualreports/tr2006/agreporhumantrafficking2006.pdf> [accessed 28 August 2008]) now provide special visa arrangements for victim-witnesses. These arrangements usually include provision for victims to take some time, “a reflection period”, to think about whether or not they wish to be involved in criminal proceedings. The most generous schemes envisage, at the end of this reflection period, the granting of residence permits to victims of trafficking who choose to cooperate. This approach, pioneered by the European Union through Council Directive 2004/81/EC [2004] OJ L 261, has now been adopted as the European legal standard (European Trafficking Convention, *supra* note 2, Article 13).

<sup>9</sup> Initial field research was carried out in Cambodia and Thailand in 2005 and 2006 as part of a broader study on victim support and assistance measures undertaken by the Asia Regional Cooperation to Prevent People Trafficking project [Hereafter: ARCPPT], a regional initiative supported by the Australian Government through its development cooperation agency AusAID. The authors conducted follow-up field research in 2007 in the context of a more targeted study of victim detention practices initiated by ARCPPT’s follow-up project, Asia Regional Trafficking in Persons project [Hereafter: ARTIP]. Nine shelters were visited in Cambodia, only two of which (run by AFESIP-Cambodia and World Vision-Cambodia) were identified as “closed”. In Thailand, there are 99 government-run shelters technically capable of receiving national and foreign victims of trafficking. While several of the major shelters were visited, the main observations contained in this study are drawn from practices at Baan Kredtrakarn, the largest of all Thai shelters and the one most often used to accommodate foreign victims of trafficking. Researchers also visited shelters in Italy.

go home and Vietnamese that have been trafficked to Cambodia and are awaiting repatriation. There are no shelter facilities for men. Up until 2003, shelter detention was widespread. However, in recent years, the policy of victim detention has come under scrutiny<sup>10</sup> and now only a handful of Cambodian shelters can be considered “closed”. While the new trafficking law is silent on the issue of victim assistance and support, a recent agreement concluded between the government and service providers commits those who do sign on to minimum standards of care and assistance for trafficked persons including an obligation to secure victim consent to remain in the shelter and to allow any victim who requests to leave to do so.<sup>11</sup>

**Thailand:** Unlike Cambodia, shelters in Thailand are administered by and under the control of the Government. Six main shelters provide accommodation and services to trafficked women and children. There are no shelter facilities for men. Baan Kredtakarn, in Bangkok, a former rehabilitation facility for sex workers mandated under the *Prostitution Prevention and Suppression Act*,<sup>12</sup> is the largest shelter, accommodating up to 500 trafficked or otherwise exploited women and girls including many Lao and Myanmar nationals who have been subject to labour exploitation. A child or woman identified as having been trafficked is automatically placed in a shelter. Those who “escape” may, under the law, be pursued and returned by an authorized person.<sup>13</sup> It is not unusual for foreign victims of trafficking to spend several years in Thai shelters awaiting family tracing and repatriation. Migrants in Thai shelters are without legal status and this is used as a primary justification for their detention. It is unclear whether Thailand’s very new trafficking law, which provides for a possibility of foreign victims receiving temporary residence, will change this deeply entrenched situation.

The issue under discussion is a sensitive and complex one and several caveats are in order. First, the focus of the Study is specifically on the question of detention of victims of trafficking in government and private shelters. While clear parallels can be drawn with other forms of detention, the Study does not directly consider the

legal or policy implications of (generally unidentified) victims being detained in immigration or criminal justice facilities. Second, the authors take for granted that those providing closed shelter to victims of trafficking may well be motivated by a genuine desire to provide much-needed assistance and support. However, motivation does not impact on the factual question of whether victims are being detained and whether such detention is permissible under international law. Finally, it is important to note that the Study does not purport to provide a comprehensive and fully authoritative treatment of this issue. The preliminary field research undertaken over the past five years and documented in this Study confirmed the existence of a practice that requires careful and in-depth documentation and analysis. It is hoped that the Study provides a useful framework and starting point for this important work.

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<sup>10</sup> For example, a study on shelter practices conducted by the Cambodian Human Rights and Development Foundation (ADHOC) confirmed the widespread practice of shelter detention and concluded that: “victims should have the possibility to go outside the shelter, not only as a matter of successful reintegration but also as a question of human rights ... the shelter should be a home and at the same time be secure and not be a prison”: ADHOC, *Paper on Shelters in the Phnom Penh Area* (Phnom Penh, 2003) p2.

<sup>11</sup> *Agreement on Guidelines for Practices and Cooperation Between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking*, done in Phnom Penh, 6 February 2007. [Hereafter: Cambodia Internal MOU]. Note that the MOU is not legally binding.

<sup>12</sup> The Prostitution Prevention and Suppression Act, B.E. 2539 (1996) [Hereafter: Prostitution Act].

<sup>13</sup> *Ibid*, Section 38.



## 2. The International Legal Position on Victim Detention

This section sets out the current international legal position with respect to the detention of victims of trafficking. It commences with a brief overview of the applicable legal framework before considering the major areas of obligation in turn. The section concludes with a list of key findings.

### 2.1 Overview of the international legal framework around trafficking

The international legal framework around trafficking comprises a number of different instruments. Some of these are treaties: imposing binding obligations on all States that are party to those treaties. The principal international treaty dealing specifically with trafficking is the *Protocol on Trafficking in Persons especially Women and Children Supplementing the United Nations Convention on Transnational Organized Crime* (UN Trafficking Protocol), which was concluded in 2000 and entered into force in 2003.<sup>14</sup> This instrument defines trafficking and sets out clearly the steps to be taken by States to prevent and deal with this crime. The Protocol's "parent" instrument, the *United Nations Convention on Transnational Organized Crime*, also contains a number of general provisions relating to, for example, the treatment of victims, that are directly applicable to trafficking in persons cases.<sup>15</sup>

International human rights law is also very much a part of the applicable legal framework around trafficking. The *International Covenant on Civil and Political Rights* (ICCPR)<sup>16</sup> and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)<sup>17</sup> both contain provisions that are especially relevant to a consideration of State obligations towards victims. Specialized human rights treaties, such as those related to children<sup>18</sup> and to women<sup>19</sup> are highly relevant to trafficking. Also important are other specialized treaties regulating related issues

such as slavery, the slave trade, international crimes, forced labour, child labour and forced marriage.<sup>20</sup> Regional human rights agreements concluded in Africa, Europe and the Americas affirm and sometimes extend the rights contained in the international treaties.<sup>21</sup>

Not all international instruments relevant to trafficking are legally enforceable treaties. For example, the United Nations has worked with States over many years to develop non-legal standards covering key aspects of the administration of criminal justice including detention and imprisonment. Examples include the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Beijing Rules).<sup>22</sup> These instruments build on legally enforceable rules such as the prohibition on arbitrary

<sup>14</sup> UN Trafficking Protocol, *supra* note 2.

<sup>15</sup> *Convention against Transnational Organized Crime*, adopted 15 November 2000 by G.A. res. 55/25, entered into force 29 September 2003.

<sup>16</sup> *International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976 [Hereafter: ICCPR].

<sup>17</sup> *International Covenant on Economic, Social and Cultural Rights*, open for signature 16 December 1966, 993 U.N.T.S. 3, entered into force 3 January 1976, Article 2.2 [Hereafter: ICESCR].

<sup>18</sup> *United Nations Convention on the Rights of the Child*, open for signature 20 November 1989, 1577 U.N.T.S. 3, entered into force 2 September 1990 [Hereafter: CRC].

<sup>19</sup> *United Nations Convention on the Elimination of all Forms of Discrimination Against Women*, open for signature 18 December 1979, 1249 U.N.T.S. 13, entered into force 3 September 1981 [Hereafter: CEDAW].

<sup>20</sup> For an overview of the relevant international legal instruments, see United Nations, Economic Commission for Asia and the Pacific, *Combating Human Trafficking in Asia: A Resource guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices* (New York: United Nations, 2003). For a detailed examination of the relevance of slavery related treaties and norms to the issue of trafficking in persons, see A. Gallagher, 'Using International Human Rights Law to Better Protect Victims of Trafficking: the Prohibitions on Slavery, Servitude, Forced Labor and Debt Bondage' in L. Sadat and M. P. Scharf (eds), *Coming of Age in International Criminal Law: An Intellectual Reflection on the Work of M. Cherif Bassiouni* (Martinus Nijhoff, 2008).

<sup>21</sup> The most relevant regional human rights treaties include the *African [Banjul] Charter on Human And People's Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force 21 October 1986 [Hereafter: African Charter]; the *African Charter on the Rights and Welfare of the Child*, adopted July 1990, OAU Doc. CAB/LEG/24.9/49, entered into force 29 November 1999; the *American Convention on Human Rights*, adopted 22 November 1969, OAS Treaty Series No. 36, entered into force 18 July 1978 [Hereafter: American Convention]; and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted 4 November 1950, CETS No. 005, entered into force 3 September 1953 [Hereafter: European Convention on Human Rights].

<sup>22</sup> *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by G.A. res. 45/113 of 14 December 1990 [Hereafter: Beijing Rules].

detention, and the rights of children. Trafficked persons are victims of crime as well as victims of human rights violations. In this context, the *Declaration of Basic Principles for Victims of Crime and Abuse of Power*,<sup>23</sup> is important as are the *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*<sup>24</sup> and the *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*.<sup>25</sup> Another, stronger source of obligation in relation to victims rights is provided by the Statute of the International Criminal Court that incorporates important protections for victims of war crimes and crimes against humanity including provisions on reparation.<sup>26</sup>

In the area of trafficking, the most important non-legal international instrument is the 2002 United Nations *Principles and Guidelines on Human Rights and Human Trafficking* (Trafficking Principles and Guidelines).<sup>27</sup> Many aspects of the *Trafficking Principles and Guidelines* are based in international treaty law. However, parts of this document go further: using accepted international legal standards to develop more specific and detailed guidance for States in areas such as legislation, criminal justice responses, victim detention and victim protection and support. Recently, the United Nations Children's Fund released a set of *Guidelines for Protection of Child Victims of Trafficking*<sup>28</sup> (UNICEF Guidelines) that provide additional guidance on the specific issue of child victims.

The international legal framework around trafficking includes treaties that have been concluded between regional groupings of States. One very significant example is the 2005 *European Convention against Trafficking in Persons* (European Trafficking Convention)<sup>29</sup> that entered into force in February 2008 with potential to bind more than 40 countries of Western, Central and Eastern Europe to a much higher standard of victim protection than that required by the *UN Trafficking Protocol*. Another, narrower, example is provided by a treaty on trafficking for prostitution concluded by the member countries of the South Asian Association of Regional Cooperation in 2002 (SAARC Treaty).<sup>30</sup> While regional treaties only impose obligations on the States that are party to them,

they can provide all countries with a useful insight into evolving standards.

Important quasi-legal and non-legal instruments have also been developed at the regional level. As with their international equivalents, these instruments often reiterate and expand existing legal principles and sometimes go beyond what has been formally agreed between States. In the latter case however, they can help to ascertain the direction in which international law is moving with respect to a particular issue. Within South East Asia, relevant regional instruments includes the 2004 *ASEAN Declaration on Trafficking in Persons*,<sup>31</sup> a Memorandum of Understanding (MOU) on cooperation against trafficking adopted in 2004 by the six countries of the greater Mekong Sub-region (COMMIT MOU);<sup>32</sup> the 2007 *ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons* (ASEAN Practitioner Guidelines);<sup>33</sup> and the 2007 Global Initiative to Fight Trafficking (GIFT) *Recommendations on an Effective*

<sup>23</sup> *Declaration of Basic Principles for Victims of Crime and Abuse of Power*, adopted by G.A. res. 40/34 of 29 November 1985, para. 1.

<sup>24</sup> *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, adopted by G.A. res. 60/147 of 16 December 2005.

<sup>25</sup> *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, adopted by ECOSOC res. 2005/20 of 22 July 2005 [Hereafter: Child Victim Guidelines].

<sup>26</sup> Rome Statute of the International Criminal Court, signed 17 July 1998, U.N. Doc. A/CONF.183/9\*, entered into force 1 July 2002.

<sup>27</sup> *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Addendum, Report of the High Commissioner for Human Rights to the Economic and Social Council, UN Doc. E/2002/68/Add.1 (20 May 2002) [Hereafter: Trafficking Principles and Guidelines].

<sup>28</sup> United Nations Children's Fund, *Guidelines for the Protection of Child Victims of Trafficking* (New York, September 2006) available from: [http://www.unicef.org/ceecis/0610-Unicef\\_Victims\\_Guidelines\\_en.pdf](http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf) [accessed 28 August 2008] [Hereafter: UNICEF Guidelines].

<sup>29</sup> European Trafficking Convention, *supra* note 2.

<sup>30</sup> SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, adopted 5 January 2002 [Hereafter: SAARC Convention].

<sup>31</sup> Association of Southeast Asian Nations (ASEAN) *Declaration on Trafficking in Persons Particularly Women and Children*, adopted on 29 November 2004 by the Heads of State/Governments of ASEAN Member Countries in Vientiane.

<sup>32</sup> *Memorandum Of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region*, adopted on 29 October 2004 in Yangon (Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam) [Hereafter: COMMIT MOU].

<sup>33</sup> Association of South East Asian Nations (ASEAN), *Criminal Justice Responses to Trafficking in Persons – ASEAN Practitioner Guidelines* (Jakarta, 2007) [Hereafter: ASEAN Practitioner Guidelines].

*Criminal Justice Response to Trafficking in Persons*.<sup>34</sup> Finally, bilateral agreements on trafficking can provide another source of information and insight into accepted or evolving legal standards. One example of such an agreement is the MOU concluded between Thailand and Cambodia on *Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking* (Cambodia-Thailand MOU).<sup>35</sup>

## 2.2 Detention of victims: specific provisions

The international legal position on detention of victims of trafficking is difficult to ascertain with precision because the most directly relevant international legal treaty, the *UN Trafficking Protocol*, is silent on this point. A review of its drafting history reveals that while no State was arguing for recognition of a right to detain victims, most were resistant to an explicit prohibition because of a fear this would curtail their options in dealing with illegal migrants.<sup>36</sup> In ascertaining the legal position of detention it is therefore necessary to look beyond the Protocol to other trafficking-specific instruments as well as to more generally applicable principles of international law.

According to the *Trafficking Principles and Guidelines*, detention of victims is inappropriate and (implicitly) illegal. Under its provisions, States are required to ensure that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.<sup>37</sup> This position is clearly linked to the issue of non-prosecution for status-related offences. The *Trafficking Principles and Guidelines* recognize that detention of victims of trafficking is often directly linked to their criminalization. They are therefore equally explicit on the point that victims of trafficking should not be arrested, charged or prosecuted for illegal acts that are a direct consequence of the fact of their having been trafficked.<sup>38</sup>

What do the regional treaties and soft-law instruments have to say about victim detention? The *European Trafficking Convention* does not refer directly to the issue. Detention does however arise, albeit indirectly, in the context of victim consent to protective measures. States

Parties to the European Convention are required to: “take due account of the victim’s safety and protection needs”.<sup>39</sup> This requirement is supplemented by a detailed provision that sets out the specific measures that must be implemented to provide “effective and appropriate protection” to victims from potential retaliation and intimidation, in particular during and after the investigation and prosecution processes.<sup>40</sup> The commentary to the Convention is clear on the point of beneficiary consent: the victim’s agreement to protective measures is essential except in extreme circumstances such as an emergency where the victim is physically incapable of giving consent.<sup>41</sup>

Given the prevalence of victim detention in South East Asia, it is relevant to examine the official position of countries in this region. Neither of the ASEAN instruments cited above refers to victim detention and the position of the *COMMIT MOU* on this point is equivocal. Signatory States commit themselves to “ensuring that persons identified as victims of trafficking are not held in detention by *law enforcement authorities*”.<sup>42</sup> The *Cambodia-Thailand MOU* states that children and women who have been trafficked

<sup>34</sup> UN.GIFT – East Asia and the Pacific, *Recommendations on an Effective Criminal Justice Response to Trafficking in Persons*, Recommendations adopted by participants of the UN.GIFT Regional Workshop on Criminal Justice Responses to Trafficking in Persons, held in Bangkok 2-4 October 2007 (Australia, Cambodia, China, Indonesia, Japan, Lao PDR, Malaysia, Mongolia, Myanmar, New Zealand, Palau, the Philippines, Republic of Korea, Thailand, Tonga, Vietnam).

<sup>35</sup> *Memorandum of Understanding between the Royal Government of the Kingdom of Cambodia and the Royal Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking*, adopted on 31 May 2003 in Siem Reap [Hereafter: Cambodia-Thailand MOU].

<sup>36</sup> See further, A Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly*, 975-1004.

<sup>37</sup> *Trafficking Principles and Guidelines*, *supra* note 27, Guidelines 2.6, 6.1.

<sup>38</sup> *Ibid*, Principle 7.

<sup>39</sup> *European Trafficking Convention*, *supra* note 2, Article 12.2. Note that this provision will also apply to victims who have only been provisionally identified as such. *Ibid*, Article 10.2.

<sup>40</sup> *Ibid*, Article 28.

<sup>41</sup> *European Trafficking Convention Explanatory Report*, *supra* note 2, para. 289. Note that the International Organization for Migration, which runs most major trafficking shelters in Central and eastern Europe, has explicitly adopted this standard in its work, identifying, as a fundamental principle, that: “participation in assistance programmes will be on a voluntary basis only, at the free and informed will of the victim”. International Organization for Migration, *The IOM Handbook on Direct Assistance for Victims of Trafficking* (Geneva, 2007), pp ix, 113.

<sup>42</sup> *COMMIT MOU*, *supra* note 32, Article 16 (emphasis added).

shall be considered victims and should not be prosecuted or detained in immigration detention centres.<sup>43</sup> The MOU specifies this further: victims should stay in safe shelters administered by the ministry responsible for social welfare in each country, which should be responsible for ensuring their security.<sup>44</sup>

The wording in both instruments reflects current practice in South East Asia: trafficked women and children, provided they are formally identified as such, are typically detained by welfare agencies, not immigration or police authorities. It is reasonable to assume that the omission of any reference to shelter detention is deliberate: seeking to preserve a presumed entitlement on the part of the State to detain victims in social welfare facilities. The question of whether such an entitlement exists in the first place is the primary question of this Study.

## 2.3 Detention of victims and obligations of protection and support

The detention of victims of trafficking in shelters is often justified with reference to a need or obligation to provide them with shelter and support as well as to protect them from further harm. The legal obligations of shelter, support and protection are explored below with a view to determining implications for the issue of victim detention.

### Shelter and support

Are States required, as a matter of law, to shelter and support victims? To what extent is victim consent relevant to the provision of such support and protection? The *UN Trafficking Protocol* does not obligate States to provide victims with shelter and support: States Parties are instead required to *consider* implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including the provision of appropriate housing and other services.<sup>45</sup>

The *Trafficking Principles and Guidelines* are much more explicit than the Protocol, requiring States to ensure the availability of safe and adequate shelter that meets the

needs of trafficked persons and the provision of which is not made contingent on the willingness of the victims to give evidence in criminal proceedings.<sup>46</sup> It is in this context that the *Trafficking Principles and Guidelines* reiterate the position that trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.<sup>47</sup>

Despite the Protocol's lack of specificity on this issue, there is some evidence for emergence of greater recognition of an obligation, on the part of the State, to shelter and support victims. The *COMMIT MOU*, the *Cambodia-Thailand MOU*, and the *ASEAN Practitioner Guidelines* refer to the need for victims to be provided prompt access to protection and shelter.<sup>48</sup> The *SAARC Convention* also provides that States "shall establish protective homes or shelters for rehabilitation of victims of trafficking".<sup>49</sup> The *European Trafficking Convention* is much more explicit: States Parties are required to provide basic assistance to all victims of trafficking – even if only provisionally identified as such – within their territory.<sup>50</sup> Such assistance cannot be reserved only for those agreeing to act as witnesses or otherwise agreeing to cooperate in investigations or criminal proceedings.<sup>51</sup> Assistance to victims should, according to the *European Trafficking Convention*, aim to support victims in their physical, psychological and social recovery.<sup>52</sup> Importantly, all protection and support measures, including accommodation and shelter are to be provided on a non-discriminatory, consensual and informed basis.<sup>53</sup>

<sup>43</sup> Cambodia-Thailand MOU, *supra* note 35, Article 7.

<sup>44</sup> *Id.*

<sup>45</sup> UN Trafficking Protocol, *supra* note 2, Article 6.

<sup>46</sup> Trafficking Principles and Guidelines, *supra* note 27, Principle 8.

<sup>47</sup> *Ibid.*, Guideline 6.1.

<sup>48</sup> COMMIT MOU, *supra* note 32, Article 17; Cambodia-Thailand MOU, *supra* note 35, Article 9; ASEAN Practitioner Guidelines, *supra* note 33, para. C.3.

<sup>49</sup> SAARC Convention, *supra* note 30, Article IX(3).

<sup>50</sup> European Trafficking Convention, *supra* note 2, Articles 10.2, 12.

<sup>51</sup> *Ibid.*, Article 12.6. The UN Human Rights Treaty Bodies have also commented on the need to separate victim assistance from cooperation in legal proceedings: Human Rights Committee, *Concluding Observations: Australia (Advance Unedited Version)*, 40th Sess., UN Doc. CAT/C/AUS/CO/1 (15 May 2008), para 32; Committee on the Elimination of Discrimination Against Women, *Concluding Observations: The Netherlands*, UN Doc. CEDAW/C/NLD/CO/4 (2 February 2007), para. 24.

<sup>52</sup> European Trafficking Convention, *supra* note 2, Article 12.1.

<sup>53</sup> *Ibid.*, Articles 3, 12.7.

**Protection from further harm:**

Could detention be an aspect of protecting victims from further harm? In exploring this question it is necessary to acknowledge that the crime of trafficking is only made possible by and sustained through fear, violence and intimidation. Unlike many other crimes, the threat to a victim does not end once she or he has escaped or been rescued from a criminal situation. In some cases, particularly where the victim is in contact with the criminal justice system, freedom from a trafficking situation can actually exacerbate the risks to that person's safety and wellbeing.

The *UN Trafficking Protocol* requires each State Party to "endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory".<sup>54</sup> While this provision is limited by the specific reference to physical safety, it nevertheless obliges States Parties "to actually take at least some steps, to the extent resources permit, that amount to an "endeavour" to protect safety".<sup>55</sup> The *Trafficking Principles and Guidelines* specifically refer to the responsibility of States to "protect trafficked persons from further exploitation and harm"<sup>56</sup> and the need for States and others to "ensure that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons".<sup>57</sup> The *European Trafficking Convention* contains a general obligation on States Parties to: "take due account of the victim's safety and protection needs".<sup>58</sup> This requirement is supplemented by a detailed provision that sets out the specific measures that must be implemented to provide "effective and appropriate protection" to victims from potential retaliation and intimidation, in particular during and after the investigation and prosecution processes.<sup>59</sup> Once again, the caveat relating to victim consent would apply with respect to the application of these measures.

## 2.4 Freedom of movement and arbitrary detention in the context of victim detention

Does international human rights law offer any guidance on the issue of victim detention? Two important

human rights are directly relevant. The first is the right to freedom of movement. The question to be asked in this context is whether victim detention constitutes an unlawful interference with freedom of movement. It is also relevant to query whether the right to freedom of movement can conflict with or modify application of other obligations such as that of the State to protect victims from harm. The second applicable human right is the right to personal liberty and the closely related prohibition on arbitrary detention. Could the practice of

<sup>54</sup> UN Trafficking Protocol, *supra* note 2, Article 6.5.

<sup>55</sup> United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of United Nations Convention against Transnational Organized Crime and the Protocols thereto* (Vienna, 2004) para. 59, [Hereafter: UNODC Legislative Guide]. On the link between this provision and the question of resources, see para. 52.

<sup>56</sup> Trafficking Principles and Guidelines, *supra* note 27, Principles 2, 8.

<sup>57</sup> *Ibid.*, Guideline 6.6.

<sup>58</sup> European Trafficking Convention, *supra* note 2, Article 12.2. Note that through Article 10.2 of the Convention, this provision will also apply to victims who have only been provisionally identified as such. Various UN Resolutions have also called on States to ensure the "protection of victims of trafficking": *Strengthening international cooperation in preventing and combating trafficking in persons and protecting victims of such trafficking*, G.A. res. 58/137 of 22 December 2003, para. 6 "Also invites Member States to adopt measures...to provide assistance and protection to victims of trafficking" and para. 7 "Further invites Member States, as appropriate, to develop guidelines for the protection of victims of trafficking before, during and after criminal proceedings"; *Trafficking in Women and Girls*, C.H.R. res. 2004/45 of 19 April 2004, para. 10: "Calls upon Governments to criminalise trafficking in persons...while ensuring protection and assistance to victims of trafficking"; *Trafficking in Women and Girls*, G.A. res. 59/166, of 20 December 2004, para. 17 and *Trafficking in Women and Girls*, G.A. res. 61/144 of 19 December 2006, para. 19: "Invites Governments to take steps to ensure that criminal justice procedures and witness protection programmes are sensitive to the particular situation of trafficked women and girls...and to ensure that during [the criminal justice process] they have access to protection"; *Rights of the Child*, C.H.R. res. 2005/44 of 19 April 2005 para. 32 and *Rights of the Child*, H.R.C. res. 7/L.34 of 26 March 2008, para. 36: "Calls upon all States...to address effectively the needs of victims of trafficking...including their safety and protection".

<sup>59</sup> European Trafficking Convention, *supra* note 2, Article 28. The Human Rights Committee has also repeatedly called for the protection of victims of trafficking so as to enable them to testify in legal proceedings: *Concluding Observations: Slovakia*, 78th Sess., UN Doc. CCPR/CO/78/SVK (22 August 2003), para. 10; *Concluding Observations: Latvia*, 79th Sess., UN Doc. CCPR/CO/79/LVA (1 December 2003), para. 12; *Concluding Observations: Russia*, 79th Sess., UN Doc. CCPR/CO/79/RUS (1 December 2003), para. 10; *Concluding Observations: Serbia and Montenegro*, 81st Sess., UN Doc. CCPR/CO/81/SEMO (12 August 2004), para. 16; *Concluding Observations: Albania*, 82nd Sess., UN Doc. CCPR/CO/82/ALB (2 December 2004), para. 15; *Concluding Observations: Kenya*, 83rd Sess., UN Doc. CCPR/CO/83/KEN (29 April 2005), para. 25; *Concluding Observations: Thailand*, 84th Sess., UN Doc. CCPR/CO/84/THA (8 July 2005), para. 21; *Concluding Observations: Slovenia*, 84th Sess., UN Doc. CCPR/CO/84/SVN (25 July 2005), para. 11; *Concluding Observations: Brazil*, 85th Sess., UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 15; *Concluding Observations: Kosovo (Serbia)*, 87th Sess., UN Doc. CCPR/C/UNK/CO/1 (14 August 2006), para. 16.

detaining victims of trafficking in shelters ever amount to arbitrary detention? If so, under what circumstances and with what consequences?

### The right to freedom of movement

In terms of its substantive content, the right to freedom of movement is generally held to refer to a set of liberal rights of the individual including the right to move freely and to choose a place of residence within a State; the right to cross frontiers in order to both enter and leave the country and the prohibition on arbitrary expulsion of aliens.<sup>60</sup> The *ICCPR* explicitly recognizes and protects a right to freedom of movement<sup>61</sup> as does the *Universal Declaration of Human Rights*<sup>62</sup> and all major regional human rights treaties.<sup>63</sup>

The only direct reference to freedom of movement in the specific context of trafficking is contained in the *UN Principles and Guidelines*:

*“States should consider protecting the rights of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe on this right.”*<sup>64</sup>

While there is a clear link between freedom of movement and victim detention, several restrictions on this right are also particularly relevant to the situation of trafficked persons. Under the terms of the *ICCPR*, freedom of movement is only guaranteed, as a matter of law, to those who are *lawfully* within the territory of the relevant State.<sup>65</sup> Trafficked persons without regular migration status (the majority of those detained in shelters) are therefore unlikely to benefit greatly from the protections afforded by this particular right.

For trafficked persons who are indeed lawfully within the relevant country, it is clear that their detention in shelters would, without further justification, violate their right to freedom of movement. However, the *ICCPR* includes freedom of movement among a small group of rights that can lawfully be restricted by States Parties on grounds of national security, public order, public health or morals or the rights and freedom of others.<sup>66</sup> This caveat could conceivably be used by States to buttress a claim that detention of victims, irrespective of their legal status, is

necessary because of the need to ensure availability of witnesses for example, or the need to protect trafficked persons from retaliation and intimidation. Such a claim would need to be tested on its merits. It would also be important to independently ascertain that the claimed restrictions do not separately violate other rights recognized in the *ICCPR*, for example, the prohibition on discrimination.<sup>67</sup>

The Human Rights Committee, in considering application of this exception, has noted that freedom of movement is “an indispensable condition for the free development of a person.”<sup>68</sup> Any restrictions on this right “must be provided by law, must be necessary ... and must be consistent with all other rights.”<sup>69</sup> The Committee has also noted that:

*“Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.”*<sup>70</sup>

<sup>60</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhen: NP Engel, 2nd ed., 2005), p260. [Hereafter: Nowak].

<sup>61</sup> *ICCPR*, *supra* note 16, Article 12.

<sup>62</sup> *Universal Declaration of Human Rights*, adopted by G.A. res. 217A (III) of 10 December 1948, Article 13.1 [Hereafter: UDHR].

<sup>63</sup> *4th Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, done at Strasbourg on 16 September 1963, ETS No. 046, entered into force 2 May 1968, Articles 2-4; *7th Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, done at Strasbourg on 22 November 1984, ETS No. 117, entered into force 1 November 1988, Article 1; African Charter, *supra* note 21, Article 12; American Convention, *supra* note 21, Article 22.

<sup>64</sup> *Trafficking Principles and Guidelines*, *supra* note 27, Guideline 1.5.

<sup>65</sup> *ICCPR*, *supra* note 16, Article 12.1.

<sup>66</sup> *ICCPR*, *supra* note 16, Article 12.3.

<sup>67</sup> *ICCPR*, *supra* note 16, Article 12.3. On the issue of compatibility between restrictions on freedom of movement and compatibility with other rights protected in the *ICCPR*, see Nowak, *supra* note 60, p273-274.

<sup>68</sup> Human Rights Committee, *General Comment No 27: Freedom of Movement*, UN Doc.CCPR/C/21/Rev.11 Add.9 (2 November 1999), para. 1.

<sup>69</sup> *Ibid*, para. 11.

<sup>70</sup> *Ibid*, para. 14-15.

In the present context, it is therefore necessary to ask whether the shelter detention of individuals who have been trafficked and who are lawfully within the country is: (i) provided for by law, (ii) consistent with other rights (such as the prohibition on sex-based discrimination) and; (iii) necessary to protect them. These issues are considered further in this section as well as at section 3 below.

### **The right to liberty and the prohibition on arbitrary detention**

The international legal standard in relation to liberty and the prohibition on arbitrary detention is set out in Article 9.1. of the ICCPR:

*“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”*<sup>71</sup>

Similar provisions can be found in the *Universal Declaration of Human Rights* as well as all major regional human rights treaties.<sup>72</sup> In determining its scope and applicability, it is important to note that the right to liberty is not absolute like the prohibitions on slavery and torture. International law recognizes that States should be able to retain the ability to use measures that deprive people of their liberty. Deprivation of liberty only becomes problematic in legal terms when it is arbitrary and unlawful.<sup>73</sup> States should make sure they define precisely those cases in which deprivation of liberty is permissible. The principle of *legality* is violated if someone is detained on grounds that are not clearly established in a domestic law or are contrary to such law.<sup>74</sup>

The *prohibition on arbitrariness* represents a second, additional requirement for States in relation to deprivation of liberty. In other words, it is not enough that the national law permits detention of victims of trafficking. That law must itself not be arbitrary and its application must not take place arbitrarily.<sup>75</sup> The word “arbitrary” refers to elements of injustice, unpredictability, unreasonableness, capriciousness and lack of proportionality, as well as the common law principle of due process of law.<sup>76</sup> The

Human Rights Committee has commented that not only must the detention be authorised by law, it must also be reasonable and necessary in all of the circumstances of the case, and a proportionate means to achieve a legitimate aim.<sup>77</sup>

Deprivation of liberty provided by law must not be “manifestly disproportional, unjust or unpredictable”. The manner in which a decision is taken to deprive someone of his or her liberty must be capable of being deemed appropriate and proportional in view of the circumstances of the case.<sup>78</sup> Importantly, a detention which was originally not arbitrary, might become arbitrary if it continues over time without proper justification.<sup>79</sup>

Finally, States are required, under international law, to ensure that necessary procedural guarantees are in place to identify and respond to situations of unlawful or arbitrary deprivation of liberty. The ICCPR specifies several of these procedural guarantees:

*“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”*<sup>80</sup> *Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.”*<sup>81</sup>

Under this analysis, it is evident that the detention of victims of trafficking in shelters could amount to unlawful deprivation of liberty and violate the prohibition on

<sup>71</sup> ICCPR, *supra* note 16, Article 9.

<sup>72</sup> UDHR, *supra* note 62, Article 3; European Convention, *supra* note 21, Article 5.1; African Charter, *supra* note 21, Article 6; American Convention, *supra* note 21, Article 7.1.

<sup>73</sup> Nowak, *supra* note 60, p211.

<sup>74</sup> *Ibid*, p224.

<sup>75</sup> *Id*.

<sup>76</sup> *Ibid*, p225.

<sup>77</sup> *Van Alphen v The Netherlands*, Human Rights Committee, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (15 August 1990) para. 5.8; *A v Australia*, Human Rights Committee, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997) para. 9.2.

<sup>78</sup> Nowak, *supra* note 60, p225.

<sup>79</sup> *Id*.

<sup>80</sup> ICCPR, *supra* note 16, Article 9.4.

<sup>81</sup> ICCPR, *supra* note 16, Article 9.5.

arbitrary detention. The risk of shelter detention being identified as unlawful or arbitrary detention is particularly high if it can be shown that such detention:

- Is not specifically provided for in law or is imposed contrary to law;
- Is provided for or imposed in a discriminatory manner;
- Is imposed for a prolonged, unspecified or indefinite period;
- Is unjust, unpredictable and/or disproportionate;
- Is not subject to judicial or administrative review to confirm its legality and to confirm that it continues to be necessary in the circumstances, with the possibility for release where no grounds for its continuation exist.

## 2.5 Discrimination on the basis of sex

As noted above, all research undertaken in connection with this Study indicated that the overwhelming majority of trafficked persons detained in welfare shelters are female. One reason for this is that women and girls are more likely to be identified through official channels as trafficked and therefore more likely than men and boys to enter both formal and informal protection systems. This does not necessarily support a claim that females are trafficked at a greater rate than males. It does however reflect a widespread perception that victims of trafficking are solely or predominantly women and girls.

In some countries, this gender bias is entrenched in legislation. For example, until very recently, the laws of both Cambodia and Thailand did not recognize the possibility that men could be trafficked and, in the case of Cambodia, that trafficking could take place for any purpose other than sexual exploitation. Even in countries that have incorporated a wider understanding

of trafficking into their laws, the myth that “men migrate and women are trafficked” has proved difficult to shift. One practical result of higher female identification rates is that females end up in welfare shelters. Male victims largely remain unidentified or are misidentified as illegal migrants, transferred to immigration detention facilities and eventually deported. Even when “correctly” identified as having been trafficked, adult male victims in Thailand, for example, are generally ineligible for public or privately available shelter and protection.<sup>82</sup>

The arguments advanced in favour of victim detention are often highly gendered. Protection from further harm is one of the most commonly cited justifications for keeping trafficked persons in shelters against their will. Female victims of trafficking are widely considered to need this protection much more than their male counterparts. Females, both women and girls are also perceived as being less competent to make decisions about their own safety. It is not surprising that many shelters for victims of trafficking are either modelled on or have evolved from institutions and arrangements originally designed to rehabilitate female sex workers.<sup>83</sup>

Is it possible to argue that detention of victims in shelters constitutes unlawful discrimination on the basis of sex?<sup>84</sup> Major human rights instruments, both international and regional, prohibit discrimination on a number of grounds including race, sex, language, religion, property, birth or other status.<sup>85</sup> Equal treatment and

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<sup>82</sup> Note that “correct” identification could not, until recently, ever have taken place due to the fact that Thai law did not recognize an offence of trafficking in men. As noted above, all shelters in Thailand are administered by the Government. Laws relating to prostitution and to child welfare dictate the operational environment including which persons can be received into shelter. These laws do not provide for adult males.

<sup>83</sup> As noted at p8 above, the main Thai shelter was formally a rehabilitation facility for ‘rescued’ sex workers. This feature of trafficking shelters has been noted in other regions. *See, for example*, Surtees, 2007, *supra* note 5 and Brunovskis and Surtees, 2007, *supra* note 5.

<sup>84</sup> The relevant international treaty, the *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW), defines such discrimination as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field: CEDAW, *supra* note 19, Article 1.



non-discrimination on the basis of sex is a fundamental human right, firmly enshrined in the major international and regional instruments.<sup>86</sup> It is widely accepted that this prohibition requires States Parties to take action to prevent private as well as public acts of discrimination.<sup>87</sup> The prohibition on sex-based discrimination is related to and reinforces the duty of equal application of the law.<sup>88</sup> In relation to trafficking, various United Nations bodies have passed resolutions calling on Governments to ensure the treatment of female victims is consistent with the internationally recognised principle of non-discrimination.<sup>89</sup>

In the present context, a determination: (i) that victim detention negatively affects the rights of the individual involved; and (ii) that such detention is overwhelmingly directed to and affecting women and girls should be sufficient, in relation to a particular situation, to support a claim of unlawful discrimination on the basis of sex. A finding that detention laws or practices discriminate unlawfully against women and girls would also be sufficient to support a claim of unlawful deprivation of liberty and/or arbitrary detention.

## 2.6 The rights of detainees

International law confirms that a detainee is any person who is deprived of personal liberty except as the result of a conviction for a criminal offence.<sup>90</sup> Victims of trafficking who are in a shelter situation that they cannot immediately leave are therefore entitled to the legal protections that international law affords detainees. These include the following:

- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person;<sup>91</sup>
- The rights and special status of women and juvenile detainees are to be respected;<sup>92</sup>
- Detained persons shall be held only in officially recognized places of detention,

and their family and legal representatives are to receive full information;<sup>93</sup>

- Decisions about the duration and legality of detention are to be made by a judicial or equivalent authority;<sup>94</sup>
- The detainee shall have the right to be informed of the reason for detention and any charges against her or him;<sup>95</sup>

<sup>85</sup> See, for example, ICCPR, *supra* note 16, Articles 29(1), 3, 4(1), 26, 36.

<sup>86</sup> Charter of the United Nations, *preamble*, Article 1(3); ICCPR, *supra* note 16, Articles 2, 3, 26; ICESCR, *supra* note 17, Articles 2, 3, 7; African Charter, *supra* note 21, Articles 2, 18(3); American Convention, *supra* note 21, Article 1; European Convention on Human Rights, *supra* note 21, Article 14.

<sup>87</sup> See, for example, T. Meron, *Human Rights Law-Making in the United Nations* (Oxford: Oxford University Press, 1986), p60, and H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (New York: Juris Publishing, 2000) [Hereafter: Charlesworth and Chinkin, 2000].

<sup>88</sup> Article 26 of the ICCPR, (*supra* note 16) for example, provides that: “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and shall guarantee to all persons equal and effective protection against discrimination on any ground such as ... sex ...”.

<sup>89</sup> *Trafficking in Women and Girls*, C.H.R. res. 2004/45 of 19 April 2004, para. 12; *Strengthening international cooperation in preventing and combating trafficking in persons and protecting victims of such trafficking*, G.A. res. 58/137 of 22 December 2003, para. 8; *Trafficking in Women and Girls*, G.A. res. 59/166 of 20 December 2004, para. 16; *Trafficking in Women and Girls*, G.A. res. 61/144 of 19 December 2006, para. 18. Note also Human Rights Committee, General Comment 28, Equality of rights between men and women (Article 3), para 14 which requires that states parties should provide information on any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis.

<sup>90</sup> Principles of Detention or Imprisonment, *supra* note 1.

<sup>91</sup> ICCPR, *supra* note 16, Article 10; Principles of Detention or Imprisonment, *supra* note 1, Principle 1.

<sup>92</sup> ICCPR, *supra* note 16, Article 10(2); CRC, *supra* note 18, Articles 37, 40; Principles of Detention or Imprisonment, *supra* note 1, Principle 5(2); *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by ECOSOC res. 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rules 8, 21(2), 23, 53, 71(5), 77, and 85(2) [Hereafter: SMR]; Beijing Rules, *supra* note 22, Part I, Rules 1-8.

<sup>93</sup> Principles of Detention or Imprisonment, *supra* note 1, Principles 12, 16(1); SMR, *supra* note 92, Rules 7, 44(3), 92.

<sup>94</sup> ICCPR, *supra* note 16, Article 9(4); Principles of Detention or Imprisonment, *supra* note 1, Principles 32, 37.

<sup>95</sup> ICCPR, *supra* note 16, Article 9(2); Principles of Detention or Imprisonment, *supra* note 1, Principles 10, 11, 12(2), 14.

- Detainees have the right to contact with the outside world, and to visits from family members, and to communicate privately and in person with a legal representative;<sup>96</sup>
- Detainees shall be kept in humane facilities, designed to preserve health, and shall be provided with adequate food, water, shelter, clothing, medical services, exercise and items of personal hygiene;<sup>97</sup>
- Every detainee shall have the right to appear before a judicial authority, and to have the legality of his or her detention reviewed.<sup>98</sup>

## 2.7 The special legal situation of children

Children are detained in shelters more often than adults and for longer periods. While children are naturally included in all relevant norms and standards referred to above, international law recognizes the particular vulnerabilities and needs of children and thereby accords them special rights. In the case of children who have been trafficked, those special rights derive from their status as victims and as children. The relevant treaties include the UN *Convention on the Rights of the Child* (CRC)<sup>99</sup> and its *Optional Protocol on Sale of Children, Child Prostitution and Child Pornography* (CRC Optional Protocol).<sup>100</sup> Other applicable instruments include the *Beijing Rules*<sup>101</sup> and the *UNICEF Guidelines*.<sup>102</sup> The *Trafficking Principles and Guidelines* also contain very specific provisions on the care and treatment of children who have been trafficked.<sup>103</sup>

In relation to the issue of shelter detention, it is important to recognize some fundamental differences between children and adults. An important source of vulnerability for children lies in their lack of full agency – in fact and under law.<sup>104</sup> A lack of agency is often made worse by the absence of a parent or legal guardian who is able to act in the child’s best interests. Such absence is typical: child

victims of trafficking are generally “unaccompanied” with deliberate separation from parents or guardians being a strategy to facilitate exploitation. In some cases, parents or carers are or have been complicit in the trafficking of the child.

The obligation to protect from further harm will have different implications for children as compared to adults given their greater vulnerability. Premature release of a child from a shelter or other secure place of care without individual case assessment (including risk assessment) could greatly endanger the child and expose him or her to further exploitation including re-trafficking. It is for these reasons that the relevant laws, principles and guidelines emphasise the importance of ensuring that the child is appointed a legal guardian who is able to act in that child’s best interests throughout the entire process until a durable solution is identified and implemented.<sup>105</sup>

<sup>96</sup> ICCPR, *supra* note 16, Article 14; Principles of Detention or Imprisonment, *supra* note 1, Principles 15, 17, 18, 19; SMR, *supra* note 92, Rules 92, 93.

<sup>97</sup> ICCPR, *supra* note 16, Article 10(1); Principles of Detention or Imprisonment, *supra* note 1, Principles 1, 22, 24, 25, 26; SMR, *supra* note 92, Rules 9-14, 15-16, 17-19, 20, 21, 22-26, 66, 82-83, 86-88, 91.

<sup>98</sup> ICCPR, *supra* note 16, Article 9(4); Principles of Detention or Imprisonment, *supra* note 1, Principle 32.

<sup>99</sup> CRC, *supra* note 18.

<sup>100</sup> *Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography*, adopted by G.A. res. 54/263 of 25 May 2000, entered into force 18 January 2002. [Hereafter: CRC Optional Protocol].

<sup>101</sup> Beijing Rules, *supra* note 22.

<sup>102</sup> UNICEF Guidelines, *supra* note 28.

<sup>103</sup> Trafficking Principles and Guidelines, *supra* note 27, especially at Guideline 8.

<sup>104</sup> This is acknowledged in the ICCPR which stipulates the right of the child to “such measures of protection as are required by his status as a minor”. ICCPR, *supra* note 16, Article 24.

<sup>105</sup> Trafficking Principles and Guidelines, *supra* note 27; UNICEF Guidelines, *supra* note 28, especially at 4.1. While the Trafficking Protocol is silent on this point, the Commentary to the Protocol encourages States parties to consider: “appointing, as soon as the child victim is identified, a guardian to accompany the child throughout the entire process until a durable solution in the best interests of the child has been identified and implemented. To the extent possible, the same person should be assigned to the child victim throughout the entire process”: UNODC Legislative Guide, *supra* note 55, para. 65(a). The European Trafficking Convention, *supra* note 2 at Article 10.4(a), requires States parties to provide for representation of an identified child victim of trafficking by a “legal guardian, organisation or authority, which shall act in the best interests of the child” (emphasis added). The Committee on the Rights of the Child, in General Comment No. 6, stated that “the appointment of a competent guardian... serves as a procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child” and recommended that States appoint

Typical tasks of a guardian would include ensuring the child's best interests remain the paramount consideration in all actions or decisions taken in respect of the child;<sup>106</sup> ensuring the provision of all necessary assistance, support and protection; being present during any engagement with criminal justice authorities; facilitating referral to appropriate services; and assisting in the identification and implementation of a durable solution.<sup>107</sup>

These additional concerns and measures do not take away from the fact that children who are placed in safe and secure accommodation are to be considered as "detained" for the purposes of ascertaining their rights and the obligations of the State towards them. International legal rules on the detention of children are very strict and are governed by the overriding principle of respect for the child's best interests. The strictness of rules around juvenile detention reflects an acknowledgement of the fact that detained children are highly vulnerable to abuse, victimization and the violation of their rights. Under the provisions of the *CRC*, no child is to be deprived of his or her liberty unlawfully or arbitrarily.<sup>108</sup> This prohibition does not just cover penal detention, it also includes deprivation of liberty on the basis of the child's welfare, health and protection and is therefore directly relevant to the situation of child victims of trafficking who are detained in shelters.<sup>109</sup> International law requires any form of juvenile detention to be in conformity with the law; used only as a measure of last resort; and imposed for the shortest appropriate period of time.<sup>110</sup>

In addition to stipulating the circumstances under which a child can be detained, international law also imposes conditions on the conduct of such detention. Once again, the overriding principle is respect for the best interests of the child including respect for his or her humanity and human dignity.<sup>111</sup> Other rules that are directly relevant to the detention of child victims of trafficking include the following:

- Children to be separated from adults unless it is considered in the child's best interests not to do so;<sup>112</sup>

- The right of the child to maintain contact with his or her family through correspondence and visits, [except in exceptional circumstances];<sup>113</sup>
- The right of the detained child to prompt access to legal and other appropriate assistance;<sup>114</sup>
- The right of the detained child to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action;<sup>115</sup>

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a guardian as soon as an unaccompanied or separated child is identified: Committee on the Rights of the Child, *General Comment No. 6 Treatment of unaccompanied or separated children outside their country of origin*, UN Doc. CRC/GC/2005/6 (1 September 2005) para. 21 [Hereafter: CRC General Comment No 6].

<sup>106</sup> The principle of "best interests of the child" is a legal doctrine accepted in many countries that has been enshrined in international law through the Convention on the Rights of the Child, *supra* note 18, Article 3.1.

<sup>107</sup> UNICEF Guidelines, *supra* note 28, 4.2. See also CRC General Comment No 6, *supra* note 105, para. 33.

<sup>108</sup> CRC, *supra* note 18, Article 37(b).

<sup>109</sup> The Beijing Rules, *supra* note 22 at Section IIb define a deprivation of liberty as any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which a person under the age of 18 is not permitted to leave at will, by order of any judicial, administrative or other public authority. Note that the Committee on the Rights of the Child has explicitly rejected detention of children in need of protection: "Such deprivation of liberty for children who have been abandoned or abused equates to punishment for children who are victims of crimes, not the offenders." See further Committee On The Rights Of The Child, *General Comment No. 10 Children's rights in Juvenile Justice*, UN Doc. CRC/C/GC/10 (25 April 2007).

<sup>110</sup> CRC, *supra* note 18, Article 37(b); Beijing Rules, *supra* note 22, Fundamental Principle 7; CRC General Comment No 6, *supra* note 105, para. 61. See also Committee on the Rights of the Child, *Concluding Observations: Canada*, 34th Sess., UN Doc. CRC/C/15/Add.215 (27 October 2003), para. 47; *Concluding Observations: The Netherlands*, 35th Sess., UN Doc. CRC/C/15/Add.227 (26 February 2004), para. 54.

<sup>111</sup> CRC, *supra* note 18, Article 37(c).

<sup>112</sup> CRC, *supra* note 18, Article 37(c); Beijing Rules, *supra* note 22, para. 29; CRC General Comment No 6, *supra* note 105, para. 63.

<sup>113</sup> CRC, *supra* note 18, Article 37(c); Beijing Rules, *supra* note 22, para. 59; CRC General Comment No 6, *supra* note 105, para. 63.

<sup>114</sup> CRC Optional Protocol, *supra* note 100, Article 8; UNICEF Guidelines, *supra* note 28, 4.2, 7.1, 9.2.1, 10.1, 10.2; CRC General Comment No 6, *supra* note 105, para. 63.

<sup>115</sup> CRC, *supra* note 18, Article 37(d). See also Committee on the Rights of the Child, *Concluding Observations: Canada*, 34th Sess., UN Doc. CRC/C/15/Add.215 (27 October 2003), para. 47.

- Support for the physical and psychological recovery and social reintegration of the child victim in an environment which fosters the health, self-respect and dignity of the child;<sup>116</sup>
- Each case involving a child deprived of his or her liberty should be handled expeditiously without any unnecessary delay.<sup>117</sup>

The above analysis confirms the need to ensure that decisions impacting on the welfare and wellbeing of children must be made on a case by case basis and with a view to the best interests of that individual child. Routine detention of child victims of trafficking in shelter facilities could not be justified on the basis of protection, best interests or any other principle cited in this section.

## 2.8 Key findings

The above analysis concludes that routine detention of victims or suspected victims of trafficking in public or private shelters violates a number of fundamental principles of international law and is therefore to be considered, *prima facie*, unlawful. Routine detention of victims of trafficking violates, in some circumstances, the right to freedom of movement and in most if not all circumstances, the prohibitions on unlawful deprivation of liberty and arbitrary detention. International law prohibits, absolutely, the discriminatory detention of victims including detention that is linked to the sex of the victim. The practice of routine detention for women and girls is discriminatory and therefore unlawful. Routine detention of trafficked children is also directly contrary to international law and cannot be justified under any circumstances.

The analysis supports a contention that the State may, on a **case-by-case basis**, be able to successfully defend victim detention in shelters with reference to, for example, criminal justice imperatives, public order requirements, or victim safety needs. The internationally accepted principles of *necessity*, *legality*, and *proportionality*

should be used to evaluate the legality of any such claim. Application of these principles would most likely only support a claim of lawful detention in relation to a situation where detention is administered as a last resort and in response to credible and specific threats to an individual victim's safety. However, even where such basic tests are satisfied, a range of protections should be in place to ensure that the rights of the detained person are respected and protected. Such measures would include but not be limited to judicial oversight of the situation to determine its on-going legality and necessity as well as an enforceable right to challenge the fact of detention.

Failure of the State to act to prevent unlawful victim detention by public or private agencies invokes the international legal responsibility of that State. Victims may be eligible for remedies, including compensation, for this unlawful detention.

International law recognises special needs and special vulnerabilities in relation to child victims of trafficking. Nevertheless, in cases where children are kept in a shelter or secure accommodation, the detaining authority must be able to demonstrate that the detention is in the child's best interests. The detaining authority must also be able to demonstrate, in relation to each and every case, that there is no reasonable option available to it other than the detention of the child. Specific protections, including the appointment of a guardian, judicial or administrative oversight and the right of challenge must be upheld in all situations where the fact of detention can be legally justified.

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<sup>116</sup> CRC, *supra* note 18, Article 39; CRC Optional Protocol, *supra* note 100, Article 8; UNICEF Guidelines, *supra* note 28, 7.1, 7.2. See also Committee on the Rights of the Child, *Concluding Observations: Armenia*, 35th Sess., UN Doc. CRC/C/15/Add.225 (26 February 2004), para. 67; *Concluding Observations: Myanmar*, 36th Sess., UN Doc. CRC/C/15/Add.237 (30 June 2004), para. 73; *Concluding Observations: Nepal*, 39th Sess., UN Doc. CRC/C/15/Add.261 (21 September 2005), para. 96.

<sup>117</sup> CRC Optional Protocol, *supra* note 100, Article 8.1(g); UNICEF Guidelines, *supra* note 28, 8.

### 3. The Policy Arguments for Victim Detention

In considering the issue of victim detention in shelters, the link between law and policy is an important one. Section 2 confirmed that while practices involving the routine detention of victims in shelters will invariably be unlawful, there may be a narrow band of situations where it is possible to justify individual detention decisions by reference to either the individual circumstances of a case, or to particular policy considerations. Accordingly, the question of whether a particular situation of detention is lawful or not may depend on whether an argument can be sustained that this is the only way for the State to discharge its legal obligation to protect the individual involved. States might also claim that short-term detention is a legal, necessary and proportionate response to the need to ensure that traffickers are effectively prosecuted. It is not possible to evaluate the legal strength of such claims without examining the underlying practical validity.

This section considers the practical and strategic implications of the various policy arguments that are commonly advanced in favour of victim detention. Can victims consent to their own detention? Is it indeed true that detention provides the only – or even the best chance of delivering much needed support and protection to victims of trafficking? Is it reasonable to cite the overwhelming reliance on victim testimony in human trafficking cases as reason for ensuring these witnesses be prevented from disappearing? Should the situation be different for victims who lack legal immigration status? These questions are framed and considered with particular reference to victim detention practices in Cambodia and Thailand.

#### 3.1 Victims consent to shelter detention

Managers of closed shelters in some countries, including both Thailand and Cambodia have at times claimed that victims are not detained in the legal sense because they

provide consent. Shelters report that the victim enters into an agreement with the shelter upon entry, accepting the rules of the shelter and agreeing to stay there for a certain period of time without going outside.<sup>118</sup> In some cases, the time period is short and clearly stipulated. In other cases, the agreement is much less clear.<sup>119</sup>

It is important to consider the quality of any “consent” given by victims of trafficking – particularly when the consent relates to a situation that restricts their movement or otherwise impinges on their rights and freedoms. Victims may not be provided information on – or fully understand – their legal rights and the various options available to them.<sup>120</sup> They may not understand, for example, that they are entitled to decline assistance offered to them. Their capacity to comprehend the situation and to make decisions may be further compromised by shock, trauma or language difficulties. In the case of foreign victims, the quality of any consent to shelter detention can be questioned when the only other alternative on offer is arrest and removal to an immigration detention facility.

Victim “consent” to shelter detention tends to be a one-off event with no requirement or expectation that such consent should be obtained on an on-going basis. As a practical matter, leaving the shelter can be difficult if a victim decides to change her mind. The only people who are available to be consulted are shelter staff or

<sup>118</sup> ACPPT Interview, AFESIP, Phnom Penh, 1 March 2006. At this time, victims arriving at AFESIP’s temporary care centre were required to sign an agreement by which they committed to stay for at least two weeks. During this time they were unable to leave the shelter. At Baan Kredtrakarn, the major, government-run shelter for victims of trafficking in Thailand, all victims sign a consent form stating they voluntarily agree to stay at the shelter for a fixed period of time: ACPPT Interview with management, Baan Kredtrakarn, Bangkok, 17 January 2006. Confirmed in subsequent ARTIP interview with management, Baan Kredtrakarn, Bangkok, 12 June 2007.

<sup>119</sup> ACPPT Interview, AFESIP, Phnom Penh, 1 March 2006.

<sup>120</sup> Research in the Balkans and South East Europe has confirmed the findings of preliminary field work in South East Asia that some victims would not have accepted assistance if they had been fully aware of what was involved: “It was just like a flat, maybe the bad thing was, you weren’t allowed to go anywhere...It would have been good going out for a short while, at least, but being closed for two and a half months, it makes you go crazy. I might not have agreed to come [if I knew about the limited freedoms].”: Surtees, 2007, *supra* note 5.

other detained victims. It may not be made clear to the residents that they can leave (if this option does in fact exist). The trauma and lack of autonomy associated with trafficking make it likely that victims will be reluctant to risk negative repercussions by speaking up. For foreign victims, the irregularity of their migration situation can mean that while a right to leave may exist in theory, immediate release is not possible. A request to leave the major, government-run Thai shelter, for example, cannot be met until the necessary papers are authorized, a process that can take many months or even years.<sup>121</sup>

The international community has already accepted that persons cannot consent to being trafficked.<sup>122</sup> The same reasoning is applicable in the context of victim detention. In short, the notion that an individual could actually consent to her own detention is counter-intuitive. If the victim has freely agreed to staying in a shelter then, provided she has the option of leaving and is in a position to exercise that option at any time, she is not in fact being detained. The moment a victim who has “agreed” to stay in a shelter cannot freely exercise her option to leave, then her situation becomes one of detention.

### 3.2 Victims have no legal status

In some countries, such as Cambodia, (and, until very recently, Thailand),<sup>123</sup> the relevant legal framework does not allow migrant victims of trafficking to be granted even temporary residence permits.<sup>124</sup> The lack of valid immigration status and the resulting potential for victims to be apprehended is commonly cited as a reason to keep victims within government-run or government-approved shelters.<sup>125</sup>

Victim detention in a shelter or any other facility is a drastic response to a lack of legal status. It is also not the only solution to a problem that affects the vast majority of individuals who have been trafficked across international borders. In many parts of the world, trafficked persons are provided with temporary residence permits that allow them to remain in the country of destination for a stipulated period of time.<sup>126</sup> This measure is widely considered to be an essential step in obtaining and

sustaining the cooperation of individuals who fear for their safety and who have little to gain in cooperating with criminal justice authorities in the investigation and prosecution of TIP cases.<sup>127</sup>

In Europe, a major factor behind government acceptance of the idea of temporary residence permits for victims of trafficking was the understanding that irregular status compromises victim safety and security and renders unlikely their cooperation in criminal justice proceedings against traffickers.<sup>128</sup> A capacity to detain victims who are also irregular migrants effectively removes this incentive.

<sup>121</sup> ARTIP interview, Baan Kredtrakarn, Bangkok, 12 June 2007.

<sup>122</sup> UN Trafficking Protocol, *supra* note 2, Article 2.

<sup>123</sup> Section 37 of the Prostitution Act (*supra* note 12) foresees the possibility of a trafficked person receiving permission to stay temporarily for the purpose of assistance and support or legal proceedings. Note this is not a legal entitlement. The Prostitution Act and laws on child and juvenile safety have, up to the present time, provided justification for victim detention in shelters. Note that under Section 38 of the Prostitution Act, residents who “escape” the shelter may be pursued by authorized persons to be sent back to the shelter.

<sup>124</sup> Note that Article 9 non-binding Cambodia Internal MOU, *supra* note 11, provides that in cases where a foreign victim of trafficking agrees to act as a witness in criminal proceedings against traffickers, the prosecutor is to inform immigration police to secure temporary authorization for the victim to remain.

<sup>125</sup> ARTIP interview, Baan Kredtrakarn, Bangkok, 12 June 2007. While a foreign victim is temporarily housed at the shelter, investigating officers will apply for a waiver under Article 54 of the Immigration Act B.E. 2522 (1979) after having questioned the victim.

<sup>126</sup> In 1994, Belgium introduced legislation to enable victims of trafficking to cooperate with law enforcement authorities by providing them with assistance and temporary residence permits. Italy took a similar path in 1998, the Netherlands and Spain in 2000, and France and Greece in 2002. In 2004, the European Union concluded EU Council Directive 2004/81/EC [2004] OJ L 261 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with authorities, available from <http://www2.europarl.eu.int/oeil/FindByProcnum.do?lang=2&procnum=CNS020043> [accessed 28 August 2008]. On the European system of short term residency permits, see further A. Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments’ (2006) 8 *European Journal of Migration and Law*, 163-189, available from: <http://ssrn.com/abstract=954441> [accessed 28 August 2008] [Hereafter: Gallagher]. Australia, Bosnia and the United States of America are among other countries to have embraced short-term residence permits for victims.

<sup>127</sup> Note however that in some countries of South Eastern Europe, the provision of temporary residence permits have not ended the practice of victim shelter detention. See further Brunovskis and Surtees, 2007, *supra* note 5, and Surtees, 2007, *supra* note 5.

<sup>128</sup> Gallagher, *supra* note 126.

### 3.3 Victims will run away

It is often argued that if victims are not detained in shelters, they will run away. Shelter providers are understandably concerned that this will prevent them from delivering much-needed protection to victims. Immigration authorities may be concerned about victims without legal status who would otherwise have been placed in immigration detention. Sometimes it is criminal justice officials who fear their valuable witnesses will escape. Runaways, likely to include those who do not self-identify as victims of trafficking, are indeed a considerable problem in closed shelters.<sup>129</sup> The typical closed shelter structure will often be too controlling for a victim of trafficking who has only recently emerged from long-term exploitation that undoubtedly included restrictions on movement.<sup>130</sup>

Open shelters also experience problems with victims leaving before the shelter considers them ready to do so.<sup>131</sup> These shelters have been forced to examine the reasons why victims who are given a choice do not want to stay and to adjust their own approach accordingly. Certainly shelters providing services that meet the victim's needs on a consensual basis seem to experience more stability among clients.<sup>132</sup> Some open shelters have found that ensuring residents' freedom of movement has a positive impact on the victims' recovery and is a valuable part of preparing them for their life post-shelter.<sup>133</sup>

Preventing runaways is not just about allowing freedom of movement. It also requires the shelter to ensure victim's needs are met in other ways and that the environment does not replicate, in any way, their trafficking experience. Interviews conducted by ARTIP confirm that among those who have left closed shelters in Thailand, a range of problems were cited including the fact of detention; strict rules-based environment of the shelter; boredom; and hostile, patronising staff.<sup>134</sup> Those interviewed noted that almost all shelter residents did not want to be there, did not wish to cooperate with criminal justice agencies and often want to run away.<sup>135</sup> Victims of trafficking, particularly those in Thailand, are afraid of shelters and will often deny their experiences and even accept a

criminal charge in order to be deported rather than be processed through a shelter.<sup>136</sup>

### 3.4 Victims need protection

In many countries experiencing a serious trafficking problem, corruption is rife, traffickers operate with impunity and the state is incapable of providing effective protection to victims. It is not surprising that victim support agencies have sometimes felt that depriving a trafficked person of her liberty is a small price to pay for ensuring that person's safety and security. While this rationale is clearly too important to be rejected outright, it is nevertheless worth noting that the need to confine victims to shelters "for their own protection" appears

<sup>129</sup> AFESIP in Cambodia noted that trafficked women and girls often ran away from its closed shelter. AFESIP staff stated, "Up to 70% of the girls who come into our temporary care shelter don't stay with us longer than the two weeks, only 30% decide they want to stay and some of these girls have been referred to us a few times and sometimes it's the second or third time that they decide to stay. ARCPPT Interview, AFESIP, Phnom Penh, 1 March 2006. On the situation in shelters of the Balkans and South East Europe, see Surtees, 2007, *supra* note 5; and Brunovskis and Surtees, 2007, *supra* note 5.

<sup>130</sup> ARCPPT Interview, AFESIP, Phnom Penh, 1 March 2006.

<sup>131</sup> A representative of one open shelter, the Cambodia Centre for the Protection of Children's Rights (CCPCR) stated: "Of course we have had problems with some children running away, especially the Vietnamese trafficked kids, but we try to create an environment here where they do not want to run away, so that they want to stay. We cannot force them to stay here if they do not want to". ARTIP Interview, CCPCR, Phnom Penh, 18 May 2007.

<sup>132</sup> ARTIP Interview, Cambodian Women's Crisis Centre (CWCC), Phnom Penh, 14 December 2005. By way of example, the CWCC provides shelter to women and girls who stay there on a voluntary basis, typically for three to six months. During this time they have access to vocational training programs. CWCC grants the residents freedom of movement because they have found "if we're too strict, then they don't stay, they run away from the shelter".

<sup>133</sup> See Brunovskis and Surtees, 2007, *supra* note 5, and Surtees, 2007, *supra* note 5.

<sup>134</sup> In 2007, ARTIP surveyed 23 Lao women and girls about to be returned to Lao PDR after having stayed in Baan Kredtrakarn from two to 22 months. All those interviews cited their detention as the major negative factor in this experience. Most victims also noted that the shelter was very "strict" with many rules to follow. "I stayed there for 5 months and did not like it because we could not go outside and there are many rules to follow. I wanted to go home earlier to sue the recruiter, but I could not leave because the guardian said I am a foreigner and I will escape. I didn't try to leave because if they catch you they will punish you ..." Ms K, 17 years old, Lao. ARTIP interview, Baan Kredtrakarn 12 June 2007.

<sup>135</sup> ARTIP interview, Baan Kredtrakarn, Bangkok, 12 June 2007.

<sup>136</sup> ARTIP Interview with Labour Protection Network, (an NGO working with Burmese migrants), Samut Sakon, Thailand, 28 June 2007; ARTIP Interview with CCSD, Royal Thai Police, 23 May 2007.

only articulated and defended in relation to women and children. It is also worth noting that victim safety is almost never cited as a justification for detaining victims of other violent crimes.

Clearly the issue of security is an important one. As noted in the previous section States are under an obligation to protect victims from further harm. Meeting that obligation requires the State to ensure that credible threats are responded to appropriately and in proportion to their likelihood and severity. However, it is also evident that as a legal and practical matter, detaining victims should be reserved as a measure of last resort. The onus is properly on the entity proposing detention to demonstrate that no other reasonable option exists for protecting the victim from further harm. Both open and closed shelters in Cambodia have been forced to deal with serious security threats.<sup>137</sup> It is relevant to note that the former have chosen options other than detention to defuse these situations and protect their clients. These include explaining the security situation to residents and encouraging them to take responsibility for their own safety and that of those around them. Other measures employed in open shelters include security cameras alarm systems, maintaining continuing staff presence at appropriate levels and ensuring good relations with local police so they can be relied upon to assist if there are security incidents. In one case, the shelter purchased mobile phones for local police in order to ensure they are contactable at all times.

The justification of security and protection from harm is rarely tested through standardized or meaningful implementation of individual risk assessment. Research in the Balkans and South Eastern Europe has confirmed that fear is often used as a way of persuading victims to consent to entering and remaining in shelters.<sup>138</sup> The quality of such consent must be called into question in the absence of appropriate and individualized risk assessment. The psychological impact of amplifying fear and risk should also be most carefully considered.

The need for individual risk assessment and the possibility of protecting victims without resorting to detention are both confirmed through the experiences

of countries outside South East Asia. In Italy, for example, it is common practice for shelter managers to assess the security situation of each new client before assigning an appropriate level of protection. Some restrictions (e.g. on the use of mobile phones) may be imposed in very serious cases or during the period immediately following victim escape/rescue from a trafficking situation. Generally however, the shelters do not create strict regimes of rules and regulations and all victims maintain the right to refuse assistance and to be repatriated home if they prefer.<sup>139</sup> Interestingly, managers of Italian shelters report that threats to the safety of victims and shelter staff has decreased significantly over the years, as the response to trafficking has matured, with better victim support and protection, and increasing investigations and convictions of traffickers.<sup>140</sup>

### 3.5 Victims are needed for investigations and prosecutions

Criminal justice imperatives are often cited as a key justification for victim detention. Victims who are cooperating in the investigation and prosecution of trafficking cases may indeed be vulnerable to threats and intimidation from traffickers. They may also be tricked or bribed into terminating their cooperation. Detention of victims in shelters is seen to serve two purposes:

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<sup>137</sup> The most notorious incident occurred in December 2004 when a group of armed individuals attacked a closed shelter in Phnom Penh and forcibly removed over 90 women and girls. While this case was used by some to demonstrate the importance of victim protection, it could equally support a contention that shelters cannot really protect victims against determined attack and that for this reason, forcibly detaining a victim in such places is not the answer to victim safety. See, for example, 'Cambodia - Attack on Trafficking Shelter', US Department of State, Press Statement, Adam Erel, Deputy Spokesman, Washington, DC, December 9, 2004, available from: <http://www.state.gov/r/pa/prs/ps/2004/39641.htm> [accessed 28 August 2008]; 'Official AFESIP Press Statement on Events', 12 December 2004, available from: [http://www.humantrafficking.org/uploads/updates/afesip\\_press\\_statement.pdf](http://www.humantrafficking.org/uploads/updates/afesip_press_statement.pdf) [accessed 28 August 2008]; 'U.S. raps Cambodia over sex trade', Elise Labott, Wednesday, December 15, 2004 available from: <http://edition.cnn.com/2004/US/12/14/cambodia.us.sex/> [accessed 28 August 2008].

<sup>138</sup> Surtees, 2007, *supra* note 5, Brunovskis and Surtees, 2007, *supra* note 5.

<sup>139</sup> See further, On the Road, *Social protection and assistance interventions addressed to the victims of trafficking: description of the Italian system* (undated) available from: <http://victimsoftrafficking.esclavagemoderne.org/pdf/SocialProtectionAssistance.pdf> [accessed 28 August 2008].

<sup>140</sup> ARCPT interview, Differenza Donna, Rome, 3 November 2005.



protecting victims from these dangers and ensuring their availability to participate as witnesses in trafficking cases.

It is certainly true that victims have a critical role to play in the criminal prosecution of traffickers and their accomplices. In fact, as noted above, investigations and prosecutions are usually difficult and sometimes impossible without the cooperation and testimony of victims. The apparent preference of law enforcement personnel in particular, for victim witnesses to be detained is certainly understandable from an operational perspective.<sup>141</sup>

However, as a practical matter, the forced detention of victim-witnesses in shelters is highly unlikely to contribute to an optimal criminal justice outcome. It is now widely accepted that the quality of victim testimony is directly related to their physical and emotional wellbeing.<sup>142</sup> A victim who remains in a situation from which she or he cannot escape (an alternative definition of trafficking) or is otherwise depressed, stressed or traumatised will not make a convincing witness.<sup>143</sup>

In practice, victim detention does not appear to increase criminal justice efficiency or effectiveness. In countries with closed shelters such as Thailand and Cambodia, significant delays in the criminal justice process are the norm and victims can be kept in detention for months or even years as cases drag through the courts. While detention cannot be blamed for these delays, there is clearly no incentive for criminal justice agencies to prioritize trafficking cases when their witnesses are in one place and available at call. It is not unreasonable to argue that the speed and outcome of criminal trials might be different if law enforcement agencies were required to work a little harder: to seek additional forms of evidence or to pursue other means of taking testimony such as by deposition. An inability to detain victim witnesses could also spur the development of innovative policies and practices to encourage their voluntary cooperation in criminal justice proceedings. It is unlikely to be a coincidence that in countries where the closed shelter option does not exist, measures are usually in place to

permit victim-witnesses to remain as well as to actively facilitate their return in order to give evidence.<sup>144</sup>

Another issue relates to the question of whether victims *must* cooperate in criminal justice proceedings against traffickers. While many States retain the right to compel testimony, the particularly vulnerable situation of victims of trafficking generally renders the exercise of this prerogative extremely problematic. At the international level, there is growing acceptance of the principle that victims should be encouraged but not required to cooperate in the investigation and prosecution of their exploiters.<sup>145</sup> Victim detention can impact on the free exercise of a victim's right to refuse to cooperate in a criminal investigation or prosecution. Victims who are under detention are unlikely to be offered a non-cooperation option – or indeed to properly absorb any such message if it is provided.

### 3.6 Other motivations for victim detention

Victim detention provides some distinct practical advantages to service providers and the State. Some of these advantages, such as the on-call availability of potential witnesses, have already been considered above. Other advantages relate to resources. Few shelters, whether governmental or non-governmental, enjoy surplus funds or support staff. It is cheaper, easier, and far more convenient for shelters to confine residents. Shelter managers frankly admit to a lack of staff capacity to supervise residents on outings outside, especially in the larger shelters.<sup>146</sup>

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<sup>141</sup> This view was expressed by shelter staff and has been anecdotally noted by the authors in their work with law enforcement officials. Field work referred to in this Study did not specifically address that point.

<sup>142</sup> Gallagher and Holmes, *supra* note 3; UNODC Toolkit, *supra* note 3.

<sup>143</sup> See C. Zimmerman, *Stolen Smiles: Physical and mental health consequences of women and adolescents trafficking in Europe* (London: London School of Hygiene and Tropical Medicine, 2006).

<sup>144</sup> See E. Pearson, *Human Trafficking and Human Rights: Redefining Victim Protection* (London: Anti-Slavery International, 2002).

<sup>145</sup> See, for example, European Trafficking Convention Explanatory Report, *supra* note 2, para. 174-176.

<sup>146</sup> ARTIP interview, Baan Kredtrakarn, 17 January 2006; ARTIP interview, World Vision Cambodia, 18 May 2007.

It would be unwise to ignore the intersection between broader shelter interests and victim detention. In many countries, the organization and funding of services to victims of trafficking creates a clear strategic and financial incentive on the part of service providers to maintain client numbers at a certain level. If the number of victims being assisted dries up, funding and other support to the shelter can be expected to shrink accordingly. Detaining victims is the easiest way to ensure the financial security of the shelter and thereby its on-going functioning. While the authors found no evidence of 'victim hunting' that has been reported in relation to shelters of Central and Eastern Europe,<sup>147</sup> it is relevant to note that even the best equipped, open shelters in that part of the world have struggled to survive as high numbers of victims continue to decline assistance.<sup>148</sup>

Closed shelters can also serve the political and strategic interests of governments. In Thailand, the major closed shelter is widely considered – and promoted - as strong evidence of the Government's commitment to ending trafficking. In Thailand at least, the authors have noted over several years that a captive and permanent victim population ensures that tours of the facility can be provided at short notice to important visitors including Heads of State and donors.

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<sup>147</sup> B. Limanowska, *Trafficking in Human Beings in South Eastern Europe* (UNICEF, UNHCHR, OSCE/ODIHR, 2004), p50.

<sup>148</sup> Brunovskis and Surtees 2007, *supra* note 5.

## 4. Conclusion and Recommendations for Change

The policy arguments advanced for victim detention do not serve to alter the validity of the underlying legal rules. Automatic detention of victims of trafficking is, as concluded above, unlawful and never justifiable on policy grounds. Victim detention in a shelter could be legally defensible under certain, carefully circumscribed circumstances. However, the onus remains firmly on the State to advance these justifications on a case-by-case basis and also to demonstrate how the protections provided by international law are being applied.

Victim detention policies and practices have serious repercussions. In countries accommodating closed shelters, victims reportedly go to great lengths to avoid being identified as such in order to avoid detention. As a result, they are being denied urgently needed care and protection and inadvertently contributing to the impunity enjoyed by their exploiters. For those who are being detained, the very fact of their detention and unjustifiable delays in the processing of their cases inevitably leads to a compounding of their distress and disempowerment.

It is important to acknowledge that providing emergency support to victims of trafficking can be easier in a situation of detention. Closed shelters can also offer a higher level of protection for victims against further harm and reduce the risk of them being bribed or intimidated into not assisting criminal justice authorities. They can protect children and others from further exploitation including re-trafficking. However, at the end of the day, these considerations are insufficient to justify a policy that either implicitly or explicitly endorses detention. A rights-based approach to trafficking demands that victims of trafficking be treated as more than criminal justice resources or as passive recipients of assistance.

The following are key recommendations for change:

States and where appropriate non-governmental agencies should:

### **In relation to the legal framework:**

1. Ensure that the national legal framework does not permit the automatic detention of victims of trafficking;
2. Ensure that victims of trafficking have a legally enforceable right to challenge the fact of their detention in a court in a timely manner and that they have access to legal advice and assistance to enable them to assert this right;
3. Ensure that the legal framework provides for non-criminalization of victims in relation to offences directly related to their status as trafficked persons;
4. Ensure that irregular immigration status is not used as a justification for victim detention by providing foreign victims with a right to temporary residence permits.

### **In relation to policy and decision-making:**

5. Ensure that decisions about victim detention are made on a case-by-case basis and that they satisfy international legal requirements regarding considerations of necessity, legality and proportionality;
6. In the case of children, ensure that detention is a last resort and defensible with reference to the best interests of the child;
7. Ensure that men are not excluded – as a matter of law, policy or practice – from support and protection services and that appropriate shelter or other accommodation and legal and social services are available and made accessible to male victims of trafficking;

8. Ensure the establishment and effective functioning of mechanisms to monitor all shelter facilities used or available for victims of trafficking. The monitoring structure and process should be transparent, free from political interference and open to review.

**In relation to shelter practices:**

9. Review the institutional model of shelters and consider other models that are smaller, more community based and more empowering for trafficked persons;

10. Ensure that consent forms to enter shelters are reviewed and that victims are regularly informed of their rights, including their right to change their mind and leave at any time;

11. Ensure that each shelter establishes a mechanism for shelter residents to make their needs known and participate in decisions about how the shelter is run;

12. Ensure that service providers and others in contact with victims receive training on the human rights of trafficked persons;

13. Consider when it is appropriate to have separate shelters for children and adults;

14. Undertake risk assessments for each victim and develop individual security plans;

15. Ensure that any restrictions on freedom of movement are justifiable with reference to the risk assessment;

16. Review the practice of opening shelters to outsiders with reference to victims' right to privacy.