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The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking

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ABSTRACT

In countries around the world it is common practice for victims of human trafficking who have been “rescued” or who have escaped from situations of exploitation to be placed and detained in public or private shelters. In the most egregious situations, victims can be effectively imprisoned in such shelters for months, even years. This article uses field-based research to document this largely unreported phenomenon. It then considers the

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international legal aspects of victim detention in shelters and weighs the common justifications for such detention from legal, policy, and practical perspectives.

I. INTRODUCTION

After more than a century of prevarication, international law has recently defined trafficking in persons as the buying, selling, receipt, or movement of persons through the use of force, deception, coercion, or similar means for the purposes of exploitation.¹ The overwhelming majority of states are party to one or more treaties concluded over the past decade that set out, with considerable precision, their obligations with respect to preventing trafficking, protecting victims, and prosecuting perpetrators.² A recent UN

1. Trafficking in persons is:

(a) . . . the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

Note that in the case of children, the element of “means” is dispensed with:

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “*trafficking in persons*” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *adopted* 15 Nov. 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., art. 3, U.N. Doc. A/RES/55/25 (2001), 2237 U.N.T.S. 319 (*entered into force* 25 Dec. 2003) (emphasis added) [hereinafter UN Trafficking Protocol].

2. Convention Against Transnational Organized Crime, *adopted* 15 Nov. 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/25 (2001), 2225 U.N.T.S. 209 (*entered into force* 29 Sept. 2003) [hereinafter Organized Crime Convention]; UN Trafficking Protocol, *supra* note 1; Convention on Action Against Trafficking in Human Beings, *opened for signature* 16 May 2005, C.E.T.S. No. 197 (*entered into force* 1 Feb. 2008) [hereinafter European Trafficking Convention]. As of 15 November 2009, these treaties have 150, 134, and 26 states parties respectively. UN Treaty Collection, Status of Treaties: Organized Crime Convention, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&lang=en; UN Treaty Collection, Status of Treaties: UN Trafficking Protocol, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en; Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, Status as of: 15/11/2009, *available at* <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>.

survey covering 155 countries confirmed that most states have comprehensive anti-trafficking laws in place—giving general, if varying, effect to these international obligations.³ Statutory reforms have frequently been accompanied by stronger criminal justice institutions and procedures aimed at ending the high levels of impunity traditionally enjoyed by those who profit from the exploitation of others and, at least in some instances, securing justice for those who have been exploited.⁴ It appears that trafficking, traditionally a marginal and marginalized issue of the UN human rights system, has finally been elevated to a matter of international and national concern.

One of the most unusual features of the legal and political discourse around trafficking is the strong emphasis on the rights and vulnerabilities of victims. For many years, international law had not overly concerned itself with the situation of victims of crime and of human rights violations.⁵ Changes to this long tradition of neglect have been recent and incremental.⁶ In the context of trafficking, the implications of supporting and protecting victims have received significant and sustained attention since the inception of the current global campaign in the mid-1990s. Protection of trafficked persons' rights is now recognized as a vital aspect of an effective national response.⁷ Support for this position does not just come from those convinced of the intrinsic value of a human rights approach. While changes in investigatory practices provide hope for a different future, the prosecution of trafficking currently relies heavily on the cooperation of those who have been trafficked.⁸

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3. UN OFFICE ON DRUGS AND CRIME (UNODC), GLOBAL REPORT ON TRAFFICKING IN PERSONS (Feb. 2009), available at http://www.unodc.org/documents/Global_Report_on_TIP.pdf [hereinafter UNODC GLOBAL REPORT]. The report reveals that by 2008, 80 percent (125 countries) of the 155 countries surveyed had specific anti-trafficking legislation, *id.* at 22; 63 percent (ninety-eight countries) of all surveyed countries had criminalized trafficking for at least forced labor and sexual exploitation irrespective of both age and gender, *id.*
 4. See generally Anne Gallagher & Paul Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line*, 18 INT'L CRIM. JUST. REV. 318 (2008). See also UNODC GLOBAL REPORT, *supra* note 3, at 25 (revealing that 52 percent (eighty-one countries) of the 155 countries surveyed had established a specialist law enforcement response to trafficking in persons; and that the number of countries to have adopted a national plan of action against trafficking rose from 5 percent in 2003 to 53 percent (seventy-six countries) by 2008).
 5. For a comprehensive analysis of the history of victim's rights in international law, see M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006).
 6. See, e.g., Rome Statute of the International Criminal Court, adopted 17 July 1998, U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (entered into force 1 July 2002) (identifying a place for victims in the criminal prosecution of perpetrators as well as remedies for crimes committed); *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 21 Mar. 2006, G.A. Res. 147, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/147 (2006) [hereinafter 2006 Victim Principles and Guidelines]. These and other recent developments at the national, regional, and international levels are discussed in detail in Bassiouni, *supra* note 5.
 7. See, e.g., UN Trafficking Protocol, *supra* note 1; European Trafficking Convention, *supra* note 2; see also *infra* Section II.B.
 8. Gallagher & Holmes, *supra* note 4, at 332.

Most criminal justice practitioners now accept that the recognition and protection of victims' rights is essential to ensure that victims are able to play an effective role in the investigation and prosecution of their exploiters.⁹

While there is widespread agreement on the need for, and value of, protecting victims' rights, and despite considerable development in the law and policy of human trafficking over the past several years, the precise contours and limits of that protection are not yet firmly established. One matter that remains to be definitively settled concerns the detention, as that term is defined in international law,¹⁰ of victims in shelters. Questions with respect to this issue abound: When victims of trafficking are placed in a shelter or safe house, is the state—or anyone else—legally entitled to insist that the victim remain there? If such a prerogative exists, what are its parameters? If there is no legal basis 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 victims of trafficking are detained in police lock-ups, immigration detention centers, and prisons. The widespread and (at least until very recently) egregiously underreported practice of victim detention in public and private shelters is directly relevant to the present study.¹¹ In countries and regions around the world, including Bangladesh,

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9. See, e.g., INTERNATIONAL CRIMINAL POLICE ORGANIZATION (INTERPOL), *TRAFFICKING IN HUMAN BEINGS: BEST PRACTICE GUIDANCE MANUAL FOR INVESTIGATORS* (2d ed. 2007) (restricted document, copy on file with authors); UNODC, *TOOLKIT TO COMBAT TRAFFICKING IN PERSONS*, 251–302 (2008), available at http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf; Gallagher & Holmes, *supra* note 4, at 332–34.
 10. *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, adopted 9 Dec. 1988, G.A. Res/43/173, U.N. GAOR, 43d Sess., 76th plenary mtg., U.N. Doc. A/RES/43/173 (1988) [hereinafter *Principles of Detention or Imprisonment*]. This 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.” *Id.* annex, pmbl, (b).
 11. For example, the UNODC GLOBAL REPORT, *supra* note 3, does not mention shelter detention in its extensive consideration of state policies and practices with respect to victim protection and support. A comprehensive analysis of 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. US AGENCY FOR INT’L DEV., *THE REHABILITATION OF VICTIMS OF TRAFFICKING IN GROUP RESIDENTIAL FACILITIES IN FOREIGN COUNTRIES* 9 (2007). The highly influential *Trafficking in Persons Reports*, prepared annually by the United States government and considered further below, have similarly marginalized the issue. The legislatively mandated criteria for evaluating the performance of states includes “whether the government . . . ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked.” U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 2009, at 28 (2009) [hereafter U.S. TIP REPORT 2009]. Supplementary guidelines prepared by the US State Department somewhat ambiguously note that

Central and Eastern Europe, Cambodia, India, Israel, Malaysia, Nepal, the Russian Federation, Nigeria, Sri Lanka, Taiwan, and Thailand, it is common practice for victims of trafficking to be effectively imprisoned in government or private support facilities without being able to leave the shelter grounds beyond the occasional supervised excursion or trip to court.¹² In some cases, these shelters are well-established institutions that provide a full range of assistance and support services to victims. In other cases, they are little more than jails. Either way, victims can languish in such places for months and even years. While there are few examples of legally sanctioned shelter detention,¹³ at least one major destination country in South East Asia recently passed a trafficking in persons law that explicitly authorizes shelter

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- “[t]o the best extent possible, trafficking victims should not be held in immigration detention centers or other detention facilities.” *Id.* at 29. Over the past two years, only one country, Nigeria, has been singled out for holding victims “under guard” in shelters, a practice that is not considered to constitute inappropriate incarceration. US DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 2008*, at 198 (2008) [hereinafter US TIP REPORT 2008]; US TIP REPORT 2009, *supra*, at 227. The most recent report does, however, give more critical attention to the issue, recommending that Nigeria: “ensure that victims’ rights are respected and that they are not detained involuntarily in shelters,” *id.* at 226; that Thailand “ensure that adult foreign trafficking victims *who are willing to work with local law enforcement* are not confined to shelters involuntarily,” *id.* at 280 (emphasis added); and, most significantly, identifying detention of adult victims in shelters as “bad practice,” *id.* at 35. An earlier version of the present study is cited in that context, *id.* (citing “an August 2008 paper published by the Australian Agency for International Development”).
12. See, e.g., Stephen Che, *NIA: Trafficking Victims Detained for Protection*, CHINA POST (Taipei), 24 Mar. 2007, available at <http://www.chinapost.com.tw/news/archives/taiwan/2007324/105390.htm> (defending victim shelter detention in Taiwan); GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, *COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD* (2007) [hereinafter *COLLATERAL DAMAGE*] (confirming the practice of shelter detention in Bosnia and Herzegovina, Nigeria, and India); MIKE DOTTRIDGE, *TERRE DES HOMMES INTERNATIONAL FEDERATION, A HANDBOOK ON PLANNING PROJECTS TO PREVENT CHILD TRAFFICKING* 21, 31 (2007) (noting detention of returned victims of trafficking in Nepalese shelters); Ministry of Public Security (Israel), *A Refuge for the Victims of Trafficking in Women*, available at <http://www.mops.gov.il/BPEng/OnTheAgenda/VictimsofTraffickingInWomen> (explaining the shelter system established by the government of Israel for trafficked women: women in the closed shelter—those “whose identities have not been established” or who have not agreed to cooperate with criminal justice authorities—are not permitted to leave except to attend court; women in the open shelter, “whose identities have been established” or who are cooperating in prosecutions, “may come and go from the building, with some limitation and surveillance placed on their movements, designed to prevent them returning to prostitution or committing other associated related offenses”). On closed shelters and restrictive shelter practices in the Balkans and South East Europe, see Anette Brunovskis & Rebecca Surtees, *Agency or Illness—The Conceptualization of Trafficking: Victims’ Choices and Behaviors in the Assistance System*, 12 *GENDER, TECH. & DEV.* 53 (2008); ANETTE BRUNOVSKIS & REBECCA SURTEES, FAFO INST. & NEXUS INST., *LEAVING THE PAST BEHIND? WHEN VICTIMS OF TRAFFICKING DECLINE ASSISTANCE* (2007); REBECCA SURTEES, INT’L CTR. FOR MIGRATION POLICY DEV., *LISTENING TO VICTIMS: EXPERIENCES OF IDENTIFICATION, RETURN AND ASSISTANCE IN SOUTH-EASTERN EUROPE* (2007), available at http://www.childtrafficking.com/Docs/listening_to_victims_1007.pdf.
 13. 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* the discussion of shelter practices in Thailand, below.

detention for both national and foreign victims of trafficking.¹⁴ Under this law, escaping from the shelter increases the term of detention equal to the period of escape. The law also criminalizes assisting a victim of trafficking to escape a shelter.¹⁵

Supporters of shelter detention, which appears overwhelmingly, if not exclusively, directed towards women and girls, commonly justify detention with reference to the complexity of the operating environment and the need to protect victims of trafficking. Often, service providers deny the very fact of detention and assert that victims agree to restrictions on their freedom of movement. Sometimes supporters of detention claim that victims are required for criminal prosecution of traffickers 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 and 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 external scrutiny or review. In all of the cases documented by the authors, victims were unable to challenge the legality of their detention in a court or through any administrative review process.

Detention of trafficking victims is not a universal practice. In many countries, the right of victims of trafficking to freedom of movement is respected, and the provision of support and protection is based on genuinely informed consent. Shelters are open and victims are free to come and go as they please. Such practices are not tied to national or regional particularities. Even in countries where victim detention is the norm, alternative means of looking after trafficked persons usually exist and appear to function reasonably well. Additionally, an increasing number of countries are forming special visa regimes that avoid the “deport or detain” approach that has typically characterized the treatment of foreign victims.¹⁶

14. Anti-Trafficking in Persons Act, Act 670, § 51(3) (2007) (Malay.).

15. *Id.* §§ 55-56.

16. An increasing number of the major destination countries for trafficked persons, including Australia, the United States, and most countries of Western Europe, now provide special visa arrangements for victim-witnesses. Such arrangements often include a provision for victims to take some time—“a reflection period”—to think about whether or not they wish to be involved in criminal proceedings. At the end of this reflection period, the most generous schemes envisage granting residence permits to victims of trafficking who choose to cooperate. This approach, pioneered by the European Union through Council Directive 2004/81/EC, 2004 O.J. (L 261), has now been adopted as the European legal standard through the European Trafficking Convention, *supra* note 2, art. 13. Within the EU, twenty-three member states have transposed the Directive into national legislation (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxemburg, Hungary, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Sweden). EUR-Lex, National Provisions Communicated by the Member States Concerning Council Directive

This article examines the legal and policy implications of shelter-based victim detention with a view to determining whether, and under what circumstances, detention of trafficked persons in shelters can be justified. This article commences with an analysis of the relevant international legal framework—in particular, international rules relating to trafficking, freedom of movement, arbitrary detention, the rights of detainees, discrimination, and the rights of the child. It then considers the practical and strategic implications of the various policy arguments supporters advance in favor of victim detention. Can victims consent to their own detention? Is it true that detention provides the only—or even the best—chance of delivering 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 that these witnesses don't disappear? Should the situation be different for victims who lack legal migration status? This article draws on examples from around the world, but in relation to policy analysis, it relies on insights and experiences derived from a field study of shelter practices in Cambodia and Thailand.¹⁷

The issue under discussion is sensitive and complex, and several caveats are in order. First, this article specifically focuses on the question of detention of victims of trafficking in both government and private shelters. The article does not directly consider the legal or policy implications of misidentified victims who are detained in immigration or criminal justice facilities. Nev-

2004/81/EC, available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72004L0081:EN:NOT#FIELD_I_E. No information is available for Denmark, Ireland, Spain, or the United Kingdom. See *id.* For a summary of the recently revised Australian visa regime for victims of trafficking, see Australian Government, Australian Government Anti-People Trafficking Strategy, available at <http://www.fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx>. For a summary of the United States visa regime for victims of trafficking, see U.S. Dep't of Justice, Trafficking in Persons—A Guide for Non-Governmental Organizations, available at <http://www.justice.gov/crt/crim/wetf/trafficrochure.php>.

17. ARCPPT team members carried out initial field research in Cambodia and Thailand in 2005 and 2006 as part of a broader study on victim support and assistance measures. The authors undertook follow-up field research in 2007 in the context of a more targeted study of victim detention practices and monitored the situation during 2008 and the first half of 2009—conducting final interviews with key informants during May and June 2009. This follow-up research involved visits to nine shelters in Cambodia, only two of which (run by AFESIP-Cambodia and World Vision-Cambodia) were identified as “closed.” In Thailand, there are currently ninety-nine 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, which is the largest of all Thai shelters by a considerable margin and the one most often used to accommodate foreign victims of trafficking. Researchers obtained comparative information and insights through visiting shelters in Italy and consulting service providers in Central and Eastern Europe. The authors have also drawn upon discussions held with senior government officials and service providers in both Malaysia and Indonesia.

ertheless, clear parallels can be drawn with other forms of detention, and the conclusions of this analysis would generally apply equally to such situations. Second, the authors accept that service providers operating within the closed shelter model may well be motivated by a genuine desire to deliver much-needed assistance and support. However, motivation has no impact on the factual question of whether victims are being detained and whether such detention is permissible under international law. Also, the article does not provide a comprehensive and fully authoritative treatment of this issue. The preliminary field research undertaken over the past five years and documented below confirms the existence of a disturbing trend that requires careful and in-depth documentation and analysis. The authors hope that the following information and insights provide a useful framework and starting point for this important work.

Finally, the subject of this article should be considered within its broader political context. Trafficking was, and continues to be, closely identified with sensitive and controversial issues including irregular migration, illegal labor, prostitution, and transnational organized crime. While the human rights dimensions of trafficking are widely acknowledged, there can be no denying the existence of mixed motivations and conflicting interests that underlie the response of many states on this issue. In at least some cases, it appears that governments use “trafficking” as a pretext for laws, policies, and practices that are intended to serve other, very different goals.¹⁸ NGOs may be complicit or may even lead the way in capitalizing on the momentum against trafficking to legitimize policies and actions that would otherwise be subject to scrutiny and criticism. Even absent manipulative intent, human rights can very easily become a casualty of states’ eagerness to demonstrate their anti-trafficking credentials to others. In the current international climate, which is largely dominated by an aggressive unilateral monitoring regime,¹⁹ the compulsion to be viewed as doing something about trafficking is strong and universal. Against this backdrop, shelter detention is one of a growing number of potentially problematic practices that are linked to, and justified by, the anti-trafficking imperative.

18. See generally Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 831-32 (2009); COLLATERAL DAMAGE, *supra* note 12.

19. Since 2001, the US State Department has issued annual Trafficking in Persons (TIP) Reports, which identify those countries deemed to be experiencing a significant trafficking problem and assess and rank their response against criteria established by US law. Failure of any country to live up to the mandated standard can lead to the imposition of sanctions and US interference in that country’s relationship with the major international banks and financial institutions. For an overview of the legislative and policy background to the TIP reports, see Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437 (2006). For an insight into their influence on the nature and direction of states’ response to trafficking, see Gallagher, *Human Rights and Human Trafficking*, *supra* note 18, at 826-28.

A. Cambodia

Shelter and assistance to trafficked persons in Cambodia is provided through a dense network of externally funded NGOs rather than by the government, which is nevertheless responsible for registering and monitoring those NGOs that provide 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 go home, victims who have been trafficked within Cambodia, and Vietnamese who have been trafficked to Cambodia and are awaiting repatriation.²⁰ 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,²¹ and now only a handful of the major Cambodian shelters can be considered “closed” shelters. While the 2008 trafficking law is strangely silent on the issue of victim assistance and support, the Ministry of Social Affairs, Veterans, and Youth Rehabilitation passed a regulation on protection of the rights of victims of trafficking in August 2009.²² With regard to the issue under discussion, the regulation refers only to “the right of the victim to live and move with freedom within their country of citizenship.” An earlier (2007) agreement between the government and some service providers mandates minimum standards of care and assistance for trafficked persons, including an obligation to secure victim consent to remain in a shelter and to allow any victim to leave.²³ This agreement is not legally binding.

B. Thailand

Unlike Cambodia, shelters in Thailand are administered by the government and are under official control. Seven main shelters provide accommodation and services to trafficked women and children, and, as of late 2008, four

20. Unless otherwise cited, the information in this section references the authors’ own research.

21. For example, a 2003 study on shelter practices conducted by the Cambodian Human Rights and Development Association (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 2 (2003) (on file with the authors).

22. Prakas on Implementation of the Policy on Protection of the Rights of Victims of Human Trafficking, No. 852 S.V.Y (2009) (Cambodia).

23. Agreement on Guidelines for Practices and Cooperation Between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking, *done on* 6 Feb. 2007 [hereinafter Cambodia Internal MOU].

additional shelters have been designated for men.²⁴ Shelters in Thailand have traditionally been highly regulated, a situation that attracted criticism as early as 1993.²⁵ Baan Kredtrakarn in Bangkok, a former rehabilitation facility for sex workers mandated under the Prostitution Prevention and Suppression Act,²⁶ is Thailand's main shelter and is, in many respects, the flagship of the country's anti-trafficking response. Baan Kredtrakarn accommodates, in a closed environment, up to 500 trafficked or otherwise exploited women and girls, including many Lao and Myanmar (Burmese) nationals who have been subject to labor exploitation. A child or woman identified in Thailand as a victim of trafficking is automatically placed in a shelter.²⁷ Those who "escape" may legally be pursued and returned by an authorized person.²⁸ It is not unusual for foreign victims of trafficking to spend several years in Thai shelters awaiting family tracing and repatriation. Such persons invariably lack legal status, and this fact is used to justify their detention. It is unclear whether Thailand's very new trafficking law,²⁹ which makes it possible for foreign victims to receive temporary residence, will change this deeply entrenched situation.

II. 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 and then considers the major areas of obligation, concluding with a list of key findings.

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24. Previously, there were no shelter facilities for men in Thailand, despite the high number of men reported to be trafficked in and through that country. See, e.g., U.S. SENATE FOREIGN RELATIONS COMMITTEE, 111TH CONG., REPORT ON TRAFFICKING AND EXTORTION OF BURMESE MIGRANTS IN MALAYSIA AND SOUTHERN THAILAND (S. PRT. 111-18) (documenting trafficking and forced labor of Burmese men in the Thai fishing industry).
 25. See HUMAN RIGHTS WATCH, A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND (1993). The Human Rights Watch report likened Baan Kredtrakarn (the designated shelter for foreign victims of trafficking) to a jail, operating under stifling regulations that prohibited detainees from leaving or receiving visitors, as well as from smoking and wearing make-up and jewelry. *Id.* at 95. Research conducted for this article confirms that some of these rules have been relaxed, although those affecting personal freedom are still in place.
 26. Prostitution and Suppression of Prostitution Act, B.E. 2539 (1996) (Thail.) [hereinafter Thailand Prostitution Act].
 27. It appears that men will also automatically be referred to the new shelters. According to the relevant ministry, an identified victim of trafficking who does not wish to cooperate with authorities or receive shelter services can elect to be returned home. Telephone interview with Ministry of Soc. Dev. and Human Sec. (June 2009). In practice, however, this option does not appear to be offered to victims.
 28. Thailand Prostitution Act § 38.
 29. Anti-Trafficking in Persons Act, B.E. 2551 (2008) (Thail.) [hereinafter Thailand Anti-Trafficking Act].

A. Overview of the International Legal Framework

Trafficking in persons does not enjoy the luxury of a clearly defined legal framework. Identifying both rights and obligations is a tricky business that requires consideration of a number of different areas including human rights law, international criminal law, transnational criminal law, and refugee law. Since 2000, the principal international agreement has been the Protocol on Trafficking in Persons especially Women and Children, Supplementing the United Nations Convention on Transnational Organized Crime (UN Trafficking Protocol), which entered into force in 2003 and currently has 133 states parties.³⁰ This instrument provides the first international legal definition of trafficking and sets out the steps to be taken by states to prevent and deal with trafficking. The Protocol's "parent" instrument, the United Nations Convention on Transnational Organized Crime, ratified by 150 states,³¹ also contains a number of general provisions relating to, for example, the treatment of victims, that are directly applicable to trafficking in persons cases.³²

Several regional specialist treaties on trafficking have been concluded since the Protocol was adopted. The most significant of these is the 2005 European Convention against Trafficking in Persons (European Trafficking Convention)³³ that entered into force in February 2008 and has the potential to bind more than forty countries of Western, Central, and Eastern Europe to a much higher standard of victim protection than required by the UN Trafficking Protocol.³⁴ The European Union has also released a number of directives on this subject that create specific legal obligations for its member states over time. A pertinent example is the EU Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking or smuggled migrants if they cooperate with authorities.³⁵ Another somewhat compromised example of regional standard-setting is a treaty on trafficking of women and girls for prostitution concluded by the member countries of the South Asian Association of Regional Cooperation in 2002 (SAARC Convention).³⁶

30. UN Treaty Collection, UN Trafficking Protocol, *supra* note 2. For an overview of the protocol and its drafting history see Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975 (2001).

31. UN Treaty Collection, Organized Crime Convention, *supra* note 2.

32. Organized Crime Convention, *supra* note 2, arts. 6-14.

33. European Trafficking Convention, *supra* note 2.

34. See further Anne Gallagher, *Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments*, 8 EUR. J. MIGRATION & L. 163 (2006).

35. Council Directive 2004/81/EC, *supra* note 16.

36. The Member States of the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, *adopted* 5 Jan. 2002 [hereinafter SAARC Convention]. The SAARC Convention was

Despite being eclipsed by the UN Trafficking Protocol, international human rights law is very much a part of the applicable legal framework surrounding trafficking. While there are direct references in only two of the core human rights treaties,³⁷ most, if not all, of the remaining treaties are relevant to the rights of those who have been trafficked.³⁸ The same can be said of international labor standards as well as classic treaties that pre-date the modern human rights system and deal with matters such as slavery and forced marriage.³⁹

Over the past decade, trafficking has generated a considerable body of what is widely (and often optimistically) characterized as soft law. In the present case, the term refers to normative instruments developed by states or intergovernmental organizations that lack full legal force. The most significant soft law instrument in this area is the UN *Recommended Principles and Guidelines on Human Rights and Human Trafficking (Trafficking Principles and Guidelines)*, developed by the UN High Commissioner for Human Rights in 2002.⁴⁰ Many aspects of the *Trafficking Principles and Guidelines* reflect international treaty law. However, parts of this document go further by using accepted international legal standards to provide 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 on Protection of Child Victims of Trafficking*⁴¹ that provides additional guidance on the specific is-

acknowledged by its drafters to be incomplete and inconsistent with the newly adopted UN Trafficking Protocol. While the Convention has entered into force, the promised review has not taken place, and key bodies mandated under its provisions have not yet been established.

37. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., art. 6, U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (*entered into force* 3 Sept. 1981) [hereinafter CEDAW]; Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 35, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (*entered into force* 2 Sept. 1990) [hereinafter CRC].
38. For a detailed consideration of the human rights instruments relevant to trafficking, see UN Office of the High Commissioner for Human Rights, *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking* (forthcoming 2010) [hereinafter *Commentary to the Trafficking Principles and Guidelines*].
39. *Id.* For a detailed examination of the relevance of slavery related treaties and norms to the issue of trafficking in persons, see Gallagher, *Human Rights and Human Trafficking*, *supra* note 18, at 796-818.
40. *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. ESCOR, Comm'n on Hum. Rts., 2002 Substantive Sess., Provisional Agenda Item 14(g), U.N. Doc. E/2002/68/Add.1 (2002) [hereinafter *Trafficking Principles and Guidelines*]. For information on how the Principles and Guidelines have been used as a normative tool, see the introductory chapter to the *Commentary to the Trafficking Principles and Guidelines*, *supra* note 38.
41. UNITED NATIONS CHILDREN'S FUND (UNICEF), GUIDELINES ON THE PROTECTION OF CHILD VICTIMS OF TRAFFICKING (2006), available at http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf [hereinafter UNICEF GUIDELINES].

sue of child victims. The office of the United Nations High Commissioner for Refugees has also issued its own guidelines on the application of international refugee law to those who have been or are at risk of being trafficked.⁴²

International normative standards on the administration of criminal justice, which build on legally enforceable rules such as the prohibition on arbitrary detention and the rights of children, are highly relevant to a consideration of the applicable legal framework around detention of victims of trafficking. Examples include the *UN Rules for the Protection of Juveniles Deprived of their Liberty*⁴³ and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.⁴⁴ 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*⁴⁵ is important, as are the more recent and comprehensive *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*⁴⁶ and 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*.⁴⁷

As with its international equivalents, regional soft law around trafficking often reiterates and expands existing legal principles, sometimes going beyond formal agreements between states. Within South East Asia, the present region of focus, major policy directives on trafficking include a memorandum of understanding on cooperation against trafficking adopted in 2004 by the six countries of the Greater Mekong Sub-region (COMMIT MOU),⁴⁸ as well as

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42. *Guidelines on International Protection: The Application of Article 1(A)(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, U.N. Doc. HCR/GIP/06/07 (2006) [hereinafter *UNHCR Trafficking Guidelines*].
 43. *Rules for the Protection of Juveniles Deprived of Their Liberty*, G.A. Res/45/113, U.N. GAOR, 45th Sess., 68th plenary mtg., Annex, U.N. Doc. A/RES/45/113 (1990); see also *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, adopted 29 Nov. 1985, G.A. Res 40/33, U.N. GAOR, 40th Sess., 96th plenary mtg., U.N. Doc. A/RES/40/33 (1985).
 44. *Principles of Detention or Imprisonment*, *supra* note 10.
 45. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted 29 Nov. 1985, G.A. Res. 40/34, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/34 (1985).
 46. *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, adopted 22 July 2005, U.N. ESCSOC Res. 2005/20, U.N. ESCOR, 2005 Substantive Sess., U.N. Doc. E/2005/INF/2/Add.1 (2005).
 47. *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 16 Dec. 2005, G.A. Res. 60/147, U.N. GAOR, 60th Sess., 64th plenary mtg., U.N. Doc. A/Res/60/147 (2006).
 48. *Memorandum of Understanding on Cooperation Against Trafficking in Persons in the Greater Mekong Sub-region*, adopted 29 Oct. 2004 in Yangon, available at http://www.no-trafficking.org/reports_docs/commit/commit_eng_mou.pdf [hereinafter COMMIT MOU]. COMMIT MOU was signed by representatives of Cambodia, China, Lao PDR, Myanmar, Thailand, and Vietnam. See also *Association of Southeast Asian Nations (ASEAN)*

a growing web of bilateral agreements that focus particularly on standards relating to the treatment of victims.⁴⁹

B. Detention of Victims: Specific Provisions

None of the international or regional treaties on trafficking cited above directly address the issue of victim detention. The drafting history of the UN Trafficking Protocol reveals that while no state argued for recognition of a right to detain victims, most resisted an explicit prohibition because they feared that it would curtail their options in dealing with undocumented or otherwise irregular migrants.⁵⁰ In sharp contrast, the *Trafficking Principles and Guidelines* explicitly addresses the issue, characterizing detention of victims as inappropriate and, implicitly, illegal. Under its provisions, states are encouraged to ensure that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.⁵¹ The *Trafficking Principles and Guidelines* recognizes that detention of victims of trafficking is often a consequence of their criminalization. The *Trafficking Principles and Guidelines* is, therefore, equally explicit on the point that victims of trafficking should not be arrested, charged, or prosecuted for status offenses—unlawful acts such as illegal migration or involvement in prostitution that are a direct consequence of trafficking.⁵²

While the European Trafficking Convention does not directly refer to the issue, detention arises 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.”⁵³ This requirement is supplemented by a detailed provision that sets out the specific measures that must be implemented to provide “effective and appropriate protection”

*Declaration Against Trafficking in Persons Particularly Women and Children, adopted on 29 Nov. 2004 by the Heads of State/Governments of ASEAN Member Countries in Vientiane, available at <http://www.aseansec.org/16793.htm>; ASEAN, *Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines* (2007) [hereinafter *ASEAN Practitioner Guidelines*], available at http://www.artipproject.org/artip-tip-cjs/tip-cjr/recent_developments/ASEAN-PG_Web_English_Final.pdf.*

49. See, e.g., *Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking, adopted 31 May 2003 in Siem Reap* [hereinafter *Cambodia-Thailand MOU*], available at http://www.no-trafficking.org/reports_docs/commit/commit_eng_mou.pdf.
50. See Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling*, *supra* note 30, at 991, 992.
51. *Id.*; *Trafficking Principles and Guidelines*, *supra* note 40, Guidelines 2.6, 6.1.
52. *Trafficking Principles and Guidelines*, *supra* note 40, princ. 7.
53. European Trafficking Convention, *supra* note 2, art. 12.2. Note that this provision will also apply to victims who have only been provisionally identified as such. *Id.* art. 10.2.

to victims from potential retaliation and intimidation, in particular during and after the investigation and prosecution processes.⁵⁴ 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.⁵⁵

Given the geographical focus of this article, it is relevant to examine the official pronouncements of South East Asian states. While most policy documents on trafficking that have emerged from this part of the world do not refer to victim detention, the position of those that do is oddly equivocal. For example, signatory states to the COMMIT MOU obligate themselves to "ensuring that persons identified as victims of trafficking are not held in detention by *law enforcement authorities*."⁵⁶ The Cambodia-Thailand MOU states that children and women who have been trafficked "shall be considered victims" and should not be prosecuted or detained *in immigration detention centers*.⁵⁷ The MOU specifies further that 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.⁵⁸ Memoranda of understanding on trafficking recently concluded by both Cambodia and Thailand with third countries reiterate this position.⁵⁹

The careful wording of these instruments reflects the current practice in South East Asia; trafficked women and children, provided they are formally identified as such, are typically detained by public or private welfare agencies, not immigration or police authorities. It is reasonable to assume that the omission of any reference to shelter detention is deliberate. The instruments seek to preserve a state's presumed entitlement to detain victims in social welfare facilities. The question of whether such an entitlement actually exists is the primary question of this study.

54. *Id.* art. 28.

55. Council of Europe, *Explanatory Report to the European Trafficking Convention*, ¶ 289, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>. 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." INT'L ORG. FOR MIGRATION, THE IOM HANDBOOK ON DIRECT ASSISTANCE FOR VICTIMS OF TRAFFICKING 113 (2007).

56. COMMIT MOU, *supra* note 48, art. 16 (emphasis added).

57. Cambodia-Thailand MOU, *supra* note 49, art. 7 (emphasis added).

58. *Id.*

59. See, e.g., *Agreement Between the Royal Government of Cambodia and the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking*, adopted 10 Oct. 2005, art. 5, available at http://www.no-trafficking.org/resources_laws_cambodia.html; *Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation to Combat Trafficking in Persons, Especially Women and Children*, adopted 9 Apr. 2009, art. 8, available at http://www.humantrafficking.go.th/pdf/MOU_thai_myanmar.pdf.

C. Detention of Victims and Obligations of Protection and Support

Those who support detention of trafficking victims in shelters often justify detention with reference to a legal obligation to provide victims with shelter and support and 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.

Are states required, as a matter of law, to shelter and support victims of trafficking? To what extent is victim consent relevant to the provision of such support and protection? States parties to the UN Trafficking Protocol are 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.⁶⁰ The Legislative Guide to the Protocol notes that these “support measures [are] intended to reduce the suffering and harm caused to victims and to assist in their recovery and rehabilitation.”⁶¹ It further notes that implementation of these provisions can provide important practical benefits including increasing victim cooperation in investigations and prosecutions and avoiding further harm such as re-victimization.⁶² While implementation of these measures is not mandatory, states parties must consider implementing them and are “urged to do so to the greatest extent possible within resource and other constraints.”⁶³

Despite the Protocol’s lack of specificity on this issue, there is some evidence of a greater recognition of an obligation, on the part of the state, to shelter and support victims. The *Trafficking Principles and Guidelines* requires states to ensure the availability of safe and adequate shelters that meet the needs of trafficked persons. The provision of safe shelters cannot be contingent on the willingness of the victims to give evidence in criminal proceedings.⁶⁴ In this context, the *Trafficking Principles and Guidelines* reiterates the position that trafficked persons should not be held in immigration detention centers, other detention facilities, or vagrant houses.⁶⁵ In South East Asia, the COMMIT MOU, the Cambodia-Thailand MOU, and other policy instruments refer to the need for victims to be provided prompt access to protection and shelter.⁶⁶ The SAARC Convention provides that states

60. UN Trafficking Protocol, *supra* note 1, art. 6.

61. UNODC, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, Part 2, ¶ 62 (2004) [hereinafter UNODC LEGISLATIVE GUIDE].

62. *Id.*

63. *Id.*

64. *Trafficking Principles and Guidelines*, *supra* note 40, princ. 8.

65. *Id.* Guideline 6.1.

66. COMMIT MOU, *supra* note 48, art. 17; Cambodia-Thailand MOU, *supra* note 49, art. 9; ASEAN Practitioner Guidelines, *supra* note 48, ¶ C.3.

“shall establish protective homes or shelters for rehabilitation of victims of trafficking.”⁶⁷

The European Trafficking Convention requires states parties to provide basic assistance to all victims or suspected victims of trafficking within their territory.⁶⁸ Such assistance cannot be reserved only for those who agree to act as witnesses or to cooperate in investigations or criminal proceedings.⁶⁹ Assistance to victims should, according to the European Convention, aim to support victims in their physical, psychological, and social recovery.⁷⁰ Importantly, as noted above, all protection and support measures, including accommodation and shelter, must be provided on a non-discriminatory, consensual, and informed basis.⁷¹

Could detention be a necessary aspect of protecting victims from further harm? In exploring this question, it must be acknowledged that trafficking is generally 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 exploitation. 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.⁷²

The UN Trafficking Protocol requires each states party to “endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.”⁷³ While this provision is somewhat soft, it nevertheless obliges states parties “to actually take at least some steps that amount to an ‘endeavour’ to protect safety.”⁷⁴ The *Trafficking Principles and Guidelines* refers directly to the responsibility of states to “protect trafficked persons . . . from further exploitation and harm”⁷⁵ and the need for states and others to “[e]nsure[] that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons.”⁷⁶ The European Traffick-

67. SAARC Convention, *supra* note 36, art. IX(3).

68. European Trafficking Convention, *supra* note 2, arts. 10.2, 12.

69. *Id.* art. 12.6. The UN Human Rights Treaty Bodies have also commented on the need to separate victim assistance from cooperation in legal proceedings. *Concluding Observations of the Committee Against Torture: Australia*, U.N. GAOR, Comm. Against Torture, 40th Sess., ¶ 32, U.N. Doc. CAT/C/AUS/CO/3 (2008); *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Netherlands*, Comm. on Elim. of Discrim. Against Women, 37th Sess., ¶ 24, U.N. Doc. CEDAW/C/NLD/CO/4 (2007).

70. European Trafficking Convention, *supra* note 2, art.12.1.

71. *Id.* arts. 3, 12.7.

72. For example, risk of retaliation from traffickers and exploiters or risk of criminalization by the State for violation of immigration or labor laws. See *further*, UNODC, *TOOLKIT TO COMBAT TRAFFICKING IN PERSONS*, *supra* note 9, at 224-40.

73. UN Trafficking Protocol, *supra* note 1, art. 6.5.

74. UNODC LEGISLATIVE GUIDE, *supra* note 61, ¶ 59. On the link between this provision and the question of resources, see *id.* ¶ 52.

75. *Trafficking Principles and Guidelines*, *supra* note 40, princs. 2, 8.

76. *Id.* Guideline 6.6.

ing Convention contains a general obligation on states parties to “take due account of the victim’s safety and protection needs.”⁷⁷ A detailed provision supplements this requirement by setting out the specific measures needed to provide “effective and appropriate protection” to victims from potential retaliation and intimidation, especially during and after the investigation and prosecution processes.⁷⁸ Once again, the caveat relating to victim consent would apply with respect to the application of these measures.

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77. European Trafficking Convention, *supra* note 2, art. 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.” *Rights of the Child, adopted* 24 Dec. 2008, G.A. Res. 63/241, U.N. GAOR, 63d Sess., Agenda Item 60(a), ¶ 50(e), U.N. Doc. A/Res/63/241 (2009), “calls upon all States . . . [i]n cases of trafficking . . . to address effectively the needs of victims, including their safety, legal assistance and protection, physical and psychological recovery and full reintegration into society;” *Trafficking in Women and Girls, adopted* 19 Dec. 2006, G.A. Res. 61/144, U.N. GAOR, 61st Sess., Agenda Item 61(a), ¶ 19, U.N. Doc. A/Res/61/144 (2007), “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, adopted* 19 Apr. 2005, C.H.R. Res. 2005/44, U.N. ESCOR, Comm’n on Hum. Rts., 61st Sess., ¶ 32, U.N. Doc. E/CN.4/Res/2005/44 (2005); *Trafficking in Women and Girls, adopted* 20 Dec. 2004, G.A. Res. 59/166, U.N. GAOR, 59th Sess., Agenda Item 98, ¶ 17, U.N. Doc. A/Res/59/166 (2005); *Trafficking in Women and Girls, adopted* 19 Apr. 2004, C.H.R. Res. 2004/45, U.N. ESCOR, Comm’n on Hum. Rts., 60th Sess., ¶ 10, U.N. Doc. E/CN.4/Res/2004/45 (2004), “Calls upon Governments to criminalize trafficking in persons . . . while ensuring protection and assistance to the victims of trafficking;” and *Strengthening International Cooperation in Preventing and Combating Trafficking in Persons and Protecting Victims of Such Trafficking, adopted* 22 Dec. 2003, G.A. Res. 58/137, U.N. GAOR, 58th Sess., Agenda Item 108, ¶¶ 6, 7, U.N. Doc. A/Res/58/137 (2004), “Also invites Member States to adopt measures . . . to provide assistance and protection to victims of trafficking” and “[f]urther invites Member States, as appropriate, to develop guidelines for the protection of victims of trafficking before, during and after criminal proceedings”.
78. European Trafficking Convention, *supra* note 2, art. 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 of the Human Rights Committee: Japan*, Hum. Rts. Comm. 94th Sess., ¶ 23, CCPR/C/JPN/CO/5 (2008); *Concluding Observations of the Human Rights Committee: Nicaragua*, Hum. Rts. Comm., 94th Sess., ¶ 9, U.N. Doc. CCPR/C/NIC/CO/3 (2008); *Concluding Observations of the Human Rights Committee: Ireland*, Hum. Rts. Comm. 93th Sess., ¶ 16, U.N. Doc. CCPR/C/IRL/CO/3 (2008); *Concluding Observations of the Human Rights Committee: Yugoslavia*, Hum. Rts. Comm. 92d Sess., ¶ 13, U.N. Doc. CCPR/C/MKD/CO/2 (2008); *Concluding Observations of the Human Rights Committee: Costa Rica*, Hum. Rts. Comm., 91st Sess., ¶ 12, U.N. Doc. CCPR/C/CRI/CO/5 (2007); *Concluding Observations of the Human Rights Committee: Czech Republic*, Hum. Rts. Comm., 90th Sess., ¶ 12, U.N. Doc. CCPR/C/CZE/CO/2 (2007); *Concluding Observations of the Human Rights Committee: Barbados*, Hum. Rts. Comm., 89th Sess., ¶ 8, U.N. Doc. CCPR/C/BRB/CO/3 (2007); *Concluding Observations of the Human Rights Committee: Bosnia & Herzegovina*, Hum. Rts. Comm., 88th Sess., ¶ 16, U.N. Doc. CCPR/C/BIH/CO/1 (2006); *Concluding Observations of the Human Rights Committee: Serbia*, Hum. Rts. Comm., 87th Sess., ¶ 16, U.N. Doc. CCPR/C/UNK/CO/1 (2006); *Concluding Observations of the Human*

D. 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 appear to be directly relevant. The first is the right to freedom of movement. The question to ask in this context is whether victim detention constitutes an unlawful interference with freedom of movement. Another important question is whether the right to freedom of movement conflicts with or modifies the application of other obligations, such as the state's obligation to protect victims from harm. The second relevant human right is the right to personal liberty and the closely related prohibition on arbitrary detention. Can the practice of detaining victims of trafficking in shelters ever amount to arbitrary detention and, if so, under what circumstances and with what consequences?

1. The Right to Freedom of Movement

In terms of its substantive content, the right to freedom of movement generally refers 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.⁷⁹ The International Covenant on Civil and Political Rights (ICCPR) explicitly recognizes and protects a right to freedom of movement,⁸⁰ as do all major regional human rights treaties.⁸¹

Rights Committee: Norway, Hum. Rts. Comm., 86th Sess., ¶ 12, U.N. Doc. CCPR/C/NOR/CO/5 (2006); *Concluding Observations of the Human Rights Committee: Brazil*, Hum. Rts. Comm., 85th Sess., ¶ 15, CCPR/C/BRA/CO/2 (2005); *Concluding Observations of the Human Rights Committee: Thailand*, Hum. Rts. Comm., 84th Sess., ¶ 21, U.N. Doc. CCPR/CO/84/THA (2005); *Concluding Observations of the Human Rights Committee: Slovenia*, Hum. Rts. Comm., 84th Sess., ¶ 11, U.N. Doc. CCPR/CO/84/SVN (2005); *Concluding Observations of the Human Rights Committee: Kenya*, Hum. Rts. Comm., 83d Sess., ¶ 25, U.N. Doc. CCPR/CO/83/KEN (2005); *Concluding Observations of the Human Rights Committee: Albania*, Hum. Rts. Comm., 82d Sess., ¶ 15, U.N. Doc. CCPR/CO/82/ALB (2004); *Concluding Observations of the Human Rights Committee: Serbia & Montenegro*, Hum. Rts. Comm., 81st Sess., ¶ 16, U.N. Doc. CCPR/CO/81/SEMO (2004); *Concluding Observations of the Human Rights Committee: Latvia*, Hum. Rts. Comm., 79th Sess., ¶ 12, U.N. Doc. CCPR/CO/79/LVA (2003); *Concluding Observations of the Human Rights Committee: Russian Federation*, Hum. Rts. Comm., 79th Sess., ¶ 10, U.N. Doc. CCPR/CO/79/RUS (2003); *Concluding Observations of the Human Rights Committee: Slovakia*, Hum. Rts. Comm., 78th Sess., ¶ 10, U.N. Doc. CCPR/CO/78/SVK (2003).

79. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 260 (2d ed. 2005).

80. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 12, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976) [hereinafter ICCPR].

81. Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 16 Sept. 1963, arts. 2-4, Europ. T.S. No. 46

The only direct reference to freedom of movement in the specific context of trafficking is contained in the *Trafficking Principles and Guidelines*, which provides that States should consider “[p]rotecting the rights of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right.”⁸² The drafters of this provision did not necessarily have the issue of victim detention in mind but were rather focused on problematic responses such as confiscation of passports and discriminatory denial of entry and exit visas.⁸³ There is, nevertheless, a clear link between freedom of movement and victim detention, and several restrictions on this right are especially relevant to the situation of trafficked persons. In particular, under the terms of the ICCPR, freedom of movement is only guaranteed to those who are lawfully within the territory of the relevant state.⁸⁴ Trafficked persons without regular migration status—often 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 lawfully within the relevant country, 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 freedoms of others.”⁸⁵ This caveat could conceivably be used by states to claim that detention of victims, irrespective of their legal status, is necessary in order to ensure the availability of witnesses, for example, or 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 ascertain whether the claimed restrictions separately violate other rights recognized in the ICCPR, such as the prohibition on discrimination.⁸⁶

The Human Rights Committee, in considering the application of this exception, has noted that freedom of movement is “an indispensable con-

(entered into force 2 May 1968); Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 22 Nov. 1984, art. 1, Europ. T.S. No. 117 (entered into force 1 Nov. 1988); African Charter on Human and Peoples’ Rights, *adopted* 27 June 1981, art. 12, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 1520 U.N.T.S. 217 (entered into force 21 Oct. 1986) [hereinafter African Charter]; American Convention on Human Rights, *signed* 22 Nov. 1969, art. 22, O.A.S. Doc. OEA/Ser.LV/II.23, doc. 21, rev. 6 (1979), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force 18 July 1978) [hereinafter American Convention].

82. *Trafficking Principles and Guidelines*, *supra* note 40, Guideline 1.5.

83. See *Commentary to the Trafficking Principles and Guidelines*, *supra* note 38.

84. ICCPR, *supra* note 80, art. 12.1.

85. *Id.* art. 12.3.

86. *Id.* On the issue of compatibility between restrictions on freedom of movement and compatibility with other rights protected in the ICCPR, see NOWAK, *supra* note 79, at 273, 274.

dition for the free development of a person."⁸⁷ Any restrictions on this right "must be provided by law, must be necessary . . . and must be consistent with all other rights."⁸⁸ 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.⁸⁹

In deciding whether shelter detention violates the right to freedom of movement of an individual who is lawfully within the country, it is necessary to ask whether that detention 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. The article addresses these issues further below.

2. *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 procedure as are established by law."⁹⁰ Similar provisions can be found in all major regional human rights treaties.⁹¹ In determining its scope and applicability, it is important to note that the right to liberty is not absolute. International law recognizes that states retain the ability to use measures that deprive people of their liberty. Deprivation of liberty only becomes problematic when it is unlawful and arbitrary.⁹² States should make sure to precisely define those cases in which deprivation of liberty is permissible. The principle of legality is violated if

87. *Freedom of Movement, Article (12)*, General Comment No. 27, adopted 18 Oct. 1999, U.N. GAOR, Hum. Rts. Comm., 67th Sess., at 174, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add. 9 (1999).

88. *Id.* ¶ 11.

89. *Id.* ¶¶ 14-15.

90. ICCPR, *supra* note 80, art. 9.

91. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, art. 5.1, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953) [hereinafter *European Convention on Human Rights*]; African Charter, *supra* note 81, art. 6; American Convention, *supra* note 81, art. 7.1.

92. NOWAK, *supra* note 79, at 211; see also *The Right to Liberty and Security of Persons*, General Comment No. 8, adopted 30 June 1982, U.N. GAOR, Hum. Rts. Comm., 16th Sess., at 130, U.N. Doc. HRI/GEN/1/Rev.6 (2003).

someone is detained on grounds that are not clearly established in domestic law or are contrary to such law.⁹³

The prohibition on arbitrariness represents a second requirement for states in relation to deprivation of liberty.⁹⁴ In other words, it is not enough that the national law permits detention of victims of trafficking. That law itself must not be arbitrary, and its application must not take place arbitrarily.⁹⁵ The term “arbitrary” refers to elements of injustice, unpredictability, unreasonableness, capriciousness, and lack of proportionality, as well as the principle of due process of law.⁹⁶ The Human Rights Committee has confirmed that the prohibition on arbitrariness requires legally authorized detention to be reasonable and necessary in all circumstances of the case, and to be proportionate means to achieve a legitimate aim.⁹⁷

Deprivation of liberty provided by law must not be “manifestly disproportional, unjust or unpredictable.”⁹⁸ The manner in which someone makes a decision to deprive an individual of his or her liberty must be appropriate and proportional in light of the circumstances of the case.⁹⁹ Importantly, a detention situation that was originally not arbitrary might become so if the detention continues without proper justification.¹⁰⁰ Regional human rights courts have confirmed that indefinite detention, particularly detention that is disproportionate or discriminatory, such as between nationals and non-nationals, violates the fundamental right to protection from arbitrary detention.¹⁰¹

Finally, international law requires states to ensure that necessary procedural guarantees are in place to identify and respond to situations of unlaw-

93. NOWAK, *supra* note 79, at 224; Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 114, 130 (Louis Henkin ed., 1981).

94. NOWAK, *supra* note 79, at 224.

95. *Id.*; SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 308 (2d ed. 2004).

96. NOWAK, *supra* note 79, at 225; JOSEPH, SCHULTZ & CASTAN, *supra* note 95, at 156, 308, 309; see also *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, General Comment No. 16, *adopted* 8 Apr. 1988, U.N. GAOR, Hum. Rts. Comm., 32d Sess., at 142, ¶ 4, U.N. Doc. HRI/GEN/1/Rev.6 (2003): “The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”

97. *van Alphen v. The Netherlands*, Communication No. 305/1988, *adopted* 15 Aug. 1990, U.N. GAOR, Hum. Rts. Comm., 39th Sess., ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (1990); *A v. Australia*, Communication No. 560/1993, *adopted* 30 Apr. 1997, U.N. GAOR, Hum. Rts. Comm., 59th Sess., ¶ 9.2, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

98. NOWAK, *supra* note 79, at 225.

99. *Id.*

100. *Id.* at 226.

101. See, e.g., *A. v. United Kingdom*, App. No. 3455/05, Eur. Ct. H. R. (2009) (finding a violation of article 5 of the European Convention).

ful 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 that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."¹⁰² Additionally, "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."¹⁰³

Under this analysis, it is evident that the detention of victims of trafficking in shelters can amount to unlawful deprivation of liberty and violate the prohibition on arbitrary detention. The likelihood of shelter detention being characterized as unlawful or arbitrary is particularly high if: domestic law does not provide for such detention or if the detention is imposed contrary to law; detention is provided for or imposed in a discriminatory manner; detention is imposed for a prolonged, unspecified, or indefinite period; detention is unjust, unpredictable, or disproportionate; or detention is not subject to judicial or administrative review that confirms its legality and continued necessity under the circumstances, with the possibility for release where no grounds for its continuation exist.

E. Discrimination on the Basis of Sex

As noted above, all research undertaken in connection with this article confirmed that the overwhelming majority of trafficked persons detained in shelters are female. Women and girls are more likely to be identified through official channels as trafficked. Therefore, they are more likely than men and boys to enter formal and informal protection systems. The larger percentage of women and girls detained in shelters 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. Until very recently, the laws of Thailand did not recognize the possibility that men could be trafficked.¹⁰⁴ While the pre-2008 laws of Cambodia were unclear on this point, no prosecutions were brought under the relevant laws for trafficking in men or for trafficking for purposes other than sexual exploitation (prostitution).¹⁰⁵ As a direct consequence of this situation, adult male victims

102. ICCPR, *supra* note 80, art. 9.4.

103. *Id.* art. 9.5.

104. The Measures in Prevention and Suppression of Trafficking in Women and Children Act B.E. 2540 (1997) (Thail.).

105. Law on Suppression of the Kidnapping, Trafficking, and Exploitation of Human Persons (29 Feb.1996) (Cambodia).

of trafficking have been ineligible for public or privately available shelter and protection. Even in countries that have incorporated a wider understanding of trafficking into their laws, the myth that “men migrate and women are trafficked” is difficult to shift. One practical result of higher female identification rates is that females end up in shelters, or what are euphemistically referred to as “rehabilitation centers.” Male victims are more often either not identified at all, or they are misidentified as illegal migrants, transferred to immigration detention facilities, and eventually deported.

The arguments advanced in favor 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 more than their male counterparts. Females, both women and girls, are also perceived as less competent to make decisions about their own safety, well-being, and future. It is not surprising that many shelters for trafficking victims in South East Asia are either modeled on, or have evolved from, institutions and arrangements originally designed to rehabilitate female sex workers.¹⁰⁶

Given this situation, is it possible to argue that detention of victims in shelters constitutes unlawful discrimination on the basis of sex?¹⁰⁷ Human rights treaties, both international and regional, prohibit discrimination on a number of grounds including race, sex, language, religion, property, birth, or other status.¹⁰⁸ The prohibition on discrimination on the basis of sex requires states parties to take action to prevent private as well as public acts of discrimination.¹⁰⁹ The prohibition on sex-based discrimination is also related

106. This feature is not as pronounced in Central and Eastern Europe where aspects of trafficking shelter policy have evolved from the domestic violence/assistance to women model. See, e.g., Brunovskis & Surtees, *Agency or Illness*, *supra* note 12, at 62-64.

107. 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 37, art. 1.

108. U.N. Charter, art. 1, ¶ 3 *signed* 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (*entered into force* 24 Oct. 1945); ICCPR, *supra* note 80, arts. 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., arts. 2, 3, 7, U.N. Doc. A/6316 (1996), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976); African Charter, *supra* note 81, arts. 2, 18(3); American Convention, *supra* note 81, art. 1; European Convention on Human Rights, *supra* note 91, art. 14.

109. See, e.g., *Equality of Rights Between Men and Women (Article 3)*, General Comment No. 28, *adopted* 29 Mar. 2000, U.N. GAOR, Hum. Rts. Comm., 68th Sess., at 179 ¶ 4, U.N. Doc. CCRP/C/21/Rev./Add. 10 (2000): “Articles 2 and 3 mandate States parties

to, and reinforces, the duty of equal application of the law.¹¹⁰ In relation to trafficking, various UN bodies have passed resolutions calling on governments to ensure that the treatment of female victims is consistent with the internationally recognized principle of non-discrimination.¹¹¹

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 towards women and girls, should suffice 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 support a claim of unlawful deprivation of liberty and/or arbitrary detention.

F. 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 offense.¹¹² Victims of trafficking who are in a shelter situation that they cannot immediately leave are entitled to the legal protections that international law affords detainees. These include the following:

- Detainees have the right to be “treated with humanity and with respect for the inherent dignity of the human person;”¹¹³

to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions both in the public and private sector which impair the equal enjoyment of rights”; see also THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 60 (1986); HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000).

110. ICCPR, *supra* note 80, art. 26, 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 guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex.”
111. *Trafficking in Women and Girls*, adopted 18 Dec. 2008, G.A. Res. 63/156, U.N. GAOR, 63d Sess., Agenda Item 56(a), ¶ 18, U.N. Doc. A/Res/63/156 (2009); *Trafficking in Women and Girls*, G.A. Res. 61/144, *supra* note 77, ¶ 18; *Trafficking in Women and Girls*, G.A. Res. 59/166, *supra* note 77, ¶ 16; *Trafficking in Women and Girls*, C.H.R. Res. 2004/45, *supra* note 77, ¶ 12.; *Strengthening International Cooperation in Preventing and Combating Trafficking in Persons and Protecting Victims of Such Trafficking*, *supra* note 77, ¶ 8. Note also *Equality of Rights Between Men and Women (Article 3)*, *supra* note 109, ¶ 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.
112. *Principles of Detention or Imprisonment*, *supra* note 10.
113. ICCPR, *supra* note 80, art.10.1; *Principles of Detention or Imprisonment*, *supra* note 10, princ. 1.

- The rights and special status of women and juvenile detainees are to be respected;¹¹⁴
- Detained persons shall be held only in officially recognized places of detention, and their family and legal representatives are to receive full information;¹¹⁵
- Decisions about the duration and legality of detention are to be made by a judicial or equivalent authority;¹¹⁶
- The detainee shall have the right to be informed of the reason for detention and any charges against her or him;¹¹⁷
- Detainees have the right to contact with the outside world, to visits from family members, and to communicate privately and in person with a legal representative;¹¹⁸
- 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;¹¹⁹
- Every detainee shall have the right to appear before a judicial authority and to have the legality of her or his detention reviewed.¹²⁰

G. The Special Legal Situation of Children

*"I don't know why they are keeping me here. I didn't do anything wrong. I don't like it here. I want to go home."*¹²¹

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114. ICCPR, *supra* note 80, art.10.2; CRC, *supra* note 37, arts. 37, 40; *Principles of Detention or Imprisonment*, *supra* note 10, princ. 5(2); Standard Minimum Rules for the Treatment of Prisoners, *adopted* 1955, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *approved by* ECOSOC Res. 663C (XXIV) (31 July 1957) and amended by ECOSOC Res. 2076 (LXII) (13 May 1977), Rules 8, 21(2), 23, 53, 71(5), 77, 85(2) [hereinafter SMR]; *Rules for the Protection of Juveniles Deprived of their Liberty*, *supra* note 43, Rules 1-8.
115. *Principles of Detention or Imprisonment*, *supra* note 10, princs. 12, 16(1); SMR, *supra* note 114, Rules 7, 44(3), 92.
116. ICCPR, *supra* note 80, art. 9.4; *Principles of Detention or Imprisonment*, *supra* note 10, princs. 32, 37.
117. ICCPR, *supra* note 80, art. 9.2; *Principles of Detention or Imprisonment*, *supra* note 10, princs. 10, 11, 12(2), 14.
118. ICCPR, *supra* note 80, art. 14; *Principles of Detention or Imprisonment*, *supra* note 10, princs. 15, 17, 18, 19; SMR, *supra* note 114, Rules 92, 93.
119. ICCPR, *supra* note 80, art. 10.1; *Principles of Detention or Imprisonment*, *supra* note 10, princs. 1, 22, 24, 25, 26; SMR, *supra* note 114, Rules 9-14, 15-26, 66, 82-83, 86-88, 91.
120. ICCPR, *supra* note 80, art. 9.4; *Principles of Detention or Imprisonment*, *supra* note 10, princ. 32.
121. INT'L LABOUR ORG., CHILD-FRIENDLY STANDARDS AND GUIDELINES FOR THE RECOVERY AND INTEGRATION OF TRAFFICKED CHILDREN 34 (2006) (quoting a child victim of trafficking in a closed shelter in Thailand).

Child victims of trafficking appear to be detained in shelters more often, and for longer periods, than adults. While children are naturally included in all the relevant norms and standards referred to above, international law recognizes the particular vulnerabilities and needs of children and 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)¹²² and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (CRC Optional Protocol).¹²³ Other applicable instruments include the *Rules for the Protection of Juveniles Deprived of their Liberty*¹²⁴ and the *UNICEF Trafficking Guidelines*.¹²⁵ The *Trafficking Principles and Guidelines* also contains very specific provisions on the care and treatment of children who have been trafficked.¹²⁶

In relation to the issue of shelter detention, it is important to recognize some fundamental differences between children and adults. A critical source of vulnerability for children lies in their lack of full agency—in fact and under law.¹²⁷ Children's 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 in trafficking cases because the deliberate separation of children from parents or guardians is a common strategy to facilitate exploitation. In some cases, parents or caregivers are or have been complicit in the trafficking of the child.

The obligation to protect trafficking victims from further harm has different implications for children as compared to adults because children are more vulnerable. 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 harm, including re-trafficking. Recent reports of children being improperly removed from shelters by their exploiters confirm these dangers.¹²⁸ For these reasons, the relevant laws, principles, and guidelines emphasize the importance of ensuring that the child is appointed a legal guardian who is able to act in that child's best interests until a durable solution is identified and implemented.¹²⁹

122. CRC, *supra* note 37.

123. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *adopted* 25 May 2000, U.N. Doc. A/RES/54/263 (2000), 2171 U.N.T.S. 227 (*entered into force* 18 Jan. 2002) [hereinafter CRC Optional Protocol].

124. *Rules for the Protection of Juveniles Deprived of Their Liberty*, *supra* note 43.

125. UNICEF GUIDELINES, *supra* note 41.

126. *Trafficking Principles and Guidelines*, *supra* note 40, Guideline 8.

127. 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 80, art. 24.

128. See, e.g., U.S. TIP REPORT 2008, *supra* note 11, at 30 (citing improper removal of children from shelters in China, Ghana, India, the Netherlands, and United Kingdom).

129. *Trafficking Principles and Guidelines*, *supra* note 40; UNICEF GUIDELINES, *supra* note 41, Guideline 4.1. While the UN Trafficking Protocol is silent on this point, the Commentary to the Protocol encourages states parties to consider:

Typical tasks of a guardian would include: ensuring that the child's best interests remain paramount in all actions or decisions taken with respect to the child;¹³⁰ 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.¹³¹

These additional considerations do not take away from the fact that children who are placed in safe and secure accommodation are "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 exacting and are governed by the overriding principle of respect for the child's best interests. The strict rules surrounding juvenile detention reflect 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.¹³² This prohibition extends beyond penal detention to include deprivation of liberty on the basis of the child's welfare, health, and protection. It is therefore directly relevant to the situation of child victims of trafficking who are detained in shelters.¹³³ International law requires any form of juvenile detention to conform to the law, be used only as a last resort, and be imposed for the shortest appropriate period of time.¹³⁴

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 61, ¶ 65(a). The European Trafficking Convention, *supra* note 2, art. 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 stated that "the appointment of a competent guardian . . . serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child" and recommended that states appoint a guardian as soon as an unaccompanied or separated child is identified. *Treatment of Unaccompanied or Separated Children Outside Their Country of Origin*, General Comment No. 6, adopted 3 June 2005, U.N. GAOR, Comm. on the Rts. of the Child, 39th Sess., ¶¶ 21, 33, U.N. Doc. CRC/GC/2005/6 (2005).

130. 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 CRC, *supra* note 37, art. 3.1.
131. UNICEF GUIDELINES, *supra* note 41, Guideline 4.2; see also *Treatment of Unaccompanied or Separated Children Outside Their Country of Origin*, *supra* note 129, ¶ 33.
132. CRC, *supra* note 37, art. 37(b).
133. *Rules for the Protection of Juveniles Deprived of Their Liberty*, *supra* note 43, ¶ 11(b), 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."
134. CRC, *supra* note 37, art. 37(b); *Rules for the Protection of Juveniles Deprived of Their Liberty*, *supra* note 43, ¶ 2; *Treatment of Unaccompanied or Separated Children Out-*

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.¹³⁵ Additional, more detailed rules concern the separation of child detainees from adults;¹³⁶ the right of the detained child to maintain contact with his or her family through correspondence and visits;¹³⁷ the right of the detained child to prompt access to legal and other appropriate assistance;¹³⁸ and 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.¹³⁹ Detained children are further entitled to support for their physical and psychological recovery and social reintegration in an environment that fosters the health, self-respect, and dignity of the child.¹⁴⁰ International law also provides that each case involving deprivation of a child's liberty should be handled expeditiously.¹⁴¹

The above analysis confirms that decisions impacting the welfare and well-being of children must be made on a case-by-case basis and with a view to ensuring the best interests of that individual child. The routine detention of child victims of trafficking in shelter facilities cannot be legally justified on the basis of protection, best interests, or any other principle cited in this section.

side Their Country of Origin, *supra* note 129, ¶ 61; *Concluding Observations of the Committee on the Rights of the Child: Netherlands*, Comm. on the Rts. of the Child, 35th Sess., ¶ 54, U.N. Doc. CRC/C/15/Add.227 (2004); *Concluding Observations of the Committee on the Rights of the Child: Canada*, Comm. on the Rts. of the Child, 34th Sess., ¶ 47, U.N. Doc. CRC/C/15/Add.215 (2003).

135. CRC, *supra* note 37, art. 37(c).

136. *Id.* art. 37(c); *Rules for the Protection of Juveniles Deprived of Their Liberty*, *supra* note 43, ¶ 29; *Treatment of Unaccompanied or Separated Children Outside Their Country of Origin*, *supra* note 129, ¶ 63.

137. CRC, *supra* note 37, art. 37(c); *Rules for the Protection of Juveniles Deprived of Their Liberty*, *supra* note 43, ¶ 59; *Treatment of Unaccompanied or Separated Children Outside Their Country of Origin*, *supra* note 129, ¶ 63.

138. CRC Optional Protocol, *supra* note 123, art. 8; UNICEF GUIDELINES, *supra* note 41, Guidelines 4.2, 7.1, 9.2.1, 10.1, 10.2; *Treatment of Unaccompanied or Separated Children Outside Their Country of Origin*, *supra* note 129, ¶ 63.

139. CRC, *supra* note 37, art. 37(d). See also *Concluding Observations of the Committee on the Rights of the Child: Canada*, *supra* note 134, ¶ 47.

140. CRC, *supra* note 37, art. 39; CRC Optional Protocol, *supra* note 123, art. 8; UNICEF GUIDELINES, *supra* note 41, Guidelines 7.1, 7.2. See also *Concluding Observations: Nepal*, Comm. on the Rts. of the Child, 35th Sess., ¶ 96, U.N. Doc. CRC/C/15/Add.261 (2005); *Concluding Observations of the Committee on the Rights of the Child: Armenia*, Comm. on the Rts. of the Child, 35th Sess., ¶ 67, U.N. Doc. CRC/C/15/Add.225 (2004); *Concluding Observations of the Committee on the Rights of the Child: Myanmar*, Comm. on the Rts. of the Child, 35th Sess., ¶ 73, U.N. Doc. CRC/C/15/Add.237 (2004).

141. CRC Optional Protocol, *supra* note 123, art. 8.1(g); UNICEF GUIDELINES, *supra* note 41, Guideline 8.

H. Key Findings on the Law

Routine detention of victims or suspected victims of trafficking in shelters violates a number of international law principles and is, *prima facie*, unlawful. In some circumstances, routine detention of victims of trafficking violates the right to freedom of movement. In most, if not all circumstances, detention also violates the prohibitions on unlawful deprivation of liberty and arbitrary detention. International law prohibits 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 inherently discriminatory and, therefore, unlawful. Routine detention of trafficked children also directly contradicts international law and cannot be justified under any circumstances.

The analysis supports a contention that states may, on a case-by-case basis, 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 validity of any such defense. Application of these principles would most likely only support a claim of lawful detention where detention is administered as a last resort in response to credible and specific threats to an individual victim's safety. However, even when these basic tests are satisfied, a range of protections must be in place to ensure that the rights of the detained person are respected and protected. Such measures should include, but are not limited to, judicial oversight to determine the continued legality and necessity of the detention as well as an enforceable right to challenge the fact of detention. Failure of the state to prevent unlawful victim detention by public or private agencies contravenes the international legal responsibility of that state. Victims may be eligible for remedies, including compensation, for this unlawful detention.

In relation to child victims of trafficking, international law recognizes children's special needs and special vulnerabilities. While these may impose greater duties on the state when it comes to the shelter and protection of children, they do not translate into a legal justification for undifferentiated detention. 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 case that there is no reasonable option available 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 detention is legally justified.

III. THE POLICY ARGUMENTS FOR VICTIM DETENTION

In considering the issue of victim detention in shelters, the link between law and policy is a critical one. The above analysis confirmed that while practices involving the routine detention of victims in shelters will invariably be unlawful, there exists a narrow band of situations where individual detention decisions can be justified by reference to the circumstances of a specific case or to special policy considerations. Accordingly, the question of whether a particular detention is lawful may ultimately depend on whether detention is the only way for the state to honor 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 effectively prosecute traffickers. It is not possible to evaluate the legal strength of such claims without examining the validity of the underlying policies. This section considers the practical and strategic implications of the various policy arguments that are commonly advanced in favor of victim detention. This section frames and considers those arguments with particular reference to victim detention practices in Cambodia and Thailand.¹⁴²

A. Victims Consent to Shelter Detention

Managers of closed shelters in some countries, including both Thailand and Cambodia, have claimed that victims are not detained in the legal sense because they provide consent. Shelters report that, upon entry, victims agree to accept the rules of the shelter and to stay there for a certain period of time without attempting to leave.¹⁴³ In some cases, the time period is short and clearly stipulated. In other cases, the agreement is much less clear.¹⁴⁴

It is important to consider the “consent” given by victims of trafficking—particularly when the consent relates to a situation that restricts their

142. Unless otherwise cited, the information in this section references the authors’ own research.

143. Asia Regional Cooperation to Prevent People Trafficking (ARCPPT) Interview with AFESIP, in Phnom Penh, Cambodia (1 Mar. 2006) [hereinafter AFESIP Interview]. At this time, victims arriving at AFESIP’s temporary care center 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 currently sign a consent form stating they voluntarily agree to stay at the shelter for a fixed period of time. ARCPPT Interview with Baan Kredtrakarn management, in Bangkok, Thailand. (17 Jan. 2006) [hereinafter Baan Kredtrakarn Interview I]. Confirmed in subsequent Asia Regional Trafficking in Persons Project (ARTIP) interview with Baan Kredtrakarn management, in Bangkok, Thailand. (12 Jun. 2007) [hereinafter Baan Kredtrakarn Interview II], and in discussions with government officials in Apr.-May 2009.

144. *Id.*

movement or otherwise impinges on their rights and freedoms. Victims may not fully understand their legal rights and the various options available to them, or even have such matters properly explained to them.¹⁴⁵ They may not understand, for example, that they are entitled to decline an offer of assistance. Shock, trauma, or language difficulties may further compromise their capacity to comprehend the situation and to make decisions. In the case of foreign victims, the quality of any consent to shelter detention is called into serious question when the only other offered alternative is arrest and removal to an immigration detention facility.

Victim consent to shelter detention tends to be a one time 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 changes her mind. The only people who are available to consult are shelter staff or other detained victims. If in fact the option exists, shelter managers may not explain to the residents that they can leave. Given the trauma and lack of autonomy associated with trafficking, victims will likely be reluctant to risk negative repercussions by speaking up. For foreign victims, the irregularity of their migration situation can mean that immediate release is not possible, even if a right to leave exists in theory. A request to leave the major, government-run Thai shelter, for example, is not granted until the necessary papers are authorized, a process that can take many months or even years.¹⁴⁶

International human rights law has long recognized that the intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which that personal freedom is taken away.¹⁴⁷ The international community has used a similar line of reasoning to conclude that persons cannot consent to being trafficked.¹⁴⁸ The notion that an individual could actually

145. Research in the Balkans and South East Europe has confirmed the findings of the present researchers 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, LISTENING TO VICTIMS, *supra* note 12, at 178 (quoting a victim).

146. Baan Kredtrakarn Interview II, *supra* note 143. Confirmed in discussions with government officials, Apr.-May 2009.

147. This issue came before the drafters of the both the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions, and Practices Similar to Slavery and the ICCPR in the context of proposals to add the qualification "involuntary" to servitude. The proposal was rejected, in both instances, on the grounds that "it should not be possible for any individual to contract himself into bondage." *Annotations on the Text of the Draft International Covenants on Human Rights*, U.N. GAOR, 10th Sess., Agenda Item 28, at 33, U.N. Doc. A/2929 (1955). The European Commission on Human Rights has confirmed that "[p]ersonal liberty is an inalienable right which a person cannot voluntarily abandon." FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 78 (2d ed. 1996) (quoting Report of the Commission in *De Wilde v. Belgium* ("Vagrancy Cases"), 10 Eur. Comm'n H.R. (ser. B) 91 (1969)),

148. UN Trafficking Protocol, *supra* note 1, art. 2.

consent to her or his own detention is similarly counter-intuitive. If the victim has freely agreed to stay in a shelter, she or he is not in fact being detained, provided that the victim has an option to leave the shelter at any time. The moment that a victim who has agreed to stay in a shelter cannot freely exercise the option to leave, however, that person's situation becomes one of detention.

B. Victims Have No Legal Status

In some countries, such as Cambodia and, until very recently, Thailand,¹⁴⁹ the relevant legal framework does not allow migrant victims of trafficking to receive even temporary residence permits.¹⁵⁰ These countries commonly cite the inability to regulate migration status, and the resulting potential for foreign victims to be apprehended for violation of immigration laws, as a reason to keep foreign victims within government-run or government-approved shelters.¹⁵¹ A much larger group of countries uses this same reasoning to justify the detention of victims of trafficking in immigration detention centers.¹⁵²

Victim detention is a drastic response to a lack of legal status and is not the only solution to a problem that affects the vast majority of individuals who are trafficked across international borders. In many parts of the world, trafficked persons now have at least the possibility of securing temporary residence permits that allow them to remain in the country of destination for a stipulated period of time.¹⁵³ This measure is an essential step in obtaining

149. The new Thailand Anti-Trafficking Act, *supra* note 29, § 37, 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 Thailand Prostitution Act, *supra* note 26, and laws on child and juvenile safety have, up to the present time, provided legal justification for victim detention in shelters and have mandated that residents who "escape" the shelter may be pursued by authorized persons and returned.

150. Note that Article 9 of Cambodia's (non-binding) Internal MOU, *supra* note 23, 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.

151. Baan Kredtrakarn Interview II, *supra* note 143. While a foreign victim is temporarily housed at the shelter, investigating officers may apply for a waiver under Article 54 of the Immigration Act B.E. 2522 (1979) after having questioned the victim.

152. The most recent US TIP Report provides a multitude of examples of victims or suspected victims of trafficking being detained in immigration detention centers including in Antigua and Barbuda (at 64); Bahrain (at 73); Ethiopia (at 133); Lebanon (at 185); Macau (at 192); Mauritania (at 204); Morocco (at 213); Oman (at 231); Saudi Arabia (at 252); South Africa (at 262); and Trinidad (at 285). U.S. TIP REPORT 2009, *supra* note 11. The authors' own experiences suggest that despite innovations such as temporary residence permits (see below), this practice is widespread, affecting, to a greater or lesser degree, most major countries of destination including those of Western Europe, North America, and Oceania.

153. See discussion of EU Legislation, *supra* note 16. On the European system of short-term residency permits, see Gallagher, *Recent Legal Developments*, *supra* note 34, at 167–69.

and sustaining the cooperation of individuals who fear for their safety and who have little to gain by cooperating with criminal justice authorities in the investigation and prosecution of human trafficking cases.¹⁵⁴ The understanding that irregular status compromises victim safety and renders unlikely their cooperation in criminal justice proceedings against traffickers was a major factor behind the establishment of temporary residence permits for victims of trafficking in Europe.¹⁵⁵

C. Victims Will Run Away

Supporters of detention routinely argue 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 and support to victims. That concern can be especially acute when the runaway is a child. Immigration authorities may be concerned about victims without legal status who would otherwise have been placed in immigration detention. Sometimes criminal justice officials fear that their valuable witnesses will escape. Runaways are indeed a considerable problem in closed shelters.¹⁵⁶ The typical closed shelter structure is often too controlling for a victim of trafficking who has recently emerged from long-term exploitation that undoubtedly included severe restrictions on movement.¹⁵⁷

Open shelters also experience problems when victims leave before the shelter considers them ready to do so.¹⁵⁸ In response to that problem, these

Since then, most EU countries have introduced some form of temporary residence permit either meeting or exceeding the minimum requirements of the EU Council Directive. Australia, Bosnia, Brazil, Nigeria, and the United States are among other countries to have embraced short-term residence permits for victims.

154. Note, however, that in some countries of South Eastern Europe, the provision of temporary residence permits has not ended the practice of victim shelter detention. See further BRUNOVSKIS & SURTEES, *WHEN VICTIMS DECLINE ASSISTANCE*, *supra* note 12; SURTEES, *LISTENING TO VICTIMS*, *supra* note 12.

155. Gallagher, *Recent Legal Developments*, *supra* note 34.

156. 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." AFESIP Interview, *supra* note 143. On the situation in shelters of the Balkans and South East Europe, see SURTEES, *LISTENING TO VICTIMS*, *supra* note 12; BRUNOVSKIS & SURTEES, *WHEN VICTIMS DECLINE ASSISTANCE*, *supra* note 12.

157. AFESIP Interview, *supra* note 143. This view was confirmed in follow-up interviews held in May and June 2009.

158. A representative of one Cambodian shelter that declares itself to be open 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 with CCPCR, in Phnom Penh, Cambodia (18 May 2007).

shelters examine the reasons why victims with a choice do not want to stay in the shelter and adjust their own approach accordingly. Certainly, shelters that provide services on a consensual basis experience more stability among clients.¹⁵⁹ Some open shelters have found that 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.¹⁶⁰

Dealing with runaways is not just about allowing freedom of movement. Shelters must also ensure that victims' needs are met in other ways and that the environment does not in any way replicate their trafficking experiences. Interviews with those who left or were in the process of leaving closed shelters in Thailand revealed a range of grievances including the fact of detention, the strict rules-based environment, boredom, and hostile, patronizing staff.¹⁶¹ Those interviewed uniformly expressed the view that almost all shelter residents did not want to be there, did not wish to cooperate with criminal justice agencies, and often wanted to run away.¹⁶² Victims of trafficking, particularly those in Thailand, are afraid of shelters, will often deny their experiences, and will even accept a criminal charge in order to be deported rather than be processed through a shelter.¹⁶³ The principal fear, expressed to NGO workers and police, is of the indeterminate detention that precedes inevitable deportation/repatriation.¹⁶⁴

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159. ARTIP Interview with Cambodian Women's Crisis Centre (CWCC), in Phnom Penh, Cambodia (14 Dec. 2005) [hereinafter CWCC Interview]. 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."
160. See BRUNOVSKIS & SURTEES, WHEN VICTIMS DECLINE ASSISTANCE, *supra* note 12; SURTEES, LISTENING TO VICTIMS, *supra* note 12.
161. In 2007, ARTIP surveyed twenty-three Lao women and girls about to be returned to Lao PDR after having stayed in Baan Kredtrakarn for periods ranging from two months to almost two years. All interviewees 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. Baan Kredtrakarn Interview II, *supra* note 143.
162. Baan Kredtrakarn Interview II, *supra* note 143.
163. ARTIP Interview with Labour Protection Network (an NGO working with Burmese migrants), in Samut Sakon, Thailand. (28 June 2007); ARTIP Interview with CCSD, Royal Thai Police, in Bangkok, Thailand. (23 May 2007). Confirmed in follow-up interviews held in May and June 2009.
164. *Id.*

D. 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 the safety and security of that person and other victims with whom she is held. While this rationale is too important to be rejected outright, it is worth noting that the use of closed shelters rarely correlates precisely with established security concerns.¹⁶⁵ The research conducted for this article did not uncover a single instance of detention that could be defended with reference to an individualized risk assessment. Another worrying sign is that the need to confine victims to shelters “for their own protection” is only articulated and defended in relation to women and children. In almost every country, protective detention is a highly unusual response to even the most violent crimes. For example, no one has ever seriously suggested that victims of domestic violence be detained for their own protection, even in situations where the risk of re-victimization is extremely high.

Clearly the issue of security is important. As noted in the previous section, states have an obligation to protect victims of trafficking from further harm, particularly when the individual is a child. In order to meet that obligation, the state must identify credible threats and respond to them appropriately and in proportion to their likelihood and severity. However, it is also evident that as a legal and practical matter, victim detention 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 individual victim from further harm. Open and closed shelters in Cambodia have dealt with serious security threats.¹⁶⁶ The former have chosen options other than detention to defuse these situations and

165. REBECCA SURTEES, NEXUS INSTITUTE, *WHY SHELTERS? CONSIDERING RESIDENTIAL APPROACHES TO ASSISTANCE* (2008).

166. 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 ninety women and girls. While some used this case 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. For a range of views on this incident and its implications, see Press Release, Adam Ereli, Deputy Spokesman, U.S. Dep't of State, Cambodia—Attack on Trafficking Shelter (9 Dec. 2004), available at <http://www.america.gov/st/washfileenglish/2004/December/20041210131143ajesrom0.0761835.html>; Press Release, AFESIP Int'l, Official AFESIP Press Statement on Events (12 Dec. 2004), available at http://www.humantrafficking.org/uploads/updates/afesip_press_statement.pdf; Elise Labott, *U.S. Raps Cambodia over Sex Trade*, CNN.COM INT'L, 15 Dec. 2004, available at <http://edition.cnn.com/2004/US/12/14/cambodia.us.sex/>.

protect their clients. These options 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 continuous staff presence at appropriate levels, and ensuring good relations with local police so that 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 that the shelter could contact the police at all times.¹⁶⁷ In other parts of the world, the shelter model itself is being called into question as alternatives, including community integration, offer a greater degree of personal security to victims.¹⁶⁸

As noted above, 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 to persuade victims to consent to entering and remaining in shelters.¹⁶⁹ The quality of such consent must be called into question in the absence of appropriate and individualized risk assessment. The negative psychological impact of amplifying fear and risk in order to secure victim “consent” to shelter detention should also be considered.

The experiences of countries outside South East Asia confirm the need for individual risk assessment and the possibility of protecting victims without resorting to detention. 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, such as on the use of mobile phones, may be imposed in very serious cases or during the period immediately following a victim’s 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.¹⁷⁰ Interestingly, managers of Italian shelters report that threats to the safety of victims and shelter staff have decreased significantly over the years as the response to trafficking has matured with better victim support and protection, and the number of investigations and convictions of traffickers has increased.¹⁷¹

167. CWCC Interview, *supra* note 159.

168. *See, e.g.,* REBECCA SURTEES & SUSAN SOMACH, USAID, METHODS AND MODELS FOR MIXING SERVICES FOR VICTIMS OF DOMESTIC VIOLENCE AND TRAFFICKING IN PERSONS IN EUROPE AND EURASIA 15-32 (2008).

169. SURTEES, LISTENING TO VICTIMS, *supra* note 12; BRUNOVSKIS & SURTEES, WHEN VICTIMS DECLINE ASSISTANCE, *supra* note 12.

170. *See further,* ON THE ROAD, SOCIAL PROTECTION AND ASSISTANCE INTERVENTIONS ADDRESSED TO THE VICTIMS OF TRAFFICKING: DESCRIPTION OF THE ITALIAN SYSTEM (n.d.), available at <http://victimsoftrafficking.esclavagemoderne.org/pdf/SocialProtectionAssistance.pdf>.

171. Interview with Management of Italian shelter for victims of trafficking, Associazione Differenza Donna, in Rome, Italy (3 Nov. 2005); follow-up (May 2009).

E. Victims Are Needed for Investigations and Prosecutions

Criminal justice imperatives are often cited as a key justification for victim detention. Victims who cooperate in the investigation and prosecution of trafficking cases may indeed be vulnerable to threats and intimidation from traffickers. Victims may also be tricked or bribed into terminating their cooperation. Those who support detention of victims in shelters see detention as serving two purposes: protecting victims from these dangers and ensuring their availability to participate as witnesses in trafficking cases.

Victims do have a critical role to play in the criminal prosecution of traffickers and their accomplices. Investigations and prosecutions are usually difficult, and sometimes impossible, without the cooperation and testimony of victims. The preference of law enforcement personnel to detain victim witnesses is certainly understandable from an operational perspective.¹⁷² As a practical matter, however, 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.¹⁷³ A victim who remains trapped in a situation from which she or he cannot escape, or is otherwise depressed, stressed, or traumatized, will not make a convincing witness.¹⁷⁴

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. 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 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 had to work harder to gather additional evidence or to pursue other means of taking testimony, such as by deposition. An inability to rely on detained victim witnesses could also spur the development of innovative policies and practices that encourage the voluntary participation of victims in criminal justice proceedings. This is true in countries where the closed shelter option does not exist. In those countries, measures to permit victim-witnesses to remain for the duration of

172. This view was expressed by shelter staff and has been anecdotally noted by the authors in their working contacts with law enforcement officials. Fieldwork referred to in this Study did not specifically address the point.

173. Gallagher & Holmes, *supra* note 4, at 333, 334.

174. See CATHY ZIMMERMAN, MAZEDA HOSSAIN, KATE YUN, BRENDA ROCHE, LINDA MORISON & CHARLOTTE WATTS, *Stolen Smiles: A Summary Report on the Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe* 22 (2006), available at http://www.humantrafficking.org/uploads/updates/afesip_press_statement.pdf.

criminal proceedings or to facilitate their return in order to give evidence have become an increasingly common feature of the criminal justice response.

Another criminal justice issue is whether victims must cooperate in criminal justice proceedings against traffickers. While many states retain the right to compel testimony, the particularly vulnerable situation of trafficking victims generally renders that prerogative extremely problematic. At the international level, there is growing acceptance of the principle that victims should be encouraged and supported to cooperate in the investigation and prosecution of their exploiters, but not compelled to do so.¹⁷⁵ Victim detention can impact the free exercise of a victim's right to refuse to cooperate in a criminal investigation or prosecution. Detained victims are unlikely to be offered a non-cooperation option—or indeed to properly absorb any such message if it is provided.

F. 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 discussed. Other advantages relate to resources. Few shelters, whether governmental or nongovernmental, enjoy surplus funds or support staff. It is cheaper, easier, and far more convenient for shelters to confine residents. Shelter managers, especially in larger shelters, frankly admit that they lack staff capacity to supervise residents on outings.¹⁷⁶

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 decreases, funding and other support to the shelter shrinks accordingly. Detaining victims is an easy way to secure the financial security and continued existence of the shelter. While the authors found no evidence of “victim hunting,” which has been reported in Central and Eastern Europe,¹⁷⁷ it is relevant to note that even the best equipped open shelters in that part of the world have struggled to survive

175. See, e.g., *Explanatory Report to the European Trafficking Convention*, *supra* note 55, ¶¶ 174-76.

176. Baan Kredtrakarn Interview 1, *supra* note 143; ARTIP Interview with World Vision Cambodia, in Phnom Penh (18 May 2007). Follow-up interviews conducted in May and June 2009 confirmed that resource constraints continue to limit options for supervised outings from the major closed shelters.

177. BARBARA LIMANOWSKA, UNICEF, UNHCHR, OSCE/ODIHR, *TRAFFICKING IN HUMAN BEINGS IN SOUTH EASTERN EUROPE* 50 (Mar. 2004).

as high numbers of victims continue to decline assistance.¹⁷⁸ Apparently not all trafficked persons want or need the services offered by shelters.

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 a victim-centered approach to ending trafficking.¹⁷⁹ In Thailand, 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.

IV. CONCLUSIONS AND RECOMMENDATIONS FOR CHANGE

The policy arguments advanced for victim detention do not alter the validity of the underlying legal rules. Routine detention of victims of trafficking is unlawful and never justifiable on policy grounds. Victim detention in a shelter can be legally defensible under 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 with closed shelters, individuals who have been trafficked reportedly go to great lengths to avoid being identified as a victim in order to evade detention. As a result, victims do not receive care and protection. They also inadvertently contribute to the impunity enjoyed by their exploiters. For victims who are detained, their detention and the unjustifiable delays in the processing of their cases inevitably compound 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 offer a higher level of protection for victims and reduce the risk of their exploiters bribing or intimidating them to not assist criminal justice authorities. Closed shelters can also protect children and other victims 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 requires that states do not discriminate against victims of trafficking on the

178. BRUNOVSKIS & SURTEES, WHEN VICTIMS DECLINE ASSISTANCE, *supra* note 12.

179. That this approach may come at the expense of the more difficult task of ending the high levels of impunity currently enjoyed by traffickers has recently been noted. See Joel Brinkley, *Migrant Fishermen Fall Through Cracks in Thai Trafficking Laws*, TAIWAN NEWS, 6 July 2009, at 6, available at http://www.etaiwannews.com/etn/news_content.php?id=994624&lang=eng_news.

basis of sex or any other difference. This type of approach also demands that victims are not just treated as criminal justice resources or as passive recipients of assistance.

The following are key recommendations for change. States and Non-governmental Agencies should:

A. In relation to the legal framework:

- Ensure that the national legal framework does not permit the routine detention of victims of trafficking;
- 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 in their assertion of this right;
- Ensure that the legal framework provides for non-criminalization of victims in relation to status offenses;
- Ensure that irregular immigration status is not a justification for victim detention by providing foreign victims with a right to temporary residence permits that are not conditional on their cooperation with criminal justice authorities.

B. In relation to policy and decision-making:

- 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;
- In the case of children, ensure that detention is a last resort and defensible with reference to the best interests of the child;
- Ensure that men are not excluded—as a matter of law, policy, or practice—from support and protection services and that appropriate services are available and made accessible to male victims of trafficking.
- Establish mechanisms to monitor all shelter facilities for victims of trafficking, and ensure that those mechanisms function effectively. The monitoring structure and process should be transparent, free from political interference, and open to review.

C. In relation to shelter practices:

- Review the institutional model of shelters and consider other models that are smaller, more community-based, and more empowering for trafficked persons;
- Ensure that shelter managers review consent forms and regularly inform victims of their rights, including their right to change their mind and leave at any time;
- Ensure that each shelter establishes a mechanism for shelter residents to make their needs known and participate in decisions about how to operate the shelter;
- Ensure that service providers and others in contact with victims receive training and understand how to protect the human rights of trafficked persons;
- Consider when it is appropriate to have separate shelters for children and adults;
- Undertake risk assessments for each victim and develop individual security plans;
- Ensure that any restrictions on freedom of movement are justifiable with reference to the risk assessment;
- Explore alternatives to the shelter model taking into account the views of victims of trafficking.

While the “host” state bears primary responsibility for ensuring that shelter practices are in accordance with international human rights and criminal justice standards, other states and intergovernmental and non-governmental organizations are also implicated. Countries of origin have a particular obligation to ensure that their nationals are not subject to unlawful or arbitrary detention and to cooperate with the destination country in the rapid identification and safe repatriation of victims. Responsibility for the protection of victims’ rights extends to those who fund shelters. Most of the shelters considered in this study are externally funded, either wholly or in part. Donors who provide support to shelters should engage and inform themselves in order to ensure that their resources are not used to perpetuate policies and practices that are incompatible with international law.

Finally, and as noted in the introduction to this article, shelter detention is just one of many potentially suspect responses that have emerged from, or are justified with reference to, the anti-trafficking imperative. Those involved in sustaining the political momentum against trafficking—from the United Nations to the United States—must be vigilant in monitoring the impact of their advocacy and interventions.