

On the Detection of Victims of Human Trafficking in the Civil Aviation Environment

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I. INTRODUCTION

Human trafficking, also referred to as “trafficking in persons” and “trafficking in human beings,”¹ is a massive international problem, present in every

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1. All these terms are used interchangeably in this Article. “Trafficking in persons” stems from the Trafficking Protocol and the ASEAN Trafficking Convention, while “trafficking in human beings” is used in the European instruments. ASEAN Convention against Trafficking in Persons, Especially Women and Children, *entered into force* Mar. 8, 2016 & Council of Europe Convention on Action against Trafficking in Human Beings, *opened for signature* May 16, 2005, C.E.T.S No. 197.

continent of the world. Determining precisely how many people are trafficked is an impossible task due to the covert nature of the phenomenon. In general, however, it is estimated that the number of victims amounts to millions.² For example, there were about 25 million people subjected to forced labor and sexual exploitation in 2016 around the world, according to some United Nations agencies.³ Besides forced labor and sexual exploitation, the most common forms of human trafficking, people are also trafficked for many other exploitative purposes such as forced marriage, removal of organs, or child soldiery.⁴

Globalization, the rise of global economy, and even climate change are some of the reasons that explain the rapid rise of human trafficking during the last few decades.⁵ Globalization has “caused increasing economic and demographic disparities,”⁶ poverty, marginalization of rural communities, and the decline of transportation costs and growth of (sex) tourism. With the rise of global economy, producers depend more on labor exploitation to stay competitive and to satisfy consumers who seek cheap goods and services. Climate change, for its part, has forced vulnerable populations to migrate from seaside areas to cities and highlands in search of livelihood.⁷ Current world conditions have created increased demand and supply. This increase has generated a prosperous business for local and transnational criminal groups who have well understood that human trafficking is a low risk and high profit

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2. United States (U.S.) Department of State, 2020 Trafficking in Persons Report at *4, available at <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> (last accessed Nov. 30, 2020).
 3. Office of the High Commissioner for Human Rights, Human Rights and Trafficking in Persons available at <https://www.ohchr.org/EN/Issues/Trafficking/TiP/Pages/Index.aspx> (last accessed Nov. 30, 2020) See also Polaris, The Facts, available at <https://polarisproject.org/human-trafficking/facts> (last accessed Nov. 30, 2020).
 4. See Daan Everts, *Human Trafficking: The Ruthless Trade in Human Misery*, 10 THE BROWN J. WORLD AFFAIRS 149, 151 (2003); ALEXIS A. ARONOWITZ, HUMAN TRAFFICKING, HUMAN MISERY: THE GLOBAL TRADE IN HUMAN BEINGS 110-21 (2009); & SIDDHARTH KARA, SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY 184 (2010).
 5. See LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE 37-58 (2010).
 6. *Id.* at 2.
 7. *Id.* at 3.

activity. Today, human trafficking is ranked among the most profitable forms of transnational crime, alongside the sale of drugs and the sale of arms.⁸

It is difficult to determine how many victims are trafficked by air, but “the last estimate in 2004 indicated that between 600,000 and 800,000 individuals were annually trafficked by air.”⁹ Most of them certainly fly for work purposes. Indeed, as stated by the International Organization for Migrations (IOM), “[t]he vast majority of victims identified between 2002 and 2016 entered the trafficking process through lab[o]r migration.”¹⁰

Members of the international community are developing and implementing a series of strategies aimed at tackling human trafficking. These strategies notably focus on prevention against trafficking, protection of victims, and the prosecution of criminals.¹¹ In order to get access to protection, assistance, and support, as provided in international and regional legal anti-trafficking instruments, victims of human trafficking usually need to be identified as such by having their status as victims formally established by competent authorities. If victims are not identified or are misidentified, like when they are wrongly qualified as smuggled migrants or illegal migrants instead of being identified as victims of human trafficking, the risk of losing the opportunity to benefit from all the rights they are entitled to is high. However, the formal identification of victims of human trafficking is a process

8. *Id.* at 7.

9. Robert W. Moorman, *Uniting Aviation, Human Trafficking: Hidden in Plane Sight*, available at <https://www.unitingaviation.com/strategic-objective/security-facilitation/hidden-in-plane-sight> (last accessed Nov. 30, 2020).

10. Global Migration Data Portal, *Immigration & emigration statistics, Human Trafficking*, available at <https://web.archive.org/web/20200617200130/https://migrationdataportal.org/themes/human-trafficking> (last accessed Nov. 30, 2020). According to some available estimates, there are more than 150 million migrant workers globally (approximately 44% are female and 56% males, and one in eight migrant workers are between 15 and 24 years old). INTERNATIONAL LABOUR ORGANIZATION, *ILO GLOBAL ESTIMATES ON MIGRANT WORKERS: RESULTS AND METHODOLOGY* xi (2015) & United Nations Office of the Secretary-General’s Envoy on Youth, *#YouthStats: Globalization and Migration*, available at <https://www.un.org/youthenvoy/globalization-migration> (last accessed Nov. 30, 2020) (citing INTERNATIONAL LABOUR OFFICE, *PROMOTING FAIR MIGRATION* 5 (2016)).

11. *See, e.g.*, U.S. Department of State, *3Ps: Prosecution, Protection, and Prevention*, available at <https://www.state.gov/3ps-prosecution-protection-and-prevention> (last accessed Nov. 30, 2020).

that can only start once alleged victims have been detected. Detection, in the sense of discovering signs that indicate that a person is being trafficked, is an upstream task that precedes the one of identification.

While the responsibility of detecting victims, apprehending, and prosecuting offenders rests with government authorities, it is widely recognized that the aviation industry can play an important role in assisting state authorities in detecting human trafficking at airports and on aircrafts. Boots on the grounds in the airport environment (e.g., check-in and gate agents, security screeners, custom officers, immigration staff, border guards) and boots in the air (e.g., flight attendants, pilots) are a precious “force multiplier”¹² in the fight against trafficking in the sense that they “can provide an additional source of intelligence when they are able to recognize signs of potential trafficking situations and report their observations to the authorities.”¹³ The role of cabin crew members is of particular importance, as they spend more time with passengers than any other customer-facing staff do. They are in a unique position where, if well-trained, the opportunity to detect signs of trafficking is high.

The second Part of this Article sheds light on some key aspects of the notion of human trafficking. The third Part exposes the measures and initiatives adopted in order to make the detection process more efficient at the airport as well as onboard the aircraft. With respect to the fight against human trafficking on the ground, the Article analyzes the obligations imposed by international and regional anti-trafficking treaties (e.g., border detection, training, cooperation) as well as their limits when they exist. With regard to the measures relating to the fight against human trafficking in the cabin environment, the Article gives an overview of some of the initiatives adopted by some airlines on a voluntary basis, the resolutions adopted and guidelines proposed by international and non-international organizations, and some of the national legislations that impose specific requirements to air carriers. Finally, the fourth Part looks at the challenges and yet, the importance of proper detection and identification of trafficked persons, emphasizing the special rights that international law recognizes to victims of trafficking.

12. Association of Flight Attendants-CWA, Stop Human Trafficking, *available at* https://www.afacwa.org/stop_human_trafficking (last accessed Nov. 30, 2020).

13. International Air Transport Association (IATA), Guidance on Human Trafficking, at 4, *available at* <https://www.iata.org/contentassets/b24797c51f6a4b02a6b9036c49bc0b81/human-trafficking-guidelines-v1.pdf> (last accessed Nov. 30, 2020).

II. DEFINITION OF HUMAN TRAFFICKING¹⁴

The first definition of the term “trafficking in persons” is contained in the globally accepted 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol).¹⁵ Article 3 (a) of the said Protocol provides —

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, [harboring] or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced lab[o]r or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁶

Since 2000, a number of regional treaties or treaty-like instruments containing a definition of human trafficking have been adopted. For example, the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention)¹⁷ and the 2015 ASEAN Convention against Trafficking in Persons, Especially Women and Children (ASEAN Trafficking Convention)¹⁸ provide a definition identical to the one in the Trafficking Protocol. With regard to the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (EU Anti-Trafficking

14. See, e.g., Eric L. Corthay, *The Identification of Victims of Human Trafficking: Definition, Challenges and States' Obligation*, 16 *INDONES. J. I. L.* 235 (2019).

15. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 2237 U.N.T.S 319 [hereinafter Trafficking Protocol].

16. *Id.* art. 3 (a).

17. Council of Europe Convention on Action against Trafficking in Human Beings art. 4 (a), *opened for signature* May 16, 2005, C.E.T.S No. 197 [hereinafter European Trafficking Convention].

18. ASEAN Convention against Trafficking in Persons, Especially Women and Children art. 2 (a), *opened for signature* Nov. 21, 2015 [hereinafter ASEAN Trafficking Convention].

Directive),¹⁹ that instrument also contains a very similar, not to say more detailed, definition of trafficking in human beings.²⁰

The definition of trafficking in persons consists in a combination of three constituent elements:

- (1) an action: “recruitment, transportation, transfer, [harboring] or receipt of persons;”²¹
- (2) by certain means used to secure that action —
the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;²²
- (3) for the purpose of exploitation, which “include[s], at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced lab[o]r or services, slavery or practices similar to slavery, servitude or the removal of organs.”²³

In criminal law terms, these three constituents (i.e., action, means, purpose) represent the *actus reus* and *mens rea* of the crime of trafficking in persons, two concepts in the absence of which no conviction can be rendered.

19. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA arts. 2 (1) & (3), April 5, 2011, O.J. (L 101) 1 [hereinafter EU Anti-Trafficking Directive]. See, e.g., Carolina Villacampa Estiarte, *The European Directive on Preventing and Combating Trafficking in Human Beings and the Victim-Centric Treatment of this Criminal Phenomenon*, 2 EUR. CRIM. LAW REV 291, 299 (2012).

20. Note, however, Article 1 (3) of the 2002 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Member States of the South Asian Association for Regional Cooperation have opted for a much narrower definition, limiting the application of the Convention to the “moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.” SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution art. 1 (3), *entered into force* Nov. 11, 2005 [hereinafter SAARC Trafficking Convention].

21. Trafficking Protocol, *supra* note 15, art. 3 (a).

22. *Id.*

23. *Id.*

The *actus reus* (the material or physical element) is split into two parts: the action and the means. The *mens rea* (the mental element that reflects the state of mind of the person charged with an offence) is the purpose element of the definition.²⁴ For a crime of human trafficking to be recognized, each of the three aforementioned constituents must be present and considered together.²⁵ For example, the “recruitment” of persons (action), involving “deception” (means), for “forced labor” (purpose) is a conduct that must be criminalized as trafficking.²⁶

There is, however, an exception regarding trafficking in children. Indeed, Article 3 (c) of the Trafficking Protocol provides that “[t]he recruitment, transportation, transfer, [harboring] 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.”²⁷ In other words, the existence or not of the means element, like the threat or use of force, coercion, abduction, fraud, deception, abuse of power, is irrelevant

24. United Nations Office on Drugs and Crime (UNODC), Anti-human trafficking manual for criminal justice practitioners, Module 1: Definitions of trafficking in persons and smuggling of migrants, at 4, *available at* https://www.unodc.org/documents/human-trafficking/TIP_module1_Ebook.pdf (last accessed Nov. 30, 2020) [hereinafter United Nations Office on Drugs and Crime, Anti-human trafficking manual].

25. *Id.*

26. Council of Europe, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, *opened for signature* May 16, 2005, C.E.T.S. No. 197 14 [hereinafter Council of Europe, Explanatory Report] & UNITED NATIONS OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME IN UNITED NATIONS OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL CRIME AND THE PROTOCOLS THERETO, at 268, U.N. Sales No. E.000000 (2004) [hereinafter UNITED NATIONS OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE]. Examples of human trafficking are available in the UNODC’s Anti-human trafficking manual for criminal justice practitioners. *See* United Nations Office on Drugs and Crime, Anti-human trafficking manual, *supra* note 24, at 6-7.

27. Trafficking Protocol, *supra* note 15, art. 3 (c).

when determining the existence of the crime of trafficking in children.²⁸ This exception is particularly important when trying to identify victims of human trafficking. As Anne T. Gallagher, leading global expert on international law on human trafficking,²⁹ observes: “[b]ecause it is unnecessary to show that force, deception, or any other means were used for trafficking in children, the identification of victims of trafficking and the identification of their exploiters can be expected to be easier for child victims as compared to adults.”³⁰

The Trafficking Protocol does not define the term of “victim.” However, the definition can be safely taken from the European Trafficking Convention, whose definition of trafficking mirrors the one in the Trafficking Protocol. According to Article 4 (e) of the Convention, “[v]ictim’ shall mean any natural person who is subject to trafficking in human beings as defined in this article.”³¹ A victim is therefore anyone subjected to a combination of the three constituents (or two constituents, when that person is a child) explained above.³²

Furthermore, trafficking in persons exists whether or not the victim consents to be exploited.³³ This is stated in Article 3 (b) of the Trafficking Protocol: “[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where

28. Under Article 3 (d) of the Trafficking Protocol, a child “shall mean any person under eighteen years of age.” Trafficking Protocol, *supra* note 15, art. 3 (d). See also European Trafficking Convention, *supra* note 19 art. 4 (d); EU Anti-Trafficking Directive, *supra* note 19, art. 2 (6); ASEAN Trafficking Convention, *supra* note 18, art. 2 (d); & SAARC Trafficking Convention, *supra* note 17, art. 1 (1).

29. U.S. Department of State, Office to Combat and Monitor Trafficking in Persons, Trafficking in Persons Report 2012, available at <https://2009-2017.state.gov/j/tip/rls/tiprpt/2012/192362.htm> (last accessed Nov. 30, 2020).

30. ANNE T GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 29 (2010).

31. European Trafficking Convention, *supra* note 17, art. 4 (e).

32. Council of Europe, Explanatory Report, *supra* note 26, art. 14 (100).

33. *Id.* at art. 4 (97). See JESSICA ELLIOTT, THE ROLE OF CONSENT IN HUMAN TRAFFICKING (2014). The United Nations Office on Drugs and Crime published a book on the Evidential Issues in Trafficking. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, EVIDENTIAL ISSUES IN TRAFFICKING IN PERSONS CASES: CASE DIGEST 132-39 (2017).

any of the means set forth in subparagraph (a) have been used.”³⁴ Once it is demonstrated that a prohibited means (e.g., deception) has been used, consent becomes irrelevant and cannot be used as a defense to absolve a trafficker from criminal responsibility.³⁵ Here the means element operates to annul an *a priori* meaningful consent. As put by the United Nations Office on Drugs and Crime (UNODC), “no person can consent to being exploited, because in the case of adults, consent has been negated through the use of improper means and, in the case of children, their vulnerable position makes it impossible for them to provide consent in the first place.”³⁶ Gallagher notes that the non-applicability of consent in case of abuse “reflects a long-standing principle of international human rights law: The intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which that personal freedom is taken away.”³⁷ Moreover, consenting to do a certain work must be distinguished from consenting to be exploited. Someone may consent to a certain employment — he or she may possibly be willing to engage, for example, in prostitution — but that does not mean that they consent to be subjected to abuse of all kinds.³⁸ Therefore, if consenting to a certain employment freely chosen is normal and relevant, consenting to be exploited is not, and it does not absolve the abuser from his or her crime.

The definition of human trafficking is good but not perfect. Given the very large variety of the situations that can be rightly qualified as human trafficking, Gallagher emphasizes that “it is [] important to accept that no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world.”³⁹ In addition, it must be stressed that the exercise of clarification of the terms used

34. Trafficking Protocol, *supra* note 15, art. 3 (b). See also European Trafficking Convention, *supra* note 17, art. 4 (b); EU Anti-Trafficking Directive, *supra* note 19, art. 2 (4); ASEAN Trafficking Convention, *supra* note 15, art. 2 (b); & SAARC Trafficking Convention, *supra* note 17, art. 1 (3).

35. UNITED NATIONS OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE, *supra* note 26, at 270; United Nations Office on Drugs and Crime, Anti-human trafficking manual, *supra* note 24, at 8; Council of Europe, Explanatory Report, *supra* note 26, art. 4 (74).

36. United Nations Office on Drugs and Crime, Anti-human trafficking manual, *supra* note 24, at 8.

37. GALLAGHER, *supra* note 30, at 28.

38. Council of Europe, Explanatory Report, *supra* note 26, art. 4 (97).

39. GALLAGHER, *supra* note 30, at 52.

in the definition is rendered difficult by the fact that “not all concepts and terms in the Protocol are fully defined.”⁴⁰ The following paragraphs aim at briefly overviewing some aspects of the three constitutive elements of the definition of trafficking.

The first constituent of the three-part definition is the “action” element which consists of “recruitment, transportation, transfer, [harboring] or receipt of persons.”⁴¹ Interpretative materials of the Protocol like the *travaux préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (*travaux préparatoires*),⁴² the Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Legislative guide),⁴³ and the Model Law against Trafficking in Persons (Model Law)⁴⁴ do not provide any interpretation of these terms. Reference may be made to the instructive guidance provided by the Council of Europe and the United Nations in Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs. In this joint study, the actions are defined as follows —

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

40. Working Group on Trafficking in Persons, *Analysis of key concepts of the Trafficking in Persons Protocol: Background Article prepared by the Secretariat*, U.N. Doc. CTOC/COP/WG.4/2010/2, 2 (5) (Dec. 9, 2009).

41. Trafficking Protocol, *supra* note 15, art. 3 (a).

42. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO* (2006).

43. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *LEGISLATIVE GUIDE*, *supra* note 26.

44. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *MODEL LAW AGAINST TRAFFICKING IN PERSONS* (2009) [hereinafter UNITED NATIONS OFFICE ON DRUGS AND CRIME, MODEL LAW].

trafficking in human beings for sexual or [labor] exploitation, it is not necessary for the victim to be present illegally in a state's territory. The [offense] therefore includes transnational and national trafficking. The *transfer* of a person includes any kind of handing over or transmission of a person to another person. This is particularly important in certain cultural environments where control over individuals (mostly family members) may be handed over to other people. As the term and the scope of the [offense] are broad, the explicit or implied offering of a person for transfer is sufficient; the offer does not have to be accepted for the [offense] of trafficking in human beings to be constituted if the other elements are also present. The [harboring] of persons means accommodating or housing persons in whatever way, whether during their journey to their final destination or at the place of the exploitation. ... The *receipt* of persons is not limited to receiving them at the place where the exploitation takes place either, but also means meeting victims at agreed places on their journey to give them further information on where to go or what to do.⁴⁵

The second constituent of the definition is the “means” element which comprises

the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.⁴⁶

As explained earlier, this element is only relevant to trafficking in adults. While some components of the element are self-evident (e.g., abduction), others are overlapping.⁴⁷ Coercion, for example, can be seen as an umbrella term that covers not only the threat or use of physical harm but also other forms of pressure (e.g., psychological restraint, economic pressure) exerted against the victim or the victim's family in order to limit the free will of a

45. COUNCIL OF EUROPE AND UNITED NATIONS, TRAFFICKING IN ORGANS, TISSUES AND CELLS AND TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF THE REMOVAL OF ORGANS 78 (2009) [hereinafter COUNCIL OF EUROPE AND UNITED NATIONS, TRAFFICKING IN ORGANS] (emphases supplied).

46. Trafficking Protocol, *supra* note 15, art. 3 (a).

47. GALLAGHER, *supra* note 30, at 31.

victim.⁴⁸ Deception and fraud are closely connected and should be seen as cheating or misleading the victim.⁴⁹

The third constituent of the definition of human trafficking is the “purpose of exploitation” element which “include[s], at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced [labor] or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁵⁰ The word “exploitation” is not defined either in the Trafficking Protocol, its *travaux préparatoires*, or other interpretative instruments. Instead, Article 3 (a) of the Trafficking Protocol provides a non-exhaustive list.⁵¹ Hence, the use of the expression “at a minimum” in the forms of exploitation. Moreover, UNODC identifies the “purpose of exploitation” as being the “*dolus specialis* mental element” (special intent) of the concept of human trafficking, which one is defined as “the purpose aimed at by the perpetrator when committing the material acts of the offence.”⁵² It is important to emphasize that “the fulfilment of the *dolus specialis* element does not require that the aim be actually achieved.”⁵³ In other words, no actual exploitation needs to take place for the offense of trafficking to be completed. Rather, it is sufficient that an intention to exploit exists, and this by whoever is involved in the trafficking cycle, be it for instance the recruiter, the transporter or the brothel owner.⁵⁴ Indeed, UNODC states that

an [offense] of trafficking in persons should not require that actual exploitation take place. As is clear from the Trafficking Protocol, actual exploitation need not occur provided there is a manifestation of intention to exploit the individual. All that is required is that the accused committed one of the constituent acts, employing one of the listed means [in case of

48. *Id.*; COUNCIL OF EUROPE AND UNITED NATIONS, TRAFFICKING IN ORGANS, *supra* note 45, at 78; & UNITED NATIONS OFFICE ON DRUGS AND CRIME, MODEL LAW, *supra* note 30, at 11.

49. COUNCIL OF EUROPE AND UNITED NATIONS, TRAFFICKING IN ORGANS, *supra* note 45, at 78.

50. Trafficking Protocol, *supra* note 15, art. 3 (a).

51. *Id.*

52. United Nations Office on Drugs and Crime, Anti-human trafficking manual, *supra* note 24, n. 1.

53. *Id.*

54. GALLAGHER, *supra* note 30, at 34.

trafficking involving adult victims] for the purpose or, put another way, with the intention that the individual be exploited.⁵⁵

II. DETECTION IN THE CIVIL AVIATION ENVIRONMENT

As a preliminary observation, it would seem interesting to clarify the definition of the two distinct wordings: “detection” and “identification.” *Stricto sensu*, these two terms do not have the same meaning. “Detection” refers to “the act or process of discovering or revealing the existence or presence of a situation or thing.”⁵⁶ In the context of human trafficking, the word “detection” construed in a narrow sense would refer to the act or process of discovering signs that indicate that a person is being trafficked. “Identification,” for its part, denotes “the act or process of establishing or determining an identity, ascertaining as having a certain characteristic or feature, proving as being a certain person or thing.”⁵⁷ With regard to human trafficking, the word “identification” understood in a narrow sense would relate to the act or process of formally ascertaining the status of a victim. In a restrictive sense, therefore, the act or process of detection precedes the ones of identification. Put otherwise, detecting signs of a trafficking offense is a first and essential stage without the existence of which it would be impossible to trigger and complete a referral mechanism whose goal is to formally establish the status of a vulnerable person. Having said that, in general it seems that international and regional legal instruments on human trafficking, and their related commentaries, do not separate the operation of detection from the operation of identification, with the notable exception of provisions on border detection. Indeed, it seems that the term “identification” (or “to identify,” “identifying,” “identified”) rather tends to be construed *lato sensu* and to encompass both

55. United Nations Office on Drugs and Crime, Anti-human trafficking manual, *supra* note 24, at 6. See also Council of Europe, Explanatory Report, *supra* note 26, art. 18 (225).

56. The Free Dictionary, Detection, *available at* <https://www.thefreedictionary.com/detection> (last accessed Nov. 30, 2020).

57. The Free Dictionary, Identification, *available at* <https://www.thefreedictionary.com/identification> (last accessed Nov. 30, 2020).

terms.⁵⁸ In that sense, “detection” equates with “preliminary or early identification.”⁵⁹

In the civil aviation environment, this is specifically at the detection level that ground and air personnel can play an important role. The process of detection begins at the airport, where first ground personnel (e.g., check-in agents, security screeners, customs staff, immigration, border agents, police, passenger service agents, ground handlers, aircraft cleaners) might face victims or suspected victims of human trafficking. Detection of potential signs of human trafficking is then complemented in the passenger cabin by flight attendants. As frontliners, cabin crew members are in a unique situation where they can observe passengers, and, if well-trained, discover signs of vulnerability, and then report potential cases of trafficking for further investigation. Finally, the detection process ends at the airport of destination where, again, airport personnel and other stakeholders might encounter so far undetected cases or handle cases previously reported by the captain-in-command during the flight.

International and regional legal instruments on human trafficking impose rather general obligations on States Parties to take measures in order to facilitate the identification of victims of human trafficking. Obviously, these measures are intended to apply to any context and not only to the air industry. Beside measures of detection *stricto sensu*, these other measures comprise the cooperation between States Parties or national entities, the training of frontliners, the adoption of legislative measures, and the establishment of national guidelines and procedures. Moreover, the combat against human trafficking in the aviation industry has been recently strengthened by a series of initiatives destined to make the detection process more efficient. Some States have enacted new legislations imposing specific requirements to air carriers, international and non-international organizations have adopted

58. See, e.g., European Trafficking Convention, *supra* note 17, art. 10. EU Anti-Trafficking Directive, *supra* note 15, arts. 11 (4) and 18 (3). Note that the Trafficking Protocol does not use *expressis verbis* the term “identification.”

59. For instance, Tool 6.4 (indicators of trafficking) in the *Toolkit to Combat Trafficking in Persons*, a tool which mainly sets forth indicators used at the detection level and the presence of which should lead to further investigation, is part of the Chapter 6 called “victim identification.” See UNITED NATIONS OFFICE ON DRUGS AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS: GLOBAL PROGRAMME AGAINST TRAFFICKING IN HUMAN BEINGS 258 (2008) [hereinafter UNITED NATIONS OFFICE ON DRUGS AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS].

resolutions and proposed guidance and guidelines, and some airlines have adopted codes of conducts and implemented good practice on a voluntary basis. The following Sections aim at presenting these general obligations and specific initiatives as well as their limits when they exist.

A. Border Detection at the Airport

Before travelling, passengers usually check in for their flight, and then meet border officials (whose titles and specific functions vary according to the countries such as border guards, custom officials, immigration) before boarding the aircraft. After landing, passengers meet border officials again before entering the country or their place of destination. These pre- and post-boarding stages should therefore give opportunities to frontliners for detecting potential signs of human trafficking. The drafters of regional and international treaties on human trafficking have understood that a better management of controls at borders could help combat human trafficking more efficiently. They have consequently insisted on the obligation for States Parties to take effective border measures. In that sense, Article 11 (1) of the Trafficking Protocol and Article 7 (1) of the European Trafficking Convention provide that “States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.”⁶⁰ In that regard, State parties “shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of [trafficking offenses].”⁶¹ The exact nature of such measures is left to the Parties’ discretion. The two treaties provide, for example, “[w]here appropriate[,] ... such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.”⁶²

60. Trafficking Protocol, *supra* note 15, art. 11 (1). *See also* European Trafficking Convention, *supra* note 17, art. 7 (1).

61. Trafficking Protocol, *supra* note 15, art. 11 (2) & European Trafficking Convention, *supra* note 17, art. 7 (2). *Compare with* ASEAN Trafficking Convention, *supra* note 18, art. 13 (2) which interestingly refers explicitly to victims of trafficking in persons.

62. Trafficking Protocol, *supra* note 15, art. 11 (3); European Trafficking Convention, *supra* note 17, art. 7 (3). The Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime notes that commercial carriers have only the obligation to ascertain whether or not passengers have the

Despite the goodwill of the drafters to combat human trafficking efficiently, the effectiveness of this last provision is doubtful. Indeed, many victims of human trafficking travel with proper documents. Therefore, the fact that someone is in possession of the travel documents required for entry into the receiving State does not at all mean that the said person is not a victim of human trafficking.

An important way to strengthen border detection is to train frontliners. At the international level, Article 10 (2) of the Trafficking Protocol requires States Parties to provide or strengthen training for a series of agencies including law enforcement and immigration.⁶³ As per this provision, the training should focus on methods used in preventing trafficking, prosecuting traffickers and protecting the rights of the victims. This focus, in the Author's opinion, most probably includes (although implicitly) methods to detect and identify possible victims of human trafficking, given that protecting the rights of these victims implies that they are first detected and identified. As per this provision, training should also encourage cooperation with elements of the civil society and other relevant organizations.⁶⁴

At the regional level as well, legal instruments stress the importance of providing training programs, or having trained people, that help relevant officials to specifically unmask trafficking.⁶⁵ In practice, however, observers from different parts of the world still note the too-often absence of continuous and specialized training, an absence that considerably lowers the capacity to detect and then identify victims quickly and accurately among frontline

necessary documents to enter the State of destination and not to assess the authenticity or validity of the documents or whether they have been validly issued to the person who possesses them. Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 55th Sess., U.N. Doc. A/55/381/Add.1, Agenda Item 105, 15 (80) (Nov. 3, 2000).

63. Trafficking Protocol, *supra* note 15, art. 10 (2).

64. *Id.*

65. See European Trafficking Convention, *supra* note 17, arts. 10 (1) & 29 (1); EU Anti-Trafficking Directive, *supra* note 19, art. 18 (3); & ASEAN Trafficking Convention, *supra* note 18, art. 16 (6).

officials.⁶⁶ Relevant officials that are likely to come into contact with victims or potential victims include law-enforcement officials, immigration, and border guards.⁶⁷ As underlined by the Council of Europe, it is “extremely important that staff of the services concerned be trained in recognizing signs of a trafficking [offense].”⁶⁸ Proper training is recognized as essential to combat trafficking effectively. The Council of Europe stresses, for instance, that “[e]ach country must have anti-trafficking specialists”⁶⁹ but that the specialization requirement can take various forms.⁷⁰

At the regional level, in 2011, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) developed the Anti-Trafficking Training for Border Guards’ Manual in collaboration with Member States, Schengen Associated Countries, experts from the European Agency for Law Enforcement Training (CEPOL) and the European Union’s Judicial Cooperation Unit (EUROJUST), and various international organizations such as the International Organization for Migration, Office of the United Nations High Commissioner for Human Rights, United Nations High Commissioner for Refugees, United Nations Children’s Fund, and the Organization for Security and Co-operation.⁷¹ One of the three training

66. See, e.g., MARIJA JOVANOVIĆ, COMPARISON OF ANTI-TRAFFICKING LEGAL REGIMES AND ACTIONS IN THE COUNCIL OF EUROPE AND ASEAN: REALITIES, FRAMEWORKS AND POSSIBILITIES FOR COLLABORATION, 42 (2018).

67. Council of Europe, Explanatory Report, *supra* note 26, art. 29 (297).

68. *Id.*

69. *Id.* art. 29 (292).

70. According to the Council of Europe —

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

Id. art. 29 (293). The Council of Europe also insists on the fact that anti-trafficking specialized authorities must, a minima, be in “sufficient numbers[,] ... composed of men and women[,] ... have the capability and [] legal and material resources [to recognize signs of trafficking,] ... [and] have the necessary independence to be able to perform [properly].” *Id.* art. 29 (292-294).

71. See Focus: Combating human trafficking at the border – training for EU Border Guards, available at <https://frontex.europa.eu/media-centre/focus/combating->

modules of the manual (awareness, identification, interviewing) aimed at improving the ability of border guards to detect potential victims of trafficking and suspected traffickers by providing indicators.⁷²

It should be noted that it is difficult to use profiling for victims. Indeed, the International Center for Migration Policy Development (ICMPD) notes

There is no precise or general profile of a potential trafficked person. What kind of people traffickers look for very much depends on the demand in the destination areas. Therefore profiles are not fixed or uniform but vary and change over time. This makes it difficult to define trafficked persons' profiles.⁷³

Thus, it is important to have indicators when trying to detect potential victims of human trafficking at border. In that regard, many indicators have been developed to help frontliners (e.g., police, social workers, border guards) to detect victims of human trafficking.⁷⁴ However, with regard to border detection, not all of these indicators have the same degree of efficacy. For example, Marika McAdam, an independent legal consultant on human rights and criminal justice issues, stresses the fact that many existing indicators offer little support to border officials because they have been developed to detect situations of current exploitation (indicators therefore more relevant for the police), while border officials are more generally in a position where they have to detect trafficked victims before any exploitation has taken place.⁷⁵ McAdam

human-trafficking-at-the-border-training-for-eu-border-guards-rRzpfI (last accessed Nov. 30, 2020).

72. *See id.*

73. INTERNATIONAL CENTER FOR MIGRATION POLICY DEVELOPMENT (ICMPD), ANTI-TRAFFICKING TRAINING FOR FRONTLINE LAW ENFORCEMENT OFFICERS: BACKGROUND READER 49 (2006).

74. *See, e.g.*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS, *supra* note 59, ch. 6.

75. Marika McAdam, 'Who's Who at the Border? A rights-based approach to identifying human trafficking at international borders', ANTI-TRAFFICKING REV., Issue No. 2, September 2013, at 33. Indicators mentioned by McAdam include two sources by the International Labour Office and European Commission and the United Nations Office on Drugs and Crime. McAdam also notes that even indicators specific to border contexts (e.g., indicators set forth in the Training Guide published by the International Center for Migration Policy Development) are of limited relevance because even though they enable the identification of human vulnerabilities they do not help distinguish between smuggled migrants, irregular

observes that “where victims or potential victims of trafficking are intercepted at border before any exploitation takes place, their identification is extremely difficult.”⁷⁶ Thus, she suggests recasting and contextualizing most of the indicators elaborated so far. She notes —

The ability of border officials to identify trafficked persons before they are exploited will be enhanced if they are equipped with indicators that pertain to the irregular migration process leading to situations of exploitation, rather than exploitative situations themselves. However, it is vital that indicators should not rush towards only the possibility of trafficking, but should support border officials to identify vulnerabilities more broadly.⁷⁷

For McAdam, indicators in the hands of border guards should help them detect any type of people trying to cross the border irregularly, be they smuggled migrants, migrants in irregular situations, or trafficked victims, rather than focusing only on detecting exploitation.⁷⁸ This process of detection would be a prelude to in-depth investigation conducted later with the aim of determining the real status of the persons intercepted.⁷⁹ She acknowledges, however, that these indicators would offer little help in detecting victims of human trafficking when they cross borders legally. In such a situation, she suggests that border officials could still raise awareness on dangers and consequences of human trafficking among people they encounter.⁸⁰

ICMPD has established a list of relevant indicators that can be used by border authorities to detect victims or potential victims, whether they cross

migrants or trafficked victims. *Id.* at 41-42 & 45 (citing International Labour Office and European Commission, Operational indicators of trafficking in human beings (2009), available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf (last accessed Nov. 30, 2020) & United Nations Office on Drugs and Crime, Human Trafficking Indicators, available at http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf (last accessed Nov. 30, 2020)). See also INTERNATIONAL CENTER FOR MIGRATION POLICY DEVELOPMENT, *supra* note 73, at 46.

76. McAdam, *supra* note 75, at 38.

77. *Id.* at 46-47.

78. *Id.* at 42.

79. *Id.* at 42.

80. *Id.*

the border legally or not.⁸¹ Nevertheless, the organization warns that “[t]aken in isolation[,] indicators may be misleading or irrelevant.”⁸² Instead, ICMPD stresses that, to become meaningful, indicators must be combined with the questioning of suspected victims, and paired with inconsistencies in information provided by them or with other information available through cooperation with other units or the analysis of available data for example.⁸³ Successful detection thus depends significantly upon the observation and communication skills of the border officers and the intelligence available to them. This is confirmed by the survey conducted by the European Agency for Fundamental Rights (FRA) in five European airports (Charles de Gaulle, Fiumicino, Frankfurt, Manchester, Schiphol).⁸⁴ To the question of what indicators they consider the most helpful for identifying potential victims of trafficking in human beings —

Officers surveyed (72%) identified the passenger’s statement as the most helpful ... How people behave when approaching a counter (55%) and during the check (50%) are the next most helpful indicators at all airports, except at Fiumicino, while 40% of officers also considered the appearance and behavior of co-[travelers] to be very helpful.⁸⁵

81. Examples of indicators that can be used by border authorities include: lack of credibility of situations observed and information provided by travelers; purpose of travel compared with other apparent signs (e.g., luggage, money, physical condition of travelers, profession declared, etc.); luggage (e.g., quantity and type compared with statements of travelers); items carried in luggage; different citizenship of people in groups travelling together; same passport used several times by different people; observing groups — common features of travelers (e.g., physical, age, etc.); individuals travelling together do not know each other; behavior and body language that indicates tension, unease etc. See TRAINING FOR LAW ENFORCEMENT OFFICERS, *supra* note 70, 54-55.

82. *Id.* at 54.

83. *Id.*

84. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, FUNDAMENTAL RIGHTS AT AIRPORTS: BORDER CHECKS AT FIVE INTERNATIONAL AIRPORTS IN THE EUROPEAN UNION 7 (2014).

85. *Id.* at 56. This material establishes criteria considered most helpful in identifying children at risk and examples of good practice implemented in Europe. *Id.* at 61 & 65. See Save the Children Italia ONLUS, *AGIRE. Acting for stronger private-public partnerships in the field of identification and support of children victims and at risk of trafficking in Europe, Training manual*, JLS/2007/ISEC/537 (Aug. 2010).

An additional important measure to strengthen detection of trafficking at airports is the collaboration between different entities. International and regional legal instruments provide that States Parties have to consider cooperation among border control agencies, notably by establishing direct channels of communication.⁸⁶ Such cooperation can be illustrated by the work of the Mobile Research Brigade at Charles de Gaulle airport (France) which consists of tailing potential victims and traffickers in close cooperation with the Mobile Immigration Brigade which provides records of passengers and risk profiles.⁸⁷ Article 10 (1) (a) of the Trafficking Protocol also requires law enforcement, immigration, or other relevant authorities of States Parties to cooperate by exchanging information about a range of relevant matters, including the detection of possible victims in transit.⁸⁸

Finally, in the Author's opinion, beside the measures described above, which are all essential to the improvement of the work of detection, border guard's routine tasks should be rethought and reorganized in order to facilitate the process of detection in general and the use of relevant indicators in particular. Indeed, border authorities currently admit that, given the limited time available for border control, plus the general rule of not creating inconvenience to travelers, they do not speak to every person, and consequently a large number of victims are probably not detected.⁸⁹ In a report published in 2014, FRA noted —

In practice, border guards do not speak to every passenger. Of the border guards FRA interviewed, 41% said that they do not generally speak to all third-country national passengers during the first-line check. Of this 41%, only a third (35%) would consider substantial signs of protection needs (to be understood in the broad sense, also including asylum) a reason for addressing

86. See Trafficking Protocol, *supra* note 15, art. 11 (6); European Trafficking Convention, *supra* note 17, art. 7 (6); ASEAN Trafficking Convention, *supra* note 15, art. 13 (1). See also Council of Europe, Explanatory Report, *supra* note 26, art. 7 (7).

87. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 84, at 56.

88. Trafficking Protocol, *supra* note 15, art. 10 (1) (a). On concerns about confidentiality of information transferred by the sending State Party, see the United Nations Office on Drugs and Crime's published material. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE, *supra* note 26, at 57.

89. INTERNATIONAL ORGANIZATION FOR MIGRATION, IDENTIFICATION AND PROTECTION SCHEMES FOR VICTIMS OF TRAFFICKING IN PERSONS IN EUROPE: TOOLS AND BEST PRACTICES 14 (2005).

third-country national passengers. As groups are handled without necessarily addressing all accompanying passengers, according to shift leaders, the scope for interaction and proactive identification is limited during the check, and a large number of victims can be expected to pass unnoticed, particularly if risk factors are not obvious.⁹⁰

B. On-Board Detection

As traffickers utilize aviation as one of their mode of transportation, it is likely that airline personnel (e.g., cabin crew and flight crew) encounter situations of trafficking on board a flight. In order to strengthen the combat against human trafficking on board aircrafts, international and non-international organizations have adopted resolutions and proposed guidance to air operators. Certain States have drafted and enacted new legislations imposing specific requirements to air carriers. Some airlines have also adopted codes of conducts and implemented good practices.

For several years, many airlines have been demonstrating commitment to tackling human trafficking. For instance, Air France has released in-flight videos and developed awareness programs for its staff.⁹¹ Aer Lingus has launched training programs for cabin and flight crew on how to spot traffickers and their victims.⁹² American Airlines, Delta, and other airlines have signed the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism.⁹³ Companies adopting the code commit themselves to take a certain number of actions such as training their personnel.⁹⁴ It is also encouraging to note that many flight attendants and pilots (e.g., Association of Flight Attendants, Air Line Pilots Association International) are highly supportive of anti-human trafficking training.⁹⁵ Today, crew members' trainings are sometimes provided by organizations of the civil society. For

90. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 84, at 56.

91. Moorman, *supra* note 9.

92. *Id.*

93. See TheCode.Org, Members of the Code, *available at* <http://www.thecode.org/who-have-signed/top-members> (last accessed Nov. 30, 2020).

94. ECPAT International, Steering Committee on the Code of Conduct, Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism: Background and Implementation Examples (2002) at 3, *available at* https://www.ecpat.org/wp-content/uploads/2016/04/Code_of_Conduct_ENG.pdf (last accessed Nov. 30, 2020).

95. Moorman, *supra* note 6.

instance, the U.S.-based non-profit organization Airline Ambassadors International (AAI) has developed a training curriculum which includes tips on how to recognize trafficking in-flight and protocols on how to report trafficking.⁹⁶

One of the key issues for the airline industry, particularly the cabin crew and flight crew, is the absence of general application of specific indicators used to detect victims and suspected victims, and the lack of standardized mechanism for reporting observations to the national law enforcement agencies on the ground. To change this situation, the 74th General Meeting of the International Air Transport Association (IATA) adopted a resolution in 2018 which acknowledges that “while the responsibility to detect, apprehend and prosecute offenders rests with government authorities, airlines can play a role in combatting trafficking in persons by raising the awareness of staff and training on how to report concerns to the appropriate authorities.”⁹⁷

The IATA Annual General Meeting also “encourages member airlines to train relevant operational staff with the objective of enabling them to recognize potential trafficking situations and deal with these in accordance with company policy and, where appropriate, report these to government authorities.”⁹⁸

In that regard, IATA released a document in 2018 that provides guidance for member airlines and other aviation stakeholders (e.g., airports, regulatory bodies) to address trafficking in persons.⁹⁹ The document guides airlines to develop for frontline ground employees and crew members a company policy on human trafficking, standard detection and reporting procedures, as well as communication protocols.¹⁰⁰ Also, in 2018, the International Civil Aviation Authority (ICAO), in collaboration with the United Nations Human Rights Office of the High Commissioner, released a circular that “provides States and operators with the framework and topics that should be included in training

96. See Airline Ambassadors International, Human Trafficking, *available at* <https://airlineamb.org/human-trafficking> (last accessed Nov. 30, 2020).

97. IATA, Resolution against Trafficking in Persons, at *1, *available at* <https://www.iata.org/contentassets/8e5bb5f5bfao4057a8826cfo42cd4df9/resolution-trafficking-persons-agm2018.pdf> (last accessed Nov. 30, 2020).

98. *Id.*

99. International Air Transport Association, *supra* note 13.

100. *Id.* at 11-15.

packages on identifying and responding to trafficking in persons.”¹⁰¹ The circular aims particularly at cabin crew and flight crew members, and it calls operators to develop policies and procedures, including reporting protocols.

Policies should notably “include a statement regarding the need to train all of the operator’s relevant employees on the issue [of trafficking in persons], on an initial and ongoing basis, so as to facilitate identifying and responding to trafficking in persons during operations.”¹⁰² It is worth repeating that cabin crew members are in a unique position in the cabin environment as they can observe passengers over a non-negligible period of time. If they are well-trained and equipped with relevant indicators, there is a real opportunity that a suspected case of trafficking can be detected. The ICAO circular and the IATA guidance provide a list of indicators that should help ground staff and crew members in detection.¹⁰³ Once the cabin crew members detect something unusual, they are recommended to follow certain steps. One of

101. INTERNATIONAL CIVIL AVIATION ORGANISATION (ICAO), UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, CIRCULAR 352, GUIDELINES FOR TRAINING CABIN CREW ON IDENTIFYING AND RESPONDING TO TRAFFICKING IN PERSONS (2018) [hereinafter CIRCULAR 352].

102. *Id.* at 12. See also International Air Transport Association, *supra* note 13, at 11.

103. CIRCULAR 352, *supra* note 101, at 8. Indicators that can assist in detection include: the person avoids eye contact and social interaction; has a language barrier with the person his or her is traveling with; has no personal items or carry-on baggage; is not wearing appropriate clothing or his or her appearance may not fit the route of travel or weather; comes from a location or State known as a source or destination for trafficking in persons; is unaware of his or her final destination and travel plans in general; is unusually submissive to the person his or her is travelling with; may not be allowed to speak for himself or herself and if directly addressed, someone else insists on answering or translating for his or her; “provide[s] inconsistent responses from person(s) traveling with him or her when asked questions[;]” does not have the freedom on the aircraft to separate him or her from others (e.g., to use the lavatory unaccompanied); may “speak[] of [a] modelling, dancing, singing, hospitality job or something similar in a [foreign country] (without knowing who will be meeting him [or] her upon arrival, and with few details about the job);” or exhibits unusual behavior that just “do[es] not [seem] right to [the cabin crew member.]” International Air Transport Association, *supra* note 13, at 13.

them is to inform flight crew members.¹⁰⁴ These latter play a vital role in reporting suspected cases of trafficking on board. As IATA states —

It will be the final decision of the captain-in-command to determine whether the information has to be relayed to the origin and destination law enforcement agencies on the suspected case. This process needs to be clarified in the company policy. The captain will have authority to exceed policy but not override it.¹⁰⁵

To not report, as has happened in the past, could have dramatic consequences for the victim.¹⁰⁶ The role of the airline ends once the suspected case has been reported to law enforcement.¹⁰⁷ Here, it should be noted that airline staff are not law enforcement agents and must not try to act on behalf of them. Safety and security issues on board must be managed carefully. Human trafficking is a crime and traffickers are criminals. Crew members must act diligently when dealing with suspected cases of human trafficking to avoid causing harm to themselves, to avoid negative impact on the trafficked person's safety, trust, or emotional state, and to avoid making the trafficker suspicious.¹⁰⁸

104. CIRCULAR 352, *supra* note 101, at 13 & International Air Transport Association, *supra* note 13, at 14. Other steps, as set forth in the IATA guidance, are, *inter alia*:

- (1) Check without being noticed whether there are any trafficking signals; solicit other staff members to check these signals too;
- (2) Assess whether the person tries to establish eye contact or on the contrary avoids looking at you;
- (3) Try to initiate informal conversation asking questions such as:
- (4) Why are you traveling?
- (5) Note seat number and passenger name record information; if the victim is accompanied,
- (6) [N]ote if the companion is nervous, prevents the child [or] person from answering questions, is rude or evasive; assess the situation with other cabin crew members and your supervisor.

International Air Transport Association, *supra* note 13, at 14.

105. *Id.* at 15. See also CIRCULAR 352, *supra* note 101, at 14.

106. See, e.g., Moorman, *supra* note 6.

107. CIRCULAR 352, *supra* note 101, at 14 & International Air Transport Association, *supra* note 13, at 15.

108. International Air Transport Association, *supra* note 13, at 13–14.

Earlier in 2013 the Parliamentary Assembly of the Organization for the Security and Co-operation in Europe (OSCE) also adopted a resolution calling on

OSCE participating States to collaborate with commercial carriers, adopting legislation where necessary, in order to ensure that flight attendants, pilots, ground crew, ... and any other transportation professionals who may come into contact with a trafficking victim are trained to identify the victim and respond according to a protocol established with law enforcement.¹⁰⁹

Thus, for example, in the Netherlands, the Royal Marechaussee trained airline staff to be attentive to signs of human trafficking.¹¹⁰ Also, the United Kingdom Home Office developed a special training package to help crew members detect traffickers and victims.¹¹¹ Convinced that traffickers usually choose the cheapest route possible, the Home Office worked closely with budget airlines.¹¹²

At the national level, some States have adopted legislation that strengthens the struggle against human trafficking in the air industry. Their legislation is aligned with international obligations. Indeed, as has already been said, the Trafficking Protocol requires States to “adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial aircraft operators from being used in the commission of the offen[s]e [of human trafficking.]”¹¹³ More generally, Article 10 (2) of the European Trafficking Convention provides that “[e]ach Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate.”¹¹⁴ Thus, aligned with international obligations, the U.S. Federal Aviation Administration (FAA) Extension, Safety, and Security Act of 2016, a document enacted by the Congress and signed by the President, requires that “each air carrier shall provide to flight attendants employed or contracted by

109. OSCE Parliamentary Assembly, Resolution on trafficking victim watchfulness: planes, trains, buses, and hotels, 22nd Sess., para 15 (Istanbul, 29 June to 3 July 2013), available at <https://www.oscepa.org/documents/annual-sessions/2013-istanbul/declaration/1801-istanbul-declaration-eng-1/file> (last accessed Nov. 30, 2020).

110. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 84, at 59.

111. *Id.* at 58.

112. *Id.*

113. Trafficking Protocol, *supra* note 12, art. 11 (2).

114. European Trafficking Convention, *supra* note 14, art. 10 (2). See also EU Anti-Trafficking Directive, *supra* note 19, art. 11 (4).

such air carrier initial and annual training regarding ... recognizing and responding to potential human trafficking victims.”¹¹⁵ U.S.-based carriers can fulfill this requirement by becoming partners of the Blue Lightning Initiative (BLI) led by the Department of Homeland Security, U.S. Customs and Border Protection, and the Department of Transportation.¹¹⁶ BLI provides training, not only to flight attendants but also to other frontliners such as pilots and customer service representatives.¹¹⁷ This training teaches airline employees how to use common indicators of trafficking and how to report suspected trafficking to law enforcement.¹¹⁸

In the United Kingdom (U.K.), the Modern Slavery Act 2015 requires each commercial organization to prepare and publish a statement for each financial year detailing the steps the company has taken during the year “to ensure[, *inter alia*,] that human trafficking is not taking place ... in any part of its [] business[.]”¹¹⁹ Alternatively, it can be a statement that the company “has taken no such steps.”¹²⁰ This provision applies to commercial organizations having a certain turnover and which carry on their business or part of their business in any part of the U.K. (wherever incorporated).¹²¹ Unfortunately, beside a requirement to prepare a statement, the Modern Slavery Act 2015 does not require businesses to take steps to ensure that their operations are trafficking-free.¹²² The Act merely suggests some areas of information that their statements may include (e.g., policies, due diligence processes, trainings available to their staff).¹²³ On the flip side, if the commercial organization has

115. FAA Extension, Safety, and Security Act of 2016, 49 U.S.C. § 2113 (2016) (U.S.).

116. U.S. Customs and Border Protection, Blue Lightning *available at* <https://www.cbp.gov/border-security/human-trafficking/blue-lightning> (last accessed Nov. 30, 2020).

117. *Id.*

118. *Id.*

119. An Act to make provision about slavery, servitude and forced or compulsory labour and about human trafficking, including provision for the protection of victims; to make provision for an Independent Anti-slavery Commissioner; and for connected purposes [Modern Slavery Act 2015], 2015 c. 30, pt. 6, no. 54 (4) (a) (ii) (2015) (U.K.).

120. *Id.* no. 54 (4).

121. *Id.* nos. 54 (2) & 54 (12).

122. See *id.*

123. *Id.* no. 54 (5).

a website, it must publish its statement on it.¹²⁴ It is hoped that this obligation will provide a good incentive to companies to take action against human trafficking. Indeed, if the statement shows a weak commitment to combating human trafficking, this could potentially affect the brand image of the company. Today, over 80 airlines are affected by this Act.¹²⁵ Annual statements show that not all of them progress at the same speed in the implementation of measures aimed at fighting human trafficking. Some companies only indicate their hope to be able to train their staff in the near future. For example, in its 2019 statement, Thai Airways stresses that it “hope[s] to introduce training on modern slavery and human trafficking for all employees” in the future.¹²⁶ Other companies, however, note that they already train their staff with more or less success. Thus, the Group Slavery and Human Trafficking Statement of the International Airlines Group (IAG) indicates —

In 2017, we continued to update our crew manuals, so our employees can [recognize] signs of potential trafficking situations and report their concerns. We have clear processes in place to ensure that our staff know how and where to report any suspected incidences of Modern Slavery. ... guidance is provided to flight crew and cabin crew to support the [U.K.] Border Agency initiative to reduce human trafficking. Awareness of this issue is part of routine cabin crew training for new starters. During 2018 and beyond, we would like to roll out training to our check-in agents and as part of our annual cabin crew training. We continue to work closely with governments and the airports in which we operate to ensure that all suspected trafficking on our flights is reported and dealt with appropriately. During 2017, there were two suspected trafficking incidents reported to the appropriate authorities.¹²⁷

IAG is one of the world’s largest airline groups. It is composed of prestigious operating companies which all together carry around 105 million passengers each year.¹²⁸ The ratio of 105 million passengers transported every

124. *Id.* no. 54 (7).

125. International Air Transport Association, *supra* note 13, at 10.

126. Thai Airways International Public Company Limited, Anti-Slavery Statement, available at https://www.thaiairways.com/static/common/pdf/terms_condition/Anti_Slavery_Statement.pdf (last accessed Nov. 30, 2020).

127. International Airlines Group, IAG Group Slavery and Human Trafficking Statement, at *1, available at https://www.iairgroup.com/~/_media/Files/I/IAG/Modern%20Slavery/2019%20Modern%20Slavery%20Statement%20Final.pdf (last accessed Nov. 30, 2020).

128. *Id.*

year to two suspected trafficking incidents reported in 2017 may leave the reader doubtful about the efficacy of the processes, guidance and trainings implemented by the group's companies. This ratio may also illustrate how difficult it is for cabin crew members to detect victims and suspected victims. These difficulties, similar to the challenges encountered by ground personnel, may be due, notably, to the absence of profiling and to the fact that victims themselves are either not aware that they live a situation of trafficking, or, when aware of their situation, they might prefer to be silent.

III. CHALLENGES AND IMPORTANCE OF DETECTION

Detecting a situation of human trafficking, and consequently a presumed victim or a suspected perpetrator, is often challenging yet of critical importance to ensure the special rights owed to trafficked individuals.

A. The Challenges of Detection

Many reasons explain why it is difficult to detect victims and presumed victims of human trafficking. On the side of the victims, at the airport of origin, transit or destination, as well as onboard airplanes, many are “not aware of the fact that they will be exploited” once at their working place, and consequently, do not approach border guards, crew members, or other agents to complain about their future-but-yet-unknown condition.¹²⁹ Also, when they feel they have been victimized, they may face difficulties in explaining why and then fail to report. In addition, when victims are aware of their situation, they may be reluctant to report for different reasons such as the lack of trust in local authorities, or the “poor conditions in their countries of origin which lead them to accept [their horrendous fate] in the country of destination.”¹³⁰ These reasons are dramatic because it is well-recognized that detection is mainly a reactive step that greatly depends on the victim. If an individual has insufficient confidence to approach frontline responders and does not self-identify as a victim, then he or she has a high risk of never being first detected and then formally identified as a victim of human trafficking.¹³¹ This explains why a tremendous effort must be put into proactive detection by frontline bodies.

129. INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra* note 89, at 14.

130. Jacqueline Bhabha and Christina Alfiev, *The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs*, at 10, *available at* <https://www.refworld.org/pdfid/4ad317bc2.pdf> (last accessed Nov. 30, 2020).

131. INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra* note 89, 14.

On the side of frontliners, however, be they airport personnel or cabin crew members, a series of complex reasons also explain why many victims are not properly detected. As explained earlier, challenges may arise from the lack of visible signs of violence or of control mechanisms by traffickers, especially when the exploitation has not yet taken place.¹³² Non-detection could also come from the lack of understanding of the notion of human trafficking, lack of commitment, time and resources, or lack of will to conduct active investigations. Sometimes also, the existence of corruption among frontline officers or complicity with traffickers paralyze any detection process.¹³³ In addition, the lack of solid mechanisms in some countries (e.g., national referral mechanisms), guidelines and procedures, render more difficult any detection.¹³⁴

B. The Importance of Detection

As mentioned above, if victims of human trafficking do not approach frontline officers to explain their horrendous situation, the risk is high that they will never be detected. However, most of the victims do not speak out. Hence, the extreme importance of having an efficient proactive detection process implemented successfully by external stakeholders gravitating along the chain of human trafficking (e.g., border guards and flight attendants to mention a few).

Moreover, detection is important in the sense that it opens the doors to in-depth investigation conducted with the aim of formally establishing the status of vulnerable persons. Here, it should be highlighted that generally, but with the notable exception of the European Trafficking Convention and other European treaty-like documents, this is only once these persons have been formally identified as victims of human trafficking that they are granted access to the rights they are entitled to as per the anti-trafficking legal instruments.

132. See INTERNATIONAL CENTER FOR MIGRATION POLICY DEVELOPMENT, *supra* note 73, at 54.

133. Bhabha and Alfiev, *supra* note 130, at 10.

134. See, e.g., ASEAN COMMISSION ON THE PROMOTION AND PROTECTION OF THE RIGHTS OF WOMEN AND CHILDREN, REGIONAL REVIEW ON LAWS, POLICIES AND PRACTICES WITHIN ASEAN RELATING TO THE IDENTIFICATION, MANAGEMENT AND TREATMENT OF VICTIMS OF TRAFFICKING, ESPECIALLY WOMEN AND CHILDREN 36-44 (2016) [hereinafter ASEAN REGIONAL REVIEW].

Formal identification, however, does not always put an end to the ordeals of trafficked victims. Indeed, victims are sometimes misidentified. For example, victims are misidentified as irregular migrants, illegal workers, or smuggled migrants.¹³⁵ Such a case of incorrect identification results in a denial of the victims' rights.¹³⁶ As stressed by the Office of the High Commissioner for Human Rights —

If a trafficked person is not identified at all or is incorrectly identified as a criminal or an irregular or smuggled migrant, then this will directly affect that person's ability to access the rights to which she or he is entitled. In short, failure to quickly and accurately identify victims of trafficking renders any rights granted to such persons illusory.¹³⁷

Rights granted to victims of human trafficking comprise particularly the right to receive immediate support and protection from further exploitation and harm from the State in whose territory they are located, the right to a safe and preferably voluntary return, as well as the right to adequate and appropriate remedies.¹³⁸

More specifically, reasonable measures of support and protection include moving the victim to a safe place, attending the immediate medical needs of the victim and providing physical, psychological, and social (e.g., appropriate housing, employment, educational and training opportunities) recovery of victims irrespective of the victim capacity or willingness to cooperate with

135. See *id.* at 44 & Jovanovic, *supra* note 66, at 42.

136. United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, U.N. Doc. E/2002/68/Add. 1, Guideline 2 (May 20, 2002) [hereinafter *Recommended Principles and Guidelines*].

137. United Nations Human Rights Office of the High Commissioner, Human Rights and Human Trafficking, available at https://www.ohchr.org/Documents/Publications/FS36_en.pdf (last accessed Nov. 30, 2020) [hereinafter *Human Rights and Human Trafficking*]. See, e.g., Corthay, *supra* note 14, at 254 (citing *Human Rights and Human Trafficking*, *supra* note 137 at 10).

138. See UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING: COMMENTARY, 166-73 (2010). See also European Trafficking Convention, *supra* note 17, arts. 10 (4), 12 (1) (f), 14 (2), & 16 (7); EU Anti-Trafficking Directive, *supra* note 19, arts. 13-16. Child protection measures, however, are missing in the text of the ASEAN Trafficking Convention. Jovanovic, *supra* note 66, at 40.

criminal justice authority, as well as assessing whether the trafficked person is under a risk of intimidation or retaliation by traffickers.¹³⁹ States are also required to protect the private life and identity of the victims,¹⁴⁰ to give trafficked persons information on relevant legal proceedings and the opportunity to participate in legal proceedings against their exploiters freely, safely and on the basis of full information.¹⁴¹

It is worth noting that European instruments require already securing assistance and support to people when they are merely presumed victims of human trafficking but not yet formally identified as such. This is explained by the fact that formally identifying the status of a victim is a process that takes time (i.e., weeks or months). Among other things, silence kept by victims suffering from post-traumatic stress disorder, and exchange of information with other countries or support organizations may lengthen the identification procedure.¹⁴² Therefore, taking up a human rights approach instead of a prosecution-oriented one, the European Trafficking Convention and the EU Anti-Trafficking Directive have introduced the concept of presumption of victim status, a concept present neither in the Trafficking Protocol nor in the ASEAN Trafficking Convention. Article 10 (2) of the European Trafficking Convention provides for example —

Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an [offense] ... has been completed by the competent authorities and shall likewise ensure that that person receives the

139. See Trafficking Protocol, *supra* note 15, art. 6. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE, *supra* note 26, at 280–291. See also European Trafficking Convention, *supra* note 17, art. 12; EU Anti-Trafficking Directive, *supra* note 19, arts. 11–12; ASEAN Trafficking Convention *supra* note 18, art. 14.

140. See Trafficking Protocol, *supra* note 12, art. 6 (1); European Trafficking Convention, *supra* note 17, art. 11; & ASEAN Trafficking Convention, *supra* note 18, art. 14 (6).

141. See Trafficking Protocol, *supra* note 15, art. 6 (2); European Trafficking Convention, *supra* note 17, art. 12 (1); EU Anti-Trafficking Directive, *supra* note 19, art. 12; ASEAN Trafficking Convention, *supra* note 18, art. 14 (10). See also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex para 6, U.N. GAOR, 96th Plen. Mtg., U.N. Doc. A/RES/40/34 (Nov. 29, 1985).

142. Council of Europe, Explanatory Report, *supra* note 26, at 46.

assistance provided for in Article 12, paragraphs 1 [assistance in physical, psychological and social recovery] and 2 [assistance in safety and protection needs].¹⁴³

The presumption of victim status means that as soon as competent authorities have “reasonable” grounds for believing that someone is a victim of human trafficking, they will not remove him or her from the territory of the receiving country to be relocated to the country of origin or to a third country, and will provide the person with assistance and support irrespectively of his or her willingness to act as a witness.¹⁴⁴ The presumption of victim status, which requires a standard of proof that is relatively low, is of great importance. Some victims are illegally present in the country where they are exploited. Therefore, application of the reasonable-grounds principle avoids that people are removed from the receiving country and are prevented from assistance and support before they can be successfully identified as victims.¹⁴⁵

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

[e]ach Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her.¹⁴⁶

143. European Trafficking Convention, *supra* note 17, art. 10 (2). *See also* EU Anti-Trafficking Directive, *supra* note 19, art. 11 (2).

144. Council of Europe, Explanatory Report, *supra* note 26, at 50 & EU Anti-Trafficking Directive, *supra* note 19, pmbl.

145. Council of Europe, Explanatory Report, *supra* note 26, at 45.

146. European Trafficking Convention, *supra* note 17, art. 13 (1). For a commentary on Article 13, see the EC’s Action against Trafficking in Human Beings Explanatory Report. *See* Council of Europe, Explanatory Report, *supra* note 26, at 12. *See also* Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities 2004 O.J. (L 261/19), art. 6 (2004) [hereinafter EU Residence Permit Directive].

The recovery and reflection period serves a series of purposes such as the elimination of the fear of immediate deportation, the escape from traffickers' influence, and the recovery from trauma.¹⁴⁷ The granting of this recovery and reflection period does not depend upon the collaboration of the victim with the investigative and prosecution procedure.¹⁴⁸ It is worth mentioning, however, that the right to a recovery and reflection period exists neither in the Trafficking Protocol nor in the ASEAN Trafficking Convention. This absence weakens the protection of victims in the sense that they might face deportation before completion of a formal identification.¹⁴⁹

Besides granting a reflection and recovery period for a short period of time, States of destination may also decide to grant residence permits to the victims. In that regard, Article 7 (1) of the Trafficking Protocol provides that "each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases."¹⁵⁰ The meaning of "appropriate cases" is not clarified in the Trafficking Protocol. However, looking at some regional instruments could help. For example, Article 14 (1) of the European Trafficking Convention provides that renewable residence permit to victims shall be issued when "the competent authority considers that their stay is necessary owing to their personal situation[, and/or] ... for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings."¹⁵¹

With respect to the right of return, "[i]nternational human rights law is clear that all victims of trafficking, children as well as adults, who are not

147. See Tenia Kyriazi, *The Council of Europe Convention on Action against Trafficking in Human Beings*, 59 *REVUE HELLÉNIQUE DE DROIT INTERNATIONAL* 655, 665 (2006).

148. *Id.*

149. Jovanovic, *supra* note 66, at 40.

150. Trafficking Protocol, *supra* note 15, art. 7 (1). See also ASEAN Trafficking Protocol, *supra* note 18, art. 14 (4). See Efthimia Barbagiannis, *Protecting Victims of Human Trafficking: Creating Better Residency Visas*, 25 *CARDOZO J. INT'L & COMP. L.* 561, 574-93 (2017).

151. European Trafficking Convention, *supra* note 15, art. 14 (1). Note that the best interest of the child takes precedence over the two requirements stated in art 14 (1). See Council of Europe, Explanatory Report, *supra* note 26, at 52. See also ASEAN Trafficking Convention, *supra* note 18, arts. 14 (4) & 16 (5); EU Residence Permit Directive, *supra* note 144, art. 8.

residents of the country in which they find themselves are entitled to return to their country of origin.”¹⁵² This right implies a series of obligations for the country of origin (e.g., to receive its returning nationals without undue or unreasonable delay and with due regard for the safety of the victim)¹⁵³ as well as for the country of destination. As established in Article 8 (2) of the Trafficking Protocol —

When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the *safety* of that person and for the *status of any legal proceedings* related to the fact that the person is a victim of trafficking and shall *preferably be voluntary*.¹⁵⁴

This provision shows that the limits to the right of the victim to return in his or her country are the same as the reasons why a State shall permit victims of trafficking to remain in its territory temporarily or permanently: namely the safety of the person and legal proceedings. Destination countries are in principle not prohibited from returning trafficked victims. However, they are prevented from returning people to a country where there is a serious risk that they will be subject to persecution or abuse. Such a risk becomes a reality when, for instance, authorities punish victims for having left the country without authorization, when families and communities strongly stigmatize or reject victims, or when traffickers carry out intimidation, violence or reprisals

152. Human Rights and Human Trafficking, *supra* note 137, at 24.

153. See Trafficking Protocol, *supra* note 15, art. 8 (1); European Trafficking Convention, *supra* note 17, art. 16 (1); ASEAN Trafficking Convention, *supra* note 18, art. 15 (1). Article 14 (2) of the ASEAN Trafficking Convention provides that the country of origin shall respect and recognize the identification of victims made by the country of destination. The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children also notes —

Conversely, it is often the case that countries of origin will identify a person as having been trafficked once they return home. In such cases, the country of destination should accept the determination made by the country of origin and work with that country to pursue criminal investigations and support any claims that the victims may have to compensation or other remedies.

ASEAN REGIONAL REVIEW, *supra* note 134, 44-45.

154. Trafficking Protocol, *supra* note 15, art. 8 (2) (emphasis supplied). See also European Trafficking Convention, *supra* note 19, art. 16 (2); ASEAN Trafficking Convention, *supra* note 18, art. 15 (2) (emphases supplied).

against victims and even re-traffic them.¹⁵⁵ Also, with respect to legal proceedings, States of destination and origin shall encourage victims to voluntarily and temporarily stay in the country of destination “for purposes of testifying or otherwise cooperating in the prosecution of their traffickers.”¹⁵⁶

Moreover, for some experts, States “should consider ... not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.”¹⁵⁷ This non-criminalization concept, an emerging yet still contentious principle,¹⁵⁸ is not expressly mentioned in the Trafficking Protocol but is provided in some regional legal instruments.¹⁵⁹

Concerning the right to remedies, finally, the Recommended Principles and Guidelines stresses a widely accepted fact that “trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies.”¹⁶⁰ Remedies, which may be criminal, civil or administrative in nature, “include the means for as full a rehabilitation as possible”¹⁶¹ and should be proportional to the gravity of the harm suffered.¹⁶²

155. Human Rights and Human Trafficking, *supra* note 137, at 23. According to Konrad, up to fifty percent of victims who are immediately repatriated to their origin country are re-trafficked. Helga Konrad, *The OSCE and the Struggle against Human Trafficking: the Argument for a Comprehensive, Multi-Pronged Approach*, 1 INTERCULTURAL HUM. RTS. L. REV. 79, 82 (2006).

156. ASEAN Trafficking Convention, *supra* note 15, art. 16 (5).

157. Working Group on Trafficking in Persons, *Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009*, U.N. Doc. CTOC/COP/WG.4/2009/2, 3 (12) (April 21, 2009).

158. See Andreas Schloenhardt & Rebekkah Markey-Towler, *Non-Criminalisation of Victims of Trafficking in Persons: Principles, Promises, and Perspectives*, 4 GRO. J. I. L. 10 (2016).

159. See European Trafficking Convention, *supra* note 15, art. 26; EU Anti-Trafficking Directive, *supra* note 19, art. 8; & ASEAN Trafficking Convention, *supra* note 18, art. 14 (7).

160. Recommended Principles and Guidelines, *supra* note 136, Guideline 9.

161. *Id.*

162. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, U.N. G.A.O.R., 60th Sess., U.N. Doc. A/RES/60/147, annex, para. 15, 18, & 20 (Mar. 21, 2006).

Remedies involve different forms. The Trafficking Protocol provides that “[e]ach State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”¹⁶³ Beside compensation, other forms of remedies include restitution, rehabilitation, satisfaction and guarantees of non-repetition.¹⁶⁴ As victims of human trafficking have the right to fair, adequate, effective, and appropriate remedies, “States should, therefore, be careful to ensure that the return of trafficked persons does not jeopardize the initiation and/or successful completion of any legal proceedings involving them.”¹⁶⁵ This issue is particularly acute when the presence of the victim in the country where he or she has initiated a legal proceeding is a requirement to secure remedial action.¹⁶⁶ In such a case, the country should at least postpone repatriation and temporarily regularize the legal status of the victim, until he or she has been able to complete any legal proceedings.¹⁶⁷

These measures of protection and support granted to victims or presumed victims of human trafficking by international and regional legal instruments are more than welcome from a human rights perspective. Paradoxically, however, they could discourage States from accurately identifying victims. As stressed by Gallagher, “the regime established by the Organized Crime Convention and its Protocols (whereby trafficked persons are accorded greater protection and therefore impose a greater financial and administrative burden than smuggled migrants) created a clear incentive for national authorities to identify irregular migrants as smuggled rather than trafficked.”¹⁶⁸

163. Trafficking Protocol, *supra* note 15, art. 6 (6). *See also* European Trafficking Convention, *supra* note 17, art. 15. EU Anti-Trafficking Directive, *supra* note 19, art. 17 & ASEAN Trafficking Convention, *supra* note 18, art. 14 (13).

164. *See* Human Rights and Human Trafficking, *supra* note 137, at 29-34.

165. *Id.* at 25.

166. *Id.*

167. *Id.*

168. GALLAGHER, *supra* note 30, at 280 (citing United Nations Convention against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, 2225 U.N.T.S. 209).

V. CONCLUSION

Traffickers will certainly never stop trying to take advantage of vulnerable people. Therefore, efforts from the international community to tackle human trafficking must not stop either. The prompt and accurate detection, report, and formal identification of victims of human trafficking are crucial. In the civil aviation environment, ground staff and onboard personnel have an important support role to play. They are a “force multiplier” in the fight against trafficking, an additional set of eyes and ears to governments and law enforcement officers. Thus, it is encouraging to note that many stakeholders, like States, airlines, and international organizations, have developed, adopted and implemented a series of measures, mechanisms and initiatives destined to make the civil aviation environment a trafficking-free zone.

However, victim detection still faces major challenges. Despite considerable efforts put by airlines and other stakeholders, human trafficking is still an invisible crime. Today, only a very small portion of the total number of persons trafficked is detected.¹⁶⁹ Too often, detection is reactive and still greatly depends on the victim. If an individual has insufficient confidence to approach frontline responders (cabin crew members, immigration, border guards) and cannot self-identify as a victim, then he or she has a high risk of never being detected and then formally identified as a victim of human trafficking, and never being referred to appropriate support and protection services.¹⁷⁰

One way to make the offense of trafficking more visible is to continuously develop and strengthen a proactive detection and identification process. Obviously, measures and initiatives adopted in that regard must not be limited to the air industry but extended to all stakeholders involved in the fight against human trafficking. Possibilities for improvement include developing and strengthening constant and specialized training and implementing capacity building initiative in order to address lack of awareness of frontline officials;¹⁷¹ ensuring that guidance, procedures, and indicators are received, understood, updated, and implemented to guarantee prompt assessment and quick reaction from frontlines officers;¹⁷² developing or strengthening functional national

169. See, e.g., ASEAN REGIONAL REVIEW, *supra* note 134, at 35.

170. INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra* note 89, at 14.

171. Jovanovic, *supra* note 66, at 43; ASEAN Regional Review, *supra* note 134, at 44.

172. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 84, at 56.

referral mechanisms;¹⁷³ ensuring that sufficient resources (human, financial, and technological) are provided to all services involved in the detection and identification process; and ensuring appropriate coordination and exchange of information among all relevant actors.

173. European Commission, May 19, 2016, *Report from the Commission to the European Parliament and the Council: Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*, Conference Report, n. 38 (citing European Commission, Council conclusions on the new EU Strategy, available at https://ec.europa.eu/anti-trafficking/eu-policy/council-conclusions-new-eu-strategy_en (last accessed Nov. 30, 2020)).