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THE APPROPRIATE LEGAL RESPONSES TO COMBATING TRAFFICKING IN PERSONS A Handbook for Parliamentarians

DRAFT-SUMMARY

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**THE APPROPRIATE LEGAL RESPONSES TO
COMBATING TRAFFICKING IN PERSONS**
A Handbook for Parliamentarians

Draft-Summary

Foreword

Trafficking in persons, both internationally and within domestic borders, affects hundreds of thousands of victims annually. Trafficking is committed primarily for purposes of forced labor and sexual exploitation. The majority of victims are women and children, and most are economically, or otherwise disadvantaged, making victimization particularly cruel.

Parliaments and parliamentarians mainly serve three functions: representation, legislation, and oversight. Serving in this capacity, parliamentarians are a crucial part of the anti-trafficking movement and have the power to initiate significant progress. Their role can be manifold, including, broadly, ensuring national commitment to and implementation of international human rights standards by ratifying international and regional human rights conventions, and more specifically, by drafting and monitoring enforcement of comprehensive anti-trafficking legislation, raising awareness of trafficking in persons at the national and international level, guiding policy, and overseeing its effective and successful implementation.

The handbook will provide comprehensive background information on the international and national legal framework governing the response to trafficking in persons and practical recommendations for what parliamentarians can do, with examples of best practices from around the world. There are many other creative ways in which we can fight trafficking in persons and we must continue to think and formulate new ideas. This handbook aims to serve as a guide in this process.

The handbook is based on an analysis of the various provisions of the Trafficking Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, as interpreted by the legislative guide and the UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking. The handbook will also make reference to comparative models of various laws recently adopted by legislators to combat trafficking in persons, as well as action plans that various governments have designed to prevent trafficking and protect victims of trafficking.

The handbook is divided into eight chapters: Chapter 1, "The International Legal Framework to Combat Trafficking in Persons"; Chapter 2, "Criminalizing All Forms of Trafficking in Persons, Providing for Appropriate, Dissuasive, and Proportionate Sanctions, and Enhancing Procedural Codes Accordingly"; Chapter 3, "Targeting All of the Actors in the Trafficking Infrastructure"; Chapter 4, "Recognizing the Trafficked Person as a Victim Entitled to Internationally Recognized Human Rights"; Chapter 5, "Preventing Trafficking in Persons"; Chapter 6, "Taking the Necessary Measures to Combat the International Crime of Trafficking in Persons at the International Level"; Chapter 7, "Reporting on the Status of Trafficking in Persons"; and Chapter 8, "Enhancing the Role of Civil Society in Combating Trafficking in Persons".

This Handbook offers a broad overview of the role of parliamentarians in combating human trafficking. The 2005 IPU/UNICEF handbook on child trafficking is also of important use to parliamentarians when considering the development of measures to combat human trafficking.

Introduction

Trafficking in persons, a form of modern-day or contemporary slavery, is a human rights violation, which constitutes a crime against the individual and the State, carrying with it important implications for the legislative approach to be taken in recognizing and punishing this crime. Crucially, it is a crime against human security as well as state security, implying the need for the implementation of interventions and actions which seek to care for and protect individual humans, rather than solely state security, whether as part of prevention, prosecution or protection efforts. Trafficking carries with it enormous consequences for those persons who are victimized by it, including psychological and physical harm and trauma, and grave health consequences, including HIV/AIDS.

Trafficking in persons is also a form of unlawful interference with international family law, as some forms of trafficking are carried out by means of distorting or taking advantage of customary practices. On the other hand, some customary practices, which may be considered as inherently harmful to human rights and dignity of persons, may also contribute to the trafficking infrastructure.

Trafficking in persons is driven by lack of gender equality and lack of equal opportunity, stark intra and interstate economic inequality, corruption, and vulnerability due to failing judicial and law enforcement systems, civil instability, and failure of States to protect and provide for their citizens. Demand for commercial sex, cheap construction, manufacturing, industrial, and domestic labor likewise contribute to the trafficking infrastructure.

A crime control, or prosecution approach to combating trafficking in persons is imperative but not sufficient. Criminalization of the act of trafficking is not enough. An anti-trafficking law should also recognize the trafficked person as a victim who is entitled to basic human rights and their protection. Moreover, immigration laws, labor laws, health laws, child protection laws, and other relevant legislation must be reviewed and amended to cover all aspects of trafficking, so as to ensure a comprehensive framework for addressing the phenomenon. Further, these laws must be effectively enforced and monitored for the success of their implementation.

States must therefore act to build a comprehensive framework, one which aims to prevent victimization, as well as to protect those who have suffered from the crime, alongside the prosecution of the criminals. States must also act to combat those factors that contribute to the trafficking infrastructure, striving to provide for their citizens in ways that diminish vulnerability to trafficking, as well as to develop alternatives for the exploitation at times inherent in the demand for cheap labor and services. States must be vigilant in enforcing laws and monitoring interventions so as to minimize the profits to be gained from trafficking in persons.

Trafficking in persons is a global problem that transcends national boundaries. Trafficking in persons is thus a transnational crime, similar in nature to international drug and arms trafficking. As such, trafficking in persons is a crime which requires transnational policies, which engages international cooperation through information exchange and mutual assistance.

This work is fraught with many challenges. Implementation of laws is no easy matter, requiring resources, continuous oversight, monitoring and evaluation. Investigation and prosecution of cases of trafficking is a complex and time-consuming process, requiring rigorous training and commitment on the part of law enforcement agencies and judicial authorities, the work of which may also be sabotaged by corrupt practices. Identification of victims of trafficking is an obstacle, with victims often fearful of deportation or reprisals from traffickers. Statistics are difficult to gather and become quickly outdated.

However, responding effectively to the various elements of trafficking in persons in a comprehensive manner can have multiplier effects that can begin to chip away at the industry as a whole. Parliamentarians have an important role to play at every step in developing and promoting the implementation of these comprehensive frameworks. This handbook aims to suggest some practical ways in which they can begin to do so.

CHAPTER 1: **THE INTERNATIONAL LEGAL FRAMEWORK TO COMBAT TRAFFICKING IN PERSONS**

Introduction

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of 2000 (hereinafter, "Trafficking Protocol") is the primary source that defines State responsibilities to prevent, suppress and punish trafficking in persons. Any comprehensive approach that is designed to protect the internationally recognized human rights of victims of trafficking requires domestic laws to recognize international human rights conventions.

The Creation of an International Consensus to Combat Trafficking in Persons

The Trafficking Protocol was the first international legal instrument to define trafficking in persons and provide for a comprehensive approach to combat the problem. Today, it remains the primary reference tool for countries in developing their national approaches to combating trafficking in persons and in guiding regional policy frameworks and international cooperation in this field. Today, 116 countries are party to the Trafficking Protocol.

The Trafficking Protocol supplements the UN Convention against Transnational Organized Crime. Consequently, compliance with international standards to combat trafficking requires implementation of both international legal instruments.

Article 1 of the Protocol states: "This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention."

Role of Parliamentarians: Ensuring Compliance with International Legal Obligations to Combat Trafficking in Accordance with International Conventional Law

Sign, ratify/ or cause to be ratified and accede to, without reservations, international legal instruments, including the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime.

Promote the signature by their governments of this Protocol and any other international instrument related to trafficking in persons.

Strengthen the relationship between international legal instruments and domestic legislation by,
Reviewing existing laws to ensure the consistency and conformity of international legal instruments with domestic legislation.

Enacting laws that implement the international standards embodied in international legal instruments.

Amending domestic legislation that may conflict with international legal instruments.

Monitor the Government's compliance in fulfilling its obligations under international law.

Create and/or strengthen a parliamentary mechanism/structure to oversee and guide government policies on human rights protection, including protection of victims of trafficking in persons.

CHAPTER 2: **CRIMINALISING ALL FORMS OF TRAFFICKING IN PERSONS, PROVIDING FOR** **APPROPRIATE, DISSUASIVE AND PROPORTIONATE SANCTIONS AND** **ENHANCING PROCEDURAL CODES ACCORDINGLY**

Since the adoption of the Trafficking Protocol, there has been a wide legislative movement to enact laws on trafficking in persons, with some countries providing for specific provisions in their criminal codes outlawing the crime of trafficking in persons, and others adopting a more comprehensive act that not only criminalizes trafficking, but also protects victims of trafficking and provides for the necessary measures to prevent the act of trafficking.

It is significant that some countries have even made the prohibition of trafficking in persons a part of their constitutional law.

Criminalizing All Forms of Trafficking in Persons

At a minimum, countries must criminalize all forms of trafficking in persons and provide for appropriate, and dissuasive and proportionate sanctions. The Trafficking Protocol mandates that:

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.” (Article 5)

Defining Trafficking in Persons in National Legislation

Accordingly, the Trafficking Protocol provides a definition of trafficking in persons that should be utilized in defining the crime of trafficking in domestic legislation. Specifically, Article 3(a) of the Trafficking Protocol states that:

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

Act, Means and Purposes of trafficking: The Requirements for Establishing the Crime of Trafficking

In accordance with this definition, to establish the crime of trafficking in persons, Article 3 requires three constituent elements:

- 1) an act (what is done);
- 2) the means (how it is done); and
- 3) exploitative purpose (why it is done)

The Trafficking Protocol requires that the crime of trafficking be defined through a combination of the three constituent elements and not the individual components, though in some cases these individual elements will constitute criminal offences independently. For example, the means of abduction or the non-consensual application of force (assault) will likely constitute separate criminal offences under domestic criminal legislation.

However, if trafficking is in children, proof of those means (or how it is done) is unnecessary. In this context article 3 (c) states:

“The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means...”

Attempting to Commit Trafficking and Participating as an Accomplice in the Commission of the Crime

The Protocol calls on States parties to criminalize not only the full commission of the crime but also attempt, participation as an accomplice and organizing or directing the commission of the crime. Article 5 states that:

“Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article” (Article 5).

Forms of Trafficking in Persons: What Constitutes Exploitation?

The Trafficking Protocol does not define exploitation but gives a non-exhaustive list of forms of exploitation:

“Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, or practices similar to slavery, servitude or the removal of organs.”

Broadly, exploitation may take the form of *sex trafficking*, which may include prostitution, exploitation of prostitution of others, sex tourism and pornography, and sexually-oriented performances; trafficking for *non-commercial sex purposes*, which may include early marriage, forced marriage, arranged marriage, compensation marriage, transaction marriage, temporary marriage, or marriage for child-bearing; or *labor trafficking*, which may include domestic servitude, sweatshop or agricultural or construction labor, or armed conflict. Importantly, children may likewise be trafficked for the purposes of prostitution, pornography, sex tourism, forced labor, domestic service, begging, illicit adoption, drug distribution, armed conflict, and criminal activities. Other forms of trafficking include use in criminal activities and removal of organs or body parts.

Transnationality and the Involvement of Organized Crime are not Requisites for Establishing the Crime of Trafficking in Persons in Domestic Legislation

The Trafficking Protocol applies to the offenses of trafficking in persons “where those offences are transnational in nature and involve an organized criminal group.” However, in domestic law, the crime of trafficking in persons should be established independently of the transnational nature or the involvement of an organized criminal group. United Nations Convention against Transnational Organized Crime, Art. 34(2).

However, transnationality and the involvement of an organized criminal group may constitute and aggravated circumstance that enhances the penalty.

Distinguishing between Trafficking in Persons and Smuggling of Migrants

Anti-trafficking legislation must distinguish between trafficking in persons and smuggling of migrants. Smuggling of migrants is defined by the 2000 Protocol Against Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol) to mean

“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident” (Article 3).

Key Differences between TIP and Migrant Smuggling

In practice, it may be difficult to distinguish between these two crimes in the first instance. In many cases, victims of trafficking may first start out as smuggled migrants. Consequently, in investigating TIP cases, it may sometimes be necessary to rely on measures against smuggling. It is critical, however, that those investigating smuggling cases be familiar with the crime of trafficking in persons as the consequences of treating a trafficking case as one of migrant smuggling can be severe for the victim.

Identifying the differences

In some cases it may be difficult to quickly ascertain whether a case is one of human smuggling or trafficking. The distinctions between smuggling and trafficking are often very subtle and there are overlaps. Identifying whether a case is one of TIP or people smuggling can be very difficult for a number of reasons:

- Some trafficked persons might start their journey by agreeing to be smuggled into a country illegally, but find themselves deceived, coerced or forced into an exploitative situation later in the process (by e.g. being forced to work for extraordinary low wages to pay for the transportation).
- Traffickers may present an ‘opportunity’ that sounds more like smuggling to potential victims. They could be asked to pay a fee in common with other people who are smuggled. However, the intention of the trafficker from the outset is the exploitation of the victim. The ‘fee’ was part of the fraud and deception and a way to make a bit more money.
- Smuggling may be the planned intention at the outset but a ‘too good to miss’ opportunity to traffic people presents itself to the smugglers/traffickers at some point in the process.
- Criminals may both smuggle and traffic people, employing the same routes.
- Conditions for a smuggled person along the journey may be so bad it is difficult to believe a person could have consented to this.

Having said this, there are a number of key differences between migrant smuggling and TIP:

Consent

Migrant smuggling generally involves the consent of those being smuggled. Victims of trafficking, on the other hand, have either never consented or, if they initially consented, that consent has been rendered meaningless by the improper means of the traffickers.

Transnationality

To smuggle a person means to facilitate the person's *illegal* border crossing and entry into another country. Trafficking in persons, on the other hand, need not involve the crossing of any border. Where it does, the legality or illegality of the border crossing is irrelevant. Thus, while migrant smuggling is always, by definition, transnational, TIP need not be.

Exploitation

The relationship between smuggler and smuggled migrant usually ends after the facilitation of the border crossing. Smuggling fees are paid up front or upon arrival. The smuggler has no intention to exploit the smuggled person after arrival. Smuggler and migrant are partners, albeit disparate, in a commercial operation that the migrant enters willingly. Trafficking involves the ongoing exploitation of the victims in some manner to generate illicit profits for the traffickers. It is the intention of the trafficker that the relationship with the exploited victims will be a continuous one and extend beyond the crossing of the border in the final destination. Smuggling can become trafficking, e.g. when the smuggler 'sells' the person and the accumulated debt, or deceives/coerces/forces the person to work off transportation costs under exploitative conditions.

Source of the Profit

One important indicator of whether a case is one of smuggling or of TIP is how the offenders generate their income. Smugglers generate their income from fees to move people. The trafficker in contrast continues to exert control over the trafficked victim in order to achieve additional profits through the ongoing exploitation of the victim.

Owing to these key differences between trafficking in persons and smuggling of migrants, addressing the two phenomena in one law is not a good legislative policy.

Recognition of Trafficking in Persons as a Serious Crime that Warrants a Serious Penalty

Anti-trafficking legislation must recognize trafficking as a serious crime, and one which carries penalties similar to those of other serious crimes like drug trafficking and arms trafficking.

While anti-trafficking legislation should provide for a strong basic penalty for the crime of trafficking in persons, provisions should likewise be made for enhancing such a penalty in the occurrence of a number of aggravating circumstances. Broadly, such aggravating circumstances can be divided into three groups, depending on whether they refer to the trafficking offender, the victim of trafficking, or the act of trafficking itself.

Aggravating Circumstances Regarding the Offender

- The offence has been committed within the framework of an organized criminal group;
- The offender is a parent, sibling, guardian, spouse, partner or a person who exercises authority over the trafficked person;
- The offense is committed by a public official;

- The offender has been previously convicted for the same or similar offence;
- The offender is in a position of responsibility or trust in relation to the victim;
- The offender is in a position of authority or control or command on the child victim.

Aggravating Circumstances Regarding the Victim

- The offence has deliberately or by gross negligence endangered the life of the victim;
- The offence has caused the victim's death or suicide;
- The offence has caused particularly serious harm or body injuries to the victim, and psychological and physical diseases, including the Human Immunodeficiency Virus (HIV) or the Acquired Immune Deficiency Syndrome (AIDS).
- The offence has been committed against a victim who was particularly vulnerable, including a pregnant woman;
- The trafficked person is a child;
- The trafficked person is physically or psychologically handicapped;
- Two or more persons are trafficked at the same time;

Aggravating Circumstances Regarding the Act

- The offence is committed across borders;
- The offence is committed with the use of threats or violence or of other forms of coercion, through kidnapping, fraud or misrepresentation;
- Weapons, drugs and medications are used in the commission of the offence;
- The offence is committed with abuse of power or by taking advantage of the victim's inability to defend him-/herself or to express his/her will;
- The offence is committed by giving or receiving money or other benefits in order to obtain the agreement of a person who has control over another person,

Procedural Law on Trafficking in Persons

Critically, procedural law must be amended or new procedural provisions enacted such that trafficking victims are afforded due protection should they choose to cooperate with authorities in pursuing the prosecution of a case of trafficking. Having such legislation in place affords much needed security and peace of mind to victims of trafficking, who frequently fear intimidation and reprisals from traffickers. Such a legal framework is critical in encouraging victims to pursue cooperation with authorities, a factor critical to ensuring the success of prosecution efforts. In addition, procedural laws must likewise pay special attention to the special needs of child victims and child victim witnesses. Importantly, this approach strives to ensure that victims of trafficking do not endure any further abuse during court proceedings. A number of principles are therefore key to ensuring that procedural law is in harmony with the protections afforded by anti-trafficking legislation.

The Role of Parliamentarians: Criminalizing All Forms of Trafficking in Persons, Providing for Appropriate, Dissuasive, and Proportionate Sanctions, and Enhancing Procedural Codes Accordingly.

Pass criminal laws that make trafficking in persons a crime.

Pass criminal laws that criminalize all forms of trafficking in persons.

Pass criminal laws that criminalize trafficking in persons for the purpose of removal of organs, tissues or body parts and the trafficking in organs themselves.

Pass criminal laws that criminalize the underlying offences such as forced labour, slavery, participation in an organized criminal group etc.

Pass criminal laws that recognize trafficking regardless of organized crime involvement.

Pass criminal laws that cover both international and domestic trafficking in persons.

Pass criminal laws that provide for serious penalties that are comparable with the gravity of the crime of trafficking in persons.

Pass or amend existing procedural codes to reflect a human rights approach to the treatment of victim-witness prior to, during and after the court proceedings.

Pass or amend existing procedural codes to reflect and respond to the special needs of child victim witnesses.

To strengthen prosecution of cases of trafficking, several initiatives may be advocated by Parliamentarians.

Create a specialized Anti-Trafficking Police Unit.

Provide legal assistance to victims of trafficking.

Encourage victims of trafficking to testify in the investigation and prosecution of cases of trafficking in persons by protecting the safety and security of victims and witnesses at all stages.

Assign a special prosecutor to deal with cases of trafficking in persons.

Modernize the investigative techniques for more efficient discovery of the offence of trafficking in persons.

Introduce training for police personnel, public prosecutors, immigration officers, and other law enforcement officials to increase their capacity to investigate cases of trafficking in persons.

CHAPTER 3:

TARGETING ALL OF THE ACTORS IN THE TRAFFICKING INFRASTRUCTURE

Expanding liability to all actors in the trafficking infrastructure is important in combating trafficking, as this crime is often characterized by the involvement of a variety of actors who contribute to the trafficking scheme at the various steps of the criminal process.

Providing for the Liability of Legal Persons

It is particularly important to target legal persons, especially commercial carriers and employment/recruitment agencies. Recruitment agencies frequently facilitate the deceptive practices of recruitment which serve to initiate the trafficking process. Similarly, agencies that facilitate international marriages (marriages by catalog, transactional marriages, and marriages via the Internet) as well as agencies facilitating international adoption may also engage in illicit practices, which can amount to or be directly conceived as acts of trafficking in persons. Other examples of legal persons that should be targeted in an anti-trafficking legislation likewise include advertisement agencies; massage parlors, strip-clubs, and escort services.

In all cases, when such legal persons knowingly, or as a result of negligence, facilitate trafficking should be strictly sanctioned and a variety of obligations placed on such agencies, which should aim to prevent the exploitative practices before they occur.

Providing for the Liability of the Public Person and Combating Corruption

It is also important to note that trafficking in persons may thrive in no small part due to the explicit or implicit participation or inaction on the part of public officials. States must therefore ensure that legislative

frameworks enacted to combat trafficking strive to chip away at role of these contributing elements of the trafficking infrastructure.

The United Nations Convention on Transnational Organized Crime mandates that:

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

“(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties” (Article 8(1)).

Article 9 further requires that State Parties shall “adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.” In doing so, countries follow different models in establishing the liability of public officials. Some countries make it a specific crime for a public official to be involved in the crime of trafficking in persons. Other countries consider the involvement of public officials in the commission of the crime as an aggravating circumstance to the basic crime of trafficking, which renders an enhanced penalty.

The Role of Parliamentarians: Targeting All of the Actors in the Trafficking Infrastructure

Expand criminal liability for the acts of trafficking to all actors in the trafficking infrastructure, including especially:

Legal Persons

Public Persons

Enact obligations of disclosure to as to monitor and regulate the activities of agencies facilitating international activities which may be abused by traffickers or which may participate in the trafficking scheme, especially employment agencies, international marriage brokers, and international adoption agencies.

Encourage the private sector to develop and enact codes of ethical conduct concerning victims of trafficking, child sex tourism, and exploitative labor.

Create dissuasive penalties to discourage the use of exploited labor by the private sector.

Create incentives to encourage the private sector to forego the use of exploited labor, such as by enacting tax breaks for corporations adhering to ethical standards.

Enact initiatives seeking to target demand for trafficking in persons for all forms of exploitation.

Monitor that cases of corruption connected to trafficking in persons are investigated and brought to completion.

Promote broad accountability and transparency of government institutions by engaging in regular evaluations of governance, with the participation of both governmental and non-governmental actors.

Consult with anti-corruption ombudsmen, task-forces, commissions, auditing agencies, concerned international organizations, and civil society to monitor levels of corruption in the country, especially in connection with trafficking in persons.

Adopt legislative measures necessary so that traffickers could be refused entry to their territory or have their visas revoked.

CHAPTER 4: **RECOGNISING THE TRAFFICKED PERSON AS A VICTIM ENTITLED TO INTERNATIONALLY RECOGNISED HUMAN RIGHTS**

A Human Rights approach to trafficking in persons is one that recognizes the trafficked person as a victim entitled to human rights.

Identification of Victims of Trafficking

Critically, the first step in the recognition of trafficked persons as victims entitled to human rights protection is their identification as such. While the Trafficking Protocol does not mention the identification of victims explicitly, the UNHCHR Recommended Principles and Guidelines stress that, “*A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place.*” To this end, the Guidelines call on States, inter-governmental and non-governmental organizations to:

“[Develop] guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons.”

Different States have utilized different approaches to ensure that their governments are under an obligation to engage in effective ways of identifying victims of trafficking. This can be accomplished by including a provision to this effect in national legislation. This can also be accomplished by mandating that such actions be taken through a National Action Plan.

In order to provide the protective services that victims of trafficking require, they must be accurately defined as such, and law enforcement authorities, as well as other front-line actors who may come into contact with victims of trafficking, should be aware of how to currently identify victims of trafficking as such, and correspondingly, what rights they are entitled to. Importantly, those persons closest to victims of trafficking, such as their children, for example, should likewise be afforded with similar protections. The following categories are important:

The Victim

While The Trafficking Protocol treats a trafficked person as a victim of a crime, it does not provide a definition of a victim of trafficking. However, the term “victim of a crime” has been defined by the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, and can be utilized, stating that victims are:

“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States.”

States therefore may utilize such general definitions as a basis for creating their own, but it is imperative that they define the trafficked person as a victim in national legislation.

The Vulnerable Victim

In defining a victim of trafficking in national legislation, it is important to account for the fact that a victim of trafficking is, most frequently, a vulnerable victim.

Non-Criminalization of a Victim of Trafficking in Persons

Closely related to the notion of a vulnerable victim is the concept of the non-criminalization of a victim of trafficking in persons.

Recognition of the trafficked person as a victim requires the application of the principle of non-criminalization. According to this principle, the law must excuse victims of trafficking in persons from criminal liability for the acts committed as a result of being trafficked, including illegal entry, falsification of travel documents, or prostitution (if criminalized).

While the Trafficking Protocol treats the trafficked person as a victim, it does not specifically provide for the principle of non-criminalization. However, the UNHCHR Recommended Principles and Guidelines stress that:

“Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”

States should therefore ensure that

[T]rafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

In particular, States should ensure that:

[L]egislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

Countries follow two main models when establishing the principle of non-criminalization of the illegal acts committed by victims of trafficking, the duress model and the causation model:

The Duress Model

- “Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so,” *Council of Europe Convention on Action against Trafficking in Human Beings, Article 26.*

The Causation Model

- “A person is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking,” *UNMIK Regulation on the Prohibition of Trafficking in Persons in Kosovo, § 8.*

- “A victim of trafficking in persons shall not be criminally liable for punishable acts related to migration, prostitution or any other crime that is the direct result from being trafficked,” *Panama Law n. 16/2004 on Trafficking in Persons, Article 19*.
- “Trafficked persons shall be recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking [...] or in obedience to the order made by the trafficker in relation thereto. In this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant,” *Philippines RA 9208 of 2003, Section 17*.
- “Penalties for the crime of unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor do “not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, [...] if that conduct is caused by, or incident to, that trafficking,” *United States Trafficking Victims Protection Act of 2000, Section 112*.
- “Where a person provides evidence that she is a victim, she shall not be liable to prosecution for any offense against the laws relating to immigration or prostitution that is direct result of the offense of trafficking in persons committed against her,” (Trafficking in Persons Act of 2007 of Jamaica, Article 8).

The Derivative Victim

The concept of a derivative victim is important when it comes to defining a victim of trafficking and providing protective services, as victims of trafficking may have family members who likewise require protection, especially in cases wherein a victim of trafficking decides to cooperate with authorities in prosecuting his or her traffickers. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides, in Article A(2) provides a definition of a derivative victim, stating that “*the term “victim” includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered to assist victims in distress or to prevent victimization*”.

The Child Victim

The Trafficking Protocol emphasizes the special needs of child trafficking victims, and the obligation of States to take them into account, stating that:

“Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care” (Article 6(4)).

Once a victim of trafficking has been identified, he or she should be provided access to a variety of protective services. The most critical of these, grounded in international standards of human rights protection, may be identified as follows:

The Bill of Rights of Victims of Trafficking

Victims of Trafficking in Persons Are Entitled to:

- The Right to Safety
- The Right to Privacy
- The Right to Information

- The Right to Legal Representation
- The Right to Be Heard in Court
- The Right to Compensation for Damages
- The Right to Assistance
- The Right to Seek Residence
- The Right to Return

The Right to Safety

Victims of trafficking should be entitled to the right to safety. If the country requires the victim of trafficking to testify against the traffickers, then the victim should be provided with witness protection as a prerequisite to coming forward and testifying.

In this regard, the Trafficking Protocol provides that:

“Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory” (Article 6).

Likewise, the UNHCHR Recommended Principles and Guidelines provide that States should ensure that:

“...trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard” (Guideline 6).

In their national legislation, States should strive to enact provisions ensuring that victims of trafficking are provided with the appropriate measures of security and personal safety, especially in cases where victims agree to cooperate with authorities in the prosecution of cases of trafficking, so that they are certain to receive adequate State protection from possible reprisals from traffickers. Derivative victims are likewise to be considered in these cases, as family members of victims of traffickers may also be targeted as part of any such reprisals.

The right to safety should include the right to receive housing. As such, Article 6(3)(a) of the Trafficking Protocol, as part of the protections to be afforded to victims of trafficking, provides for “*appropriate housing.*” To this end, shelters should be set up and funded and/or operated by the State, and in cooperation with NGOs or international organizations, where appropriate.

The Right to Privacy

Victims of trafficking should be entitled to the right to privacy. The Trafficking Protocol provides that State Parties “*shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.*”

The Right to Information

Victims of trafficking should be entitled to the right to information. Accordingly, in Article 6, the Trafficking Protocol provides that State parties should make available to victims of trafficking, “*information on relevant*

court and administrative proceedings, and "...information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand."

The Right to Legal Representation

Victims of trafficking should be granted the right to legal representation. The UNHCHR Recommended Principles and Guidelines mandate *"providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters."*

The Right to Be Heard in Court

The Trafficking Protocol States in article 6(2) that State Parties should provide victims of trafficking with *"assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders."* For that purpose, victims of trafficking should be provided with *"Information on relevant court and administrative proceedings."*

The Right to Compensation for Damages

Victims of trafficking in persons should be provided with compensation for the trauma and exploitation that they have suffered as a result of their being trafficked. As such, the Trafficking Protocol provides that:

"each 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" (Article 6(6)).

Likewise, the UNHCHR Recommended Principles and Guidelines stress that

"Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies" (Guideline 9).

Consequently, the UNHCHR Recommended Principles and Guidelines mandate that:

"States shall ensure that trafficked persons are given access to effective and appropriate legal remedies".

Five basic models on victim compensation may be utilized by the legislator in enacting appropriate civil compensation provisions, including: *mandatory restitution, confiscation of assets, creation of a state fund to assist victims of trafficking, civil action, and punitive damages.*

Mandatory Restitution/Compensation

Some legal systems grant victims of trafficking the right to receive restitution/compensation for their losses.

Confiscation of assets

Some laws provide for paying the damages to victims of trafficking out of the property of traffickers.

State Fund

In some legal systems, compensation to victims of trafficking is paid out of specially created state Funds.

Civil Action

Other legal systems recognize the right of a victim of trafficking to seek damages in a civil court.

Punitive Damages

In some legal systems, victims are awarded not only damages to compensate their losses or moral damages, but also punitive damages, that are damages whose purpose is to reform or deter the perpetrator whose conduct damaged the victim.

The Right to Assistance

Victims of trafficking should be entitled to the right to assistance, in the form of medical, psychological, legal, and social aid. In this regard, the Trafficking Protocol states:

"[E]ach State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons." The U.N. Protocol further explains that victims have the right to be granted: "(a) Appropriate housing; (b) Counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities."(Article 6(3))

The Right to Seek Residence

A victim of trafficking should be entitled to the right to seek residency in the country of destination. The immediate return of the victims to their home countries may be unsatisfactory both for the victims and for the law enforcement authorities endeavoring to combat trafficking. For the victims, this means that they might be vulnerable to reprisals by the traffickers, even against family or friends in the country of origin. For law enforcement, if the victims continue to live clandestinely in the country or are removed immediately, they cannot give information for effectively combating trafficking. The greater victims' confidence that their rights and interests will be protected, the better the information they will give.

According to Article 7 of the Trafficking Protocol,

"State Parties 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. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors."

According to the Protocol, there is no mandatory obligation to legislate measures relating to the status of victims. However, in several countries where measures have been adopted for the

temporary or permanent residence of victims of trafficking, such as Belgium, Italy, the Netherlands and the United States of America, such measures have had a positive effect on victims coming forward to testify against traffickers and on non-governmental organizations encouraging victims to whom they provide services to report incidents to the Government.

In doing so, some States have made such a residency status contingent upon the victim testifying in court, and, more broadly, cooperating with the authorities in the prosecution of the traffickers. However, it is more in line with a human rights based approach to combating trafficking to provide the victim such a status without it being contingent on the victim's cooperation with authorities.

Closely linked to the concept of residency status is the option that the legislator has, in the country of destination for trafficking, of granting the victim with a so-called "recovery and reflection period." Granting a reflection period, followed by a temporary or permanent residence permit, would ideally be granted to victims of trafficking regardless of whether the trafficked person is able or willing to give evidence as a witness. Such protection of the victim serves to raise his or her confidence in the State and its ability to protect his or her interests. Once recovered, a trafficked person with confidence in the State is more likely to make an informed decision and cooperate with authorities in the prosecution of traffickers.

The Right to Return

Victims of trafficking in persons should have the right to seek residence in the country to which they have been trafficked. They should also have the right to the dignified return to their country of origin.

The Trafficking Protocol provides, in Article 8, that State Parties of which victims of trafficking are nationals or residents should "*facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.*" Repatriation of victims "*shall be preferably voluntary.*" Victims should be provided with all necessary assistance to ensure a dignified return.

The repatriation of victims of trafficking may be regulated through international or bi-lateral treaties between countries of origin and countries of destination.

The Role of Parliamentarians: Recognizing the Trafficked Person as a Victim Entitled to Internationally Recognized Human Rights

Incorporate human rights principles in all anti-trafficking and related legislation.

Adopt a human rights approach that recognizes the trafficked person as a victim who is entitled to basic human rights.

Adopt legislative measures for setting up specialized centres to assist the victim and provide them with protection and support services.

Develop, enact, and finance policies seeking to identify victims of trafficking.

Ensure that a victim of trafficking is provided with the rights enumerated under the *Trafficking Victims' Bill of Rights*, including:

- The Right to Safety
- The Right to Privacy
- The Right to Information
- The Right to Legal Representation
- The Right to Be Heard in Court
- The Right to Compensation for Damages
- The Right to Assistance

- The Right to Seek Residence

- The Right to Return

Enact legislation that ensures that the special needs of child victims of trafficking in persons are responded to and that children are provided with the additional necessary protections.

Ensure that social services, necessary for trafficked persons are available and accessible accommodating the special needs of the trafficked victims.

Enact legislation that mandates protections for family members of victims of trafficking.

Enact legislation providing for the principle of non-criminalization of victims of trafficking.

Enact legislation that allows the victims access to justice and civil or criminal proceedings

Establish measures to guarantee the security of victims when involved in criminal justice proceedings against the traffickers.

Allocate funds to service providers that can assist victims of trafficking eg, NGOs, victim support help lines

Support organizations and agencies that provide reintegration assistance in countries of destination and origin

Allocate funds for the repatriation process, whenever it is in the best interest of the trafficked victim

Allocate funds to compensate victims of trafficking.

Create legislation that would allow the parties to confiscate the proceeds derived from the crime of trafficking in order to compensate the victim

CHAPTER 5: **PREVENTING TRAFFICKING IN PERSONS**

A State, under the Trafficking Protocol and related conventions, is under an international responsibility to prevent instances of acts of trafficking committed within the State's control.

The Trafficking Protocol, in Article 9(1), imposes an obligation on a State to:

“establish comprehensive policies, programmes and other measures...to prevent and combat trafficking in persons.”

Such measures, as elaborated by the Trafficking Protocol in Article 9(2), include:

“research, information and mass media campaigns and social and economic initiatives...”

Moreover, these measures should include the necessary steps to

“alleviate the factors that make persons, especially women and children, vulnerable to trafficking such as parents, underdevelopment and lack of equal opportunity” (Trafficking Protocol, Article 9(4)).

Countries have a wide choice when it comes to legislating regarding prevention, since the needs of prevention are so wide-ranging in scope. As such, all countries have the ability to do something when it comes to prevention, and thus should have no reason to ignore the realities of national vulnerabilities that require mechanisms of response.

In addition, the Trafficking Protocol, in Article 9(2), mandates that victims of trafficking in persons must be protected against re-victimization. Doing so is in itself a prevention mechanism against cases of re-trafficking. Avoiding re-victimization requires serious efforts to rehabilitate victims and help them reintegrate into the society.

Any comprehensive anti-trafficking strategy must incorporate robust trafficking prevention programs, to be carried out by the government in cooperation with civil society. In addition, as part of a comprehensive prevention strategy, the legislator must take care to harmonize related laws with anti-trafficking legislation. While enacting a specific comprehensive law to combat trafficking in persons is critical to combating trafficking, related legislation must likewise be reviewed and brought into compliance with international human rights standards and the anti-trafficking laws. As such, prevention mechanisms may broadly be divided into two major categories, namely (1) Prevention Policies and Legislation and (2) Prevention in Trafficking-Related Legislation.

Prevention Policies and Legislation

Prevention should be a key part of any comprehensive anti-trafficking legislation and prevention policies should strive to alleviate the major causes of vulnerability to trafficking in persons. As such, these policies should reflect a focus on the alleviation of economic, social, political, and cultural causes of vulnerability to trafficking. These include both the “supply” side of the trafficking infrastructure, as well as its “demand” side.

Any response to trafficking in persons must therefore be grounded in a solid understanding of these underlying causes of the trafficking infrastructure and causes of vulnerability of particular populations to trafficking in persons. In the context of trafficking in persons, the primary causes of vulnerability may be identified as economic, social, cultural, and political insecurities.

Economic insecurity is addressed directly in the Trafficking Protocol, which mentions poverty, underdevelopment, and lack of equal opportunities as being among the root causes of trafficking in persons. Economic insecurities may also be extended to include unemployment and the lack of access to basic health care, education, and social welfare.

Social insecurity is concerned with the low status of women in society, which also directly impacts children and creates a corresponding condition of insecurity likewise for them. This involves gender inequality and sex discrimination in education, employment practices, access to legal and medical services, and access to information, as well as violence against women, sexual violence or abuse, and domestic violence.

Cultural insecurity is related to social insecurity in a number of ways. For example, in many societies, there exist harmful cultural practices, such as arranged marriages, early marriages, temporary marriages, marriages by catalog or mail order brides, and other forms of sexual exploitation, all of which contribute to the trafficking infrastructure. Further, in many societies, cultural norms affect the manner in which women respond to trafficking. For instance, in some societies women who are trafficked into prostitution would find it more difficult to reintegrate into their families and communities after being freed from exploitation. Many trafficked women may also have contracted HIV/AIDS or other sexually transmitted diseases, reporting of which is considered shameful in some societies.

In addition to economic, social, and cultural insecurity, political insecurity may be a reason behind trafficking in persons. This is particularly the case in transitional societies, where transition to democracy, civil unrest, loss of national identity, and political instability all have created a favorable environment for organized crime, including trafficking in persons.

In combination with policies seeking to alleviate these factors of vulnerability, policies which include public awareness, research, and education on trafficking in persons are key.

Public Awareness

Public awareness serves as an important tool to not only inform the public about the dangers of trafficking in persons and the signs that help to recognize it, but also as an instrument that is helpful in rescuing those who may have already fallen victim to it, particularly among those persons who may come into contact with potential victims of trafficking, as well as the general public.

Research

Research is an important component of prevention, as an accurate understanding of the problem and its changing dynamics serves to inform better, more effective policy development toward its eradication. Research is also an important tool in galvanizing momentum to address trafficking in persons, as accurate statistics can serve to bring attention to its importance.

Education

Akin to public awareness and research, education is another important tool toward the prevention of trafficking in persons. For example, the Brussels Declaration on Preventing and Combating Trafficking in Human Beings, which was adopted in November 29, 2002, explicitly states: *“Closer links should be developed with educators and Ministries of Education with a view to elaborating and including relevant and realistic teaching modules in school and college curricula and to informing pupils and students of human rights and gender issues”. These subjects should specifically be linked to teaching young people about the modus operandi and dangers presented by trafficking crime, the opportunities for legal migration and foreign employment and of the grave risks involved in irregular migration”.*

States can utilize different ways on ensuring that trafficking in persons becomes part of the academic inquiry and that the educational system is also utilized to inform students about this phenomenon.

Prevention in Trafficking-Related Legislation

A comprehensive framework of prevention requires that laws related to trafficking in persons likewise reflect a commitment to the eradication of trafficking in persons. Because trafficking is such a complex and multi-faceted crime, it involves a variety of related phenomena which must likewise be addressed if trafficking is to be effectively prevented. Trafficking in persons is connected to many other crimes, such as drug trafficking, arms trafficking, alien smuggling, money laundering, child sex tourism and child pornography, document fraud, and others. Because trafficking involves exploitation of labor, labor codes are relevant and because trafficking can be dangerous to private and public health, laws governing health and related subjects are relevant. Child protection laws are also key in alleviating the factors that may make children particularly vulnerable to trafficking. Prevention is also well-served when laws governing marriage and birth registration are well-drafted and enforced.

As such, legislators should review existing codes through the prism of an effort to combat trafficking in a multidisciplinary way, and spearhead a movement toward amending any legislation that may be in contradiction with the spirit of anti-trafficking initiatives.

At a minimum, the following laws may be reviewed for harmonization with anti-trafficking policies:

- Labor laws and codes, including laws government domestic service labor
- Immigration laws
- Laws addressing organized crime
- Money laundering laws
- Public corruption laws
- Birth registration

- Marriage registration
- Child protection laws including laws against child sex tourism and laws against child pornography
- Equal opportunity laws
- Laws relating to health, especially HIV/AIDS

Expanding criminal liability in many of these related laws is an integral part of any comprehensive legal approach to combating trafficking. Some of these laws are related to enacting protections and safety nets that serve to alleviate vulnerabilities to trafficking. Other laws should be tied to trafficking in persons, as they govern crimes that may impact the safety or well-being of victims of trafficking.

Finally, yet other laws serve to penalize crimes that contribute to the trafficking infrastructure, may serve to create the demand for trafficking in persons, or may be linked in other ways to the phenomenon.

The Role of Parliamentarians: Preventing Trafficking in Persons

Allocate sufficient funds for anti-trafficking programmes, which include prevention measures, implementation of assistance programmes and awareness raising campaigns.

Enact comprehensive anti-trafficking legislation, which includes provisions on prevention.

Enact a comprehensive legal framework in which all laws are harmonized with anti-trafficking policies.

Enact laws that promote equality of opportunity, ensure gender equality, and strive toward the creation of social safety nets for the most vulnerable members of society.

Address specific needs of extremely vulnerable groups exposed to trafficking and make poverty alleviation the cornerstone of a development strategy.

Adopt positive measures to ensure gender equality by supporting specific policies for women who are more likely to be trafficked.

Enact laws aimed at enhancing child protection, including enforcing birth registration laws, and reviewing laws addressing violence against children.

Enact laws regulating registration of marriages and promoting birth registration.

Enact legislation to strengthen border controls as may be necessary to prevent and detect trafficking in persons.

Adopt or strengthen legislative measures to discourage demand (whether for sexual exploitation, forced labour or services, slavery and practices similar to slavery, servitude and organ removal) in order to achieve effective dissuasion.

Ensure that travel or identity documents delivered in their own states are of such quality that they can not easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued.

CHAPTER 6:

TAKING THE NECESSARY MEASURES TO COMBAT THE INTERNATIONAL CRIME OF TRAFFICKING IN PERSONS AT THE INTERNATIONAL LEVEL

Since trafficking in persons is recognized by the Trafficking Protocol as a crime also involving transnational aspects, it often requires transnational responses to be addressed effectively. Likewise, The UNHCHR Guidelines on Human Rights and Human Trafficking state that:

“Trafficking is a regional and global phenomenon which cannot always be dealt with effectively at the national level: a strengthened national response can often result in the operations of traffickers moving elsewhere. International, multilateral and bilateral cooperation can play an important role in combating trafficking activities. Such

cooperation is particularly critical between countries involved in different stages of the trafficking cycle.”

The areas that legislators should focus on to enhance efficiency of international cooperation mechanisms include: *establishment of jurisdiction on an extraterritorial basis, extradition, mutual legal assistance and law enforcement cooperation, including exchange of information.*

Extraterritoriality

The Convention against Transnational Organized Crime, Art. 15, requires States Parties to establish jurisdiction to investigate, prosecute and punish all offences established by the Convention and any Protocols to which the country in question is a State Party.

Jurisdiction must be established over all offences committed within the territorial jurisdiction of the country, including its marine vessels and aircraft. This is called the *principle of territorial jurisdiction*.

If the national legislation prohibits the extradition of its own nationals, jurisdiction must also be established over offences committed by such nationals anywhere in the world. This allows the country to meet its Convention obligation to prosecute offenders who cannot be extradited on request because of their nationality.¹

The Convention also encourages, but does not require, the establishment of jurisdiction in other circumstances, such as all cases where the nationals of a State are either victims or offenders. Jurisdiction established over offences committed against nationals of the State is based on the principle of *passive personality*. Jurisdiction established over offences committed by nationals of the State is based on the principle of *active personality*.²

Domestic legislation should follow such guidelines found in the various international documents.

Importantly, liability for the crime of trafficking should likewise be applicable to military personnel, contractors, peacekeepers, and other personnel operating on behalf of a government abroad.

The United Nations have addressed these issues with regard to peacekeeping missions. Rule 4 of the U.N. peacekeeper Code of Conduct says that UN peacekeepers should “not indulge in immoral acts of sexual, physical, or psychological abuse or exploitation.”

Extradition

Trafficking in persons must be recognized as an extraditable offence in any existing extradition treaty. The TOC Convention may also be used as a legal basis for extradition. Article 16(4) of the Transnational Crime Convention states that:

“ [if] a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider the Convention the legal basis for extradition in respect of any offence to which this article applies.”

¹ Art.16, para.(10) (obligation to prosecute where no extradition due to nationality of offender). See also the discussion of jurisdictional issues in chapter 9 of the Legislative Guide to the Convention.

² TOC Convention Art.15, para.(1) (mandatory jurisdiction); Art.15, para.(2) (optional jurisdiction);

Even in cases where extradition is not conditional on the existence of a treaty, States should consider, as part of their anti-trafficking legislation, making a specific provision that makes trafficking in persons an extraditable offense (see also art. 16(6) of the TOC Convention).

Mutual Legal Assistance

Mutual legal assistance between countries of origin, transit and destination is conducive to meeting various needs in the fight against including effective action to ensure not only investigation and prosecution of traffickers, but also the protection and assistance of victims.

Investigation and prosecution of traffickers

Treaties on mutual assistance in criminal matters must be a part of any transnational legal response because apprehension of traffickers, investigation of cases of trafficking, and prosecution of the traffickers require cooperation between countries of origin, transit and destination. According to the Convention against Transnational Organized Crime (see art. 18), mutual legal assistance may be requested for:

- taking evidence or statements;
- effecting service of judicial documents;
- executing searches and seizures and freezing;
- examining objects and sites;
- providing information;
- evidentiary items and expert evaluations;
- providing relevant documents and records;
- identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- facilitating the voluntary appearance of persons; and
- other type of assistance.

Protection and assistance of victims

Effective implementation of relevant provisions of the TOC Convention (art. 25) and the Trafficking Protocol (art. 6) may need may require enhanced cooperation between competent authorities of different States and art. 18 of the TOC Convention provides a sufficient legal framework for such cooperation.

Law enforcement cooperation, including Exchange of Information

The TOC Convention requires States parties to cooperate closely with one another to enhance the effectiveness of law enforcement action to combat the offences covered by the Convention and its supplementary Protocols, including trafficking in persons. In this vein, measures should be taken at the national level to establish and/or strengthen channels of communication between the competent authorities, as well as to facilitate the secure and rapid exchange of information among them (see art. 27(1) of the TOC Convention).

The Trafficking Protocol states, in article 10, that States Parties should cooperate with one another to determine:

- “(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;*
- (b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and*

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.”

The Role of Parliamentarians: Taking the Necessary Measures for the promotion of international cooperation to Combat Trafficking in Persons

Develop and ratify appropriate legislation which would provide for comprehensive jurisdictional bases for investigation and prosecution in trafficking cases.

Develop and ratify bilateral and multilateral agreements for mutual legal assistance and extradition which should provide for cooperation in investigating and prosecuting trafficking in persons.

Develop and ratify bilateral and multilateral agreements to protect, assist and repatriate victims of trafficking, when necessary for the best interest of the victim, and when victims wish to do so.

Develop and ratify bilateral and multilateral agreements to promote law enforcement cooperation against trafficking in persons.

Ensure that internationally recognized labor rights are part of any free trade agreement that they approve.

CHAPTER 7:
REPORTING ON THE STATUS OF TRAFFICKING IN PERSONS

The ultimate goal of monitoring and reporting on government policies and actions against trafficking in persons is to create an effective mechanism which ensures that promises made materialize into action, and corresponding legal and administrative provisions are implemented. A suitable mechanism is needed whereby this progress can be measured, and the legislator, as part of its oversight responsibilities, has an important and unique role to play in this regard; as well as a variety of models to choose from in designing such a mechanism.

As such, regional mechanisms, while emphasizing the importance of reporting and evaluation, have left it up to the States to utilize the reporting mechanism/s that they feel suits them best. For example, the OSCE Action Plan to Combat Trafficking in Human Beings emphasizes the importance of monitoring and reporting, recommending the establishment of a “follow-up and coordinating mechanism”. Accordingly, the OSCE Action Plan calls upon States to appoint a National Rapporteur or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements.

Likewise, the Council of Europe Convention on Action against Trafficking in Human Beings, in Article 29(4) states that:

“Each Party shall consider appointing National Rapporteurs or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements.”

Legislators are in a unique position to mobilizing energies toward implementing robust reporting mechanisms and thereby guiding progressively more effective anti-trafficking policies. The various possible models that legislators can use to achieve this, either independently, or in combination, include: *an office of a National Rapporteur; parliamentary committees and hearings, inter-ministerial task forces*. In all cases, the executive branch reports to the legislative branch, which is responsible for the oversight of the government’s anti-trafficking policies.

National Rapporteurship

The appointment of a national rapporteur on trafficking in persons is one way of holding the government accountable in its implementation of anti-trafficking policies. Frequently, this model involves the choice of one national ministry to serve as the rapporteur, collecting relevant information from all concerned agencies, and presenting such information to the appropriate oversight body in the legislature. The Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation developed the concept of a National Rapporteur by elaborating the following recommended actions:

- 1) *Report to governments on the scale [of] the prevention and combating of trafficking in women,*
- 2) *Develop criteria for reporting on the scale, nature and mechanisms [of reporting] trafficking in women and the effectiveness of policies and measures concerning this phenomena,*
- 3) *Encourage the cooperation of national rapporteurs on a regular basis.*

National Rapporteurs can be independent government entities or national ministries.

Parliamentary Committees

Reports may be made both to and by parliamentary committees charged with oversight of the government's performance in combating trafficking in human beings and having the authority to investigate government actions in this regard. Such committees can either be specific to trafficking in persons, or may be broader in scope, such as committees addressing foreign policy, human rights, women's and children's rights, or other related topics.

Importantly, such committees create the perfect forum for consulting civil society, as they can hold public forums and invite NGOs concerned with the issue of trafficking to provide their recommendations on policy directions.

In addition, the parliament may make use of its ability to make motions or declarations to bring attention to the issue of trafficking and related concerns, raising both parliamentary, as well as public awareness of the issues.

Inter-ministerial Task Forces

The reporting and monitoring function has also been entrusted to a multi-agency anti-trafficking task force. Many of these special Task Forces have the task of research and reporting on the status of trafficking in human beings and government actions to combat the phenomenon.

Role of Parliamentarians: Monitoring the Status of Trafficking in Persons and the Appropriate Responses to Combat the Problem

Create a special parliamentary mechanism or structure on combating trafficking in persons.

Request research and data collection on the scope of the problem of trafficking and best practices to combat the phenomenon.

Investigate specific violations of rights of victims of trafficking and inquire into remedies and assistance.
Ensure timely and complete reporting by the government to the UN human rights bodies, and that reporting is in full compliance with the corresponding international human rights obligations.
Request information from the relevant government agencies that are concerned with combating trafficking in persons.
Oversee the implementation of foreign policy that is committed to international cooperation in the field of combating trafficking.
Monitor the implementation of national action plans that are directed toward combating trafficking in persons.
Allocate the appropriate funding that is necessary for the implementation of programs aimed at assisting victims of trafficking.
Pass resolutions and declarations to condemn trafficking in persons and call for greater efforts to combat the phenomenon within the parliament.

CHAPTER 8 : **ENHANCING THE ROLE OF CIVIL SOCIETY IN COMBATING TRAFFICKING IN PERSONS**

The participation and engagement of civil society is a crucial element of any comprehensive approach to combating trafficking. Civil society organizations are critical partners particularly in prevention and protection efforts, but can also be key in assisting the government in the area of prosecution, starting with their role in the identification of victims of trafficking, support and care for victims of trafficking prior to, during and after court proceedings, including the provision of legal assistance, medical and psychological aid, as well as in contributing to a dignified process of repatriation (if such is desired by the victim) and reintegration, or the process of integration into society if a residency status is granted.

Civil society, however, needs the space and the support from the government to be able to fulfill these roles accordingly. Broadly, the legislator needs to express its commitment to the strengthening of civil society nationally and internationally, so as to create a framework within which NGOs and civil society associations can thrive and operate their programs on a sustainable basis.

The engagement of civil society in the fight against trafficking in persons specifically, can take a number of forms, and different countries have utilized different models, but what is critical is that civil society must be a fully engaged partner in any governmental anti-trafficking efforts. The participation of civil society in combating trafficking should thus be ensured and encouraged by the legislator by not solely embedding the participation of civil society in anti-trafficking policies, but also by appropriating adequate and sufficient funding mechanisms toward this end. For example, the Indonesian National Plan of Action for the Elimination of Trafficking in Women and Children of 2002, calls for an integrated approach to combating trafficking, one which includes civil society, especially NGOs, trade unions, academics, and activists.

The notion of civil society may broadly be divided into two major components, namely the *organizational component* and the *public component*. The organizational component is comprised by NGOs, including local, national, and international entities, and the public component is meant to represent the public at large.

Organizational Component of Civil Society

Two main models may be utilized to engage civil society organizations working to combat trafficking in persons with government efforts to do so. These are the *representation model* and the *consultation model*.

Representation Model

The representation model, which is the more inclusive model for the full partnership of civil society organizations in the government's anti-trafficking efforts, involves the inclusion of representatives of non-governmental organizations concerned with the issue of trafficking as part of a national inter-agency body tasked with implementing anti-trafficking policies.

Consultation Model

The consultation model, on the other hand, engages NGOs on a consultative basis, rather as representatives of a governmental entity tasked with implementing anti-trafficking policies. As such, representatives of civil society organizations concerned with the issue of trafficking in persons are mandated by law to be regularly engaged by the government as consultants. This can include the hearing of such organizations' testimonies as part of parliamentary hearings aimed at policy development and refinement, their inclusion as consultants in research and investigations that may be carried out by the parliament, or their engagement as independent experts in policy evaluation. In addition, the legislator can mandate that such organizations must be consulted by the government on information collection and policy implementation, since civil society organizations often have the best and most complete understanding of the realities of the needs of victims and of vulnerable populations.

Public Component of Civil Society

Public participation in combating trafficking is key. Firstly, public awareness and concern with trafficking in persons is important in holding the government accountable to its anti-trafficking obligations. Secondly, the public, and especially the members of those communities most vulnerable to trafficking must have a voice in prevention policies as these are developed by the government. The legislator, as a people's representative, is in a unique position to reach out to the constituencies so as to glean which policies must be most effective in alleviating causes of vulnerability. Additionally, the private citizens, as members of communities where trafficking victims may be found, can also play an important role in the process of the identification of victims of trafficking, when aware and concerned with the issue.

Role of Parliamentarians: Enhancing the Role of Civil Society in Combating Trafficking in Persons

Increase public debate and discussion of the issue of trafficking in persons.

Consulting civil society in hearings and other oversight should be encouraged.

Hold public hearings for members of civil society to offer their opinion on ways and methods to combat trafficking.

Engage survivors of trafficking in persons in elaborating policy frameworks for victim identification and protection.

Encourage government agencies concerned with combating trafficking in persons to cooperate and establish partnerships with civil society organizations.

Mobilize public opinion and public support to back government policies in combating trafficking in persons.

Lead public awareness campaigns to raise awareness of trafficking in persons.

Develop Memoranda of Understanding between national authorities and NGOs to provide protection and assistance to victims of trafficking.

Support NGOs working in this field, including financially.