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Item 3 of the provisional agenda*

**Analysis of key concepts of the Protocol to Prevent,
Suppress and Punish Trafficking in Persons, Especially
Women and Children, supplementing the United Nations
Convention against Transnational Organized Crime**

Analysis of key concepts of the Trafficking in Persons Protocol

Background paper prepared by the Secretariat

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I. Introduction

1. In decision 4/4, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC) acknowledged that the Trafficking in Persons Protocol was the principal legally binding global instrument to combat trafficking in persons. The Conference further decided to establish an open-ended interim working group, to advise and assist the Conference in the implementation of its mandate with regard to the Trafficking in Persons Protocol.

2. A first meeting of the Working Group was held in Vienna, Austria from 14 to 15 April 2009 (CTOC/COP/WG.4/2009/2). It was decided that a second meeting of the Working Group should be held before the fifth session of the Conference of the Parties, and that such meeting should focus on a few specific issues to allow a fruitful exchange of views and experiences among experts and practitioners in the area of combating trafficking in persons. A provisional agenda for the second meeting was accordingly set up (reference to provisional agenda), which includes the consideration of specific issues identified by States Parties as critical to the implementation of the Trafficking in Persons Protocol. The present background paper was prepared by the Secretariat to aid in the discussion of item 3 of the provisional agenda.

II. Development of appropriate measures

3. Member States might consider the following points, among others, in implementing the key concepts of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol):

- What is the meaning given to the term “exploitation” by domestic legislation?
- What is the meaning given to the term “exploitation of the prostitution of others”?
- What is the meaning given to the term “labour exploitation” in the context of trafficking in persons?
- What is the meaning given to the term forced or service marriages?
- What is the meaning given to the terms slavery or practices similar to slavery and related concepts?

III. Overview of issues

4. Effective implementation of the Trafficking in Persons Protocol remains a challenge. Not all concepts and terms expressed in the Protocol are fully defined, and national interpretation and experience varies widely. Additionally, the limited criminal justice capacity of States and expertise in responding to trafficking in

persons has been identified as a hindrance for effective implementation of the Protocol.

5. While the UN Trafficking Protocol defines the term *trafficking in persons*, it does not define *exploitation*. The Protocol notes in the definition of *trafficking in persons* provided at Article 3(a) that

“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”.

6. Article 14 of the Trafficking in Persons Protocol takes note of the existence of other international instruments in interpreting the Protocol. The concepts of forced labour, slavery, practices similar to slavery and servitude are elaborated upon in a number of international conventions and should, where applicable to States concerned, guide the interpretation and application of the Protocol.

IV. Guidance for response

7. The International Framework for Action to Implement the Trafficking in Persons Protocol suggests the following implementation measures relating to exploitation:

- Ensure that legislation criminalizes at a minimum those forms of exploitation mentioned in the Protocol while other forms of exploitation may be added;
- Ensure that the forms of exploitation are clearly defined in national legislation and/or case law;
- Ensure legislation and court practice reflect that when the use of one or more of the means has been established, the consent of the victim is irrelevant;
- Ensure legislation also applies when the exploitative purpose has not yet materialized.

A. Exploitation of the prostitution of others and sexual exploitation

8. Prima facie, it must be noted that prostitution and related matters outside of the scope of trafficking in persons is specifically reserved for the laws and policies of the individual States parties.¹ The approach of UNODC in this respect then, is not to evaluate policy and national approaches to the broader issues of prostitution, but rather to examine the concept of *exploitation of the prostitution of others* contained within the Protocol and the normative and operational levels in countries that take different policy approaches to the issue of prostitution.

9. The terms *exploitation of the prostitution of others* and *sexual exploitation* have been intentionally left undefined in the Protocol in order to allow all States, independent of their domestic policies on prostitution, to ratify the Protocol. The

¹ See the Interpretative Notes (A/55/383/Add.1), paragraph 64.

Protocol addresses the exploitation of the prostitution of others only in the context of trafficking.² There is no obligation under the Protocol to criminalize prostitution. Different legal systems — whether or not they legalize, regulate, tolerate or criminalize, comply with the Protocol.

10. The “UNODC Model Law against Trafficking in Persons” offers the following definition of *exploitation of prostitution of others*: “Exploitation of prostitution of others shall mean the unlawful obtaining of financial or other material benefit from the prostitution of another person”.³ The term “unlawful” was added to indicate that this has to be unlawful in accordance with the national laws on prostitution. If using these terms in domestic law, it is advisable to define them.

11. The “UNODC Model Law against Trafficking in Persons” offers the following definition of *sexual exploitation*: “Sexual exploitation shall mean the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials.”

B. Forced labour or services

12. The notion of exploitation of labour in the definition of trafficking in persons allows for a link to be established between the Trafficking in Persons Protocol and ILO Convention concerning Forced Labour, and makes clear that trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour of the Convention.

13. The “UNODC Model Law against Trafficking in Persons” offers the following definition of *forced labour or other services* (derived from the ILO Convention No. 29): “Forced labour or other services shall mean all work or service that is exacted from any person under the threat of penalty and for which the person concerned has not offered him- or herself voluntarily.”⁴

14. Legislatures and law enforcement have to take into account that the seemingly “voluntary offer” of a worker/victim may have been manipulated or was not based on an informed decision. Also, the initial recruitment can be voluntary and the coercive mechanisms to keep a person in an exploitative situation may come into play later.⁵

² See the Interpretative Notes (A/55/383/Add.1), paragraph 64.

³ Derived from *Trafficking in Human Beings and Peace Support Operations: Trainers’ Guide*, United Nations Interregional Crime and Justice Research Institute, 2006, p. 153.

⁴ Derived from ILO Convention No. 29 concerning Forced or Compulsory Labour of 1930, article 2, paragraphs 1 and 25.

⁵ Where (migrant) workers were induced by deceit, false promises, the retention of travel or identity documents or use of force to remain at the disposal of the employer, the ILO supervisory bodies noted a violation of the Convention. This means that also in cases where an employment relationship was originally the result of a freely concluded agreement, the worker’s right to free choice of employment remains inalienable, that is, a restriction on leaving a job, even when the worker freely agreed to enter into it, can be considered forced labour. ILO Guidelines on Human Trafficking and Forced Labour Exploitation, 2005; ILO, *Eradication of Forced Labour*, International Labour Conference, 2007, pp. 20-21.

15. One way to deal with the difficulty that the use of the term *voluntary* may cause, is to include in the definition the use of means such as force, coercion or threat. This has been the approach taken by several national legislators. The UNODC Model Law includes samples of how States have resolved the difficulty.⁶

16. ILO identifies five major elements that can point to a forced labour situation:

- (Threat of) physical or sexual violence; this may also include emotional torture like blackmail, condemnation, using abusive language and so on;
- Restriction of movement and/or confinement to the workplace or to a limited area;
- Debt bondage/bonded labour; withholding of wages or refusal of payment;
- Retention of passport and identity papers so that the worker cannot leave or prove his or her identity and status;
- Threat of denunciation to the authorities.⁷

⁶ Examples of criminal law definitions of forced labour are: “Anyone who unlawfully forces a person to work, by using force or other means of pressure or by threat of one of these, or by consent elicited by means of fraud, whether or not for consideration, shall be liable to ... imprisonment.”

(Source: Israel, Criminal Code)

“(1) Forced labour or services means labour or services that are performed or provided by another person and are obtained or maintained through an actor:

“(a) causing or threatening to cause serious harm to any person;

“(b) physically restraining or threatening to physically restrain any person;

“(c) abusing or threatening to abuse the law or legal process;

“(d) knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;

“(e) using blackmail;

“(f) causing or threatening to cause financial harm to any person or using financial control over any person; or

“(g) using any scheme, plan, or pattern intended to cause any person to believe that, if the person did not perform such labour or services, that person or another person would suffer serious harm or physical restraint.

“(2) “Labour” means work of economic or financial value.

“(3) “Services” means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor or a third party. Commercial sexual activity and sexually explicit performances shall be considered “services” under this Act.

“(4) “Maintain” means, in relation to labour or services, to secure continued performance thereof, regardless of any initial agreement on the part of the trafficked person to perform such labour or service.”

(Source: State Model Law on Protection for Victims of Human Trafficking, Global Rights 2005, drafted for the states of the United States of America)

“Forced labour means the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats:

“(a) is not free to cease providing labour or services; or

“(b) is not free to leave the place or area where the person provides labour or services.”

(Source: Australia, Criminal Code Act 1995, S73.2(3)).

⁷ ILO, Human trafficking and forced labour exploitation — guidance for legislation and

17. While the Protocol draws a distinction between exploitation for forced labour or services and sexual exploitation, this should not lead to the conclusion that coercive sexual exploitation does not amount to forced labour or services, particularly in the context of trafficking. Coercive sexual exploitation and forced prostitution fall within the scope of the definition of forced labour or compulsory labour.⁸ Since the coming into force of Convention No. 29, the ILO Committee of Experts has treated trafficking for the purpose of commercial sexual exploitation as one of the forms of forced labour. A forced labour situation is determined by the nature of the relationship between a person and an “employer”, and not by the type of activity performed, the legality or illegality of the activity under national law, or its recognition as an “economic activity.”⁹

C. Forced or service marriages

18. The “UNODC Model Law against Trafficking in Persons” offers the following definition of *forced or servile marriage*:

Forced or servile marriage shall mean any institution or practice in which:

- (i) A woman [person] or child without the right to refuse is promised or given in marriage on payment of a consideration in money or in kind to her [his] parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family or his clan has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person.¹⁰

The definition refers solely to the practice of forced or servile marriages in relation to women. Legislators may consider updating this definition to include practices in which both women/girls and men/boys can be the subject of forced or servile marriages. This may cover trafficking for marriage and certain forms of “mail order bride” practices.

D. Slavery

19. The “UNODC Model Law against Trafficking in Persons” offers the following definition of slavery:

“Slavery” shall mean the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised; or

“Slavery” shall mean the status or condition of a person over whom control is exercised to the extent that the person is treated like property.¹¹

law enforcement.

⁸ ILO, *Eradication of Forced Labour*, International Labour Conference, 2007, p. 42.

⁹ ILO, *Global Report 2005*, p.6.

¹⁰ Derived from the Supplementary Convention on the Abolition of Slavery, article 1.

¹¹ Derived from Slavery Convention of 1926 as amended by the 1952 Protocol, article 1, paragraph 1.

20. The definition in the Slavery Convention may cause some difficulties today, as there could be no rights of ownership for one person over another. In order to solve this difficulty, an alternative definition is included here, which instead requires that the person is “treated like property”. Another definition of slavery, which focuses on the core of the crime — that is, the objectification of human beings — is “reducing a person to a status or condition in which any or all of the powers attaching to the right of property are exercised”.

E. Practices similar to slavery

21. The “UNODC Model Law against Trafficking in Persons” offers the following definition of *practices similar to slavery*:

“Practices similar to slavery” shall include debt bondage, serfdom, servile forms of marriage and the exploitation of children and adolescents.

22. The Supplementary Convention on the Abolition of Slavery does not contain a definition, but specifically prohibits debt bondage, serfdom, servile forms of marriage and the exploitation of children and adolescents.

23. Another definition could be:

“Practices similar to slavery shall mean the economic exploitation of another person on the basis of an actual relationship of dependency or coercion, in combination with a serious and far-reaching deprivation of fundamental civil rights, and shall include debt bondage, serfdom, forced or servile marriages and the exploitation of children and adolescents.”

F. Debt bondage

24. The “UNODC Model Law against Trafficking in Persons” offers the following definition of *debt bondage*:

“Debt bondage” shall mean the status or condition arising from a pledge by a debtor of his or her personal services or those of a person under his or her control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or if the length of those services is not limited and defined.

G. Serfdom

25. The “UNODC Model Law against Trafficking in Persons” offers the following definition of *serfdom*:

“Serfdom” shall mean the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his or her status.¹²

¹² Supplementary Convention on the Abolition of Slavery, article 1.

H. Servitude

26. The “UNODC Model Law against Trafficking in Persons” offers the following definition of *servitude*:

“Servitude” shall mean the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he or she cannot change.¹³

¹³ This definition is derived from the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966). Neither of these instruments provides an explicit definition of servitude; the definition provided here is therefore based on an interpretation of those instruments. An example of a criminal law definition of servitude is *Siliadin v. France* (ECHR, 26 July 2005, No. 73316/01):

In its 2005 judgment in the case of *Siliadin v. France* the European Court of Human Rights defined servitude as:

“An obligation to provide one’s services that is imposed by the use of coercion, and is to be linked to the concept of slavery.”

Annex

Key tools and recommended resources

UNODC Model Law against Trafficking in Persons

The Model Law against Trafficking in Persons has been developed to assist States in implementing the provisions contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC). The Model Law covers not only the criminalization of trafficking in persons and related offences, but also the different aspects of assistance to victims as well as establishing cooperation between different state authorities and NGOs. Each provision is accompanied by a detailed commentary, providing several options for legislators, as appropriate, and legal sources and examples.

http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf

Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto

The main purpose of the legislative guides is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime and its supplementary Protocols. The guides lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider as they try to implement the Convention and its Protocols. The guides have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options.

<http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>

Combating Trafficking in Persons: A Handbook for Parliamentarians

The Inter-Parliamentary Union (IPU) and UNODC, in the framework of UN.GIFT, http://www.unodc.org/documents/human-trafficking/UN_Handbook_engl_core_low.pdf developed the publication Combating Trafficking in Persons: A Handbook for Parliamentarians. The Handbook contains a compilation of international laws and good practices developed to combat human trafficking and offers guidance on how national legislation can be brought in line with international standards. It outlines measures to prevent the commission of the crime, to prosecute offenders and to protect its victims.

http://www.unodc.org/documents/human-trafficking/UN_Handbook_engl_core_low.pdf

UNODC Toolkit to Combat Trafficking in Persons

In pursuit of the goals of preventing and combating trafficking in persons, protecting and assisting its victims and promoting international cooperation to these ends, the UNODC Toolkit to Combat Trafficking in Persons seeks to facilitate the sharing of knowledge and information among policymakers, law enforcers, judges, prosecutors, victim service providers and members of civil society who are working

at different levels towards these same objectives. Specifically, the Toolkit is intended to provide guidance, showcase promising practice and recommend resources in thematic areas.

<http://www.unodc.org/unodc/en/human-trafficking/electronic-toolkit-to-combat-trafficking-in-persons---index.html>

International Framework for Action to Implement the Trafficking in Persons Protocol

The International Framework for Action is a technical assistance tool that supports United Nations Member States in the effective implementation of the United Nations Trafficking Protocol, supplementing the United Nations Convention against Transnational Organized Crime. The International Framework for Action consists of a narrative part and a set of tables. The narrative describes key challenges in the implementation of the United Nations Trafficking Protocol and proposes general measures that can be taken in order to more effectively address these challenges. The set of tables details these measures further, through five pillars containing practical actions to support the implementation of the United Nations Trafficking Protocol.

http://www.unodc.org/documents/human-trafficking/Framework_for_Action_TIP.pdf
