



UNITED NATIONS
Office on Drugs and Crime



Appropriate Legal Responses to **Combating Trafficking in Persons in Afghanistan**

MANUAL FOR PARLIAMENTARIANS OF AFGHANISTAN

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

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OF AFGHANISTAN**

July 2008



UNITED NATIONS
New York, 2008

Contributory material to this manual has been sourced and adapted from various UNODC material, including the United Nations Office on Drugs and Crime, Inter-Parliamentary Union and UN.GIFT “The Appropriate Legal Responses to Combating Trafficking in Persons: A Handbook for Parliamentarians [draft].”

UNODC would like to acknowledge the generous support provided by the Government of Italy to this project.

Photos by Alessandro Scotti. The photos were not taken in the context of human trafficking and are used for illustration purposes only.

This publication has not been formally edited.



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Foreword

Trafficking in persons is a global phenomenon of a multi-disciplinary nature. In one way or another, it affects nearly all countries of the world. Trafficking is committed primarily for purposes of forced labour and sexual exploitation, the majority of victims being women and children. It is dynamic, adaptable, and opportunistic and, like many other forms of criminal activity, it takes advantage of conflicts, humanitarian disasters and the vulnerability of people in situations of crises. Thus, tackling trafficking poses great challenges to national criminal justice systems, law enforcement, the general public and non-governmental organizations. However, they all have a role to play in preventing trafficking in persons, prosecuting those who commit the offence and protecting the rights of the victims of human trafficking.

Trafficking in persons has become a major concern for Afghanistan. This is reflected by President Hamid Karzai's presidential decree of 2006 against trafficking in persons. In 2007, the Ministry of Justice included legislation to prevent and combat trafficking in persons in the Council of Minister's Annual Legislative Work Plan. Thereafter, the Ministry of Justice in partnership with other ministries successfully drafted the anti-trafficking legislation, which will be sent to the National Assembly for their approval.

The National Assembly of Afghanistan and Afghan parliamentarians have made great progress to establish the rule of law in Afghanistan. The anti-trafficking legislation provides an opportunity for the National Assembly and Afghan Parliamentarians to demonstrate their ability and the crucial role they have to play in the anti-human trafficking movement. Approval of the legislation will signify significant progress towards combating trafficking in persons in Afghanistan.

The role of Afghan parliamentarians in combating trafficking is manifold, and includes ensuring ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and any other relevant international instruments. Parliamentarians, by drafting, amending and monitoring national legislation to combat trafficking in persons in accordance with international standards, can work to ensure that the crime of trafficking is precisely defined in national law. Parliamentarians' work also includes enforcement of a 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.

This manual provides comprehensive background information on the international and national legal framework governing the response to trafficking in persons. It draws on examples of good practices, including model laws, from around the world to present practical recommendations to parliamentarians in Afghanistan to serve as a guide in the process to more effectively combat trafficking in persons.

The manual is based on: the values and principles of Islamic Law; an analysis of the various provisions of the 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 to the Protocol; the United Nations Office of the High Commissioner for Human Rights Recommended

Principles and Guidelines on Human Rights and Human Trafficking; and the United Nations Office on Drugs and Crime, Inter-Parliamentary Union and UN.GIFT “The Appropriate Legal Responses to Combating Trafficking in Persons: A Handbook for Parliamentarians [draft].”¹

¹ “The Appropriate Legal Responses to Combating Trafficking in Persons: A Handbook for Parliamentarians” will be launched October 2008 (www.ungift.org/docs/ungift/pdf/initiatives/Parliamentarians_Handbook_en.pdf).



Abbreviations

AIHRC	Afghanistan Independent Human Rights Commission
IOM	International Organization for Migration
OHCHR	Office of the United Nations High Commissioner for Human Rights
NGO	Non-governmental organization
Smuggling Protocol	Protocol against the Smuggling of Migrants by Land, Sea and Air
TOC Convention	Convention against Transnational Organized Crime
Trafficking Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
UNDP	United National Development Programme
UNIFEM	United Nations Development Fund for Women
UNODC	United Nations Office on Drugs and Crime



Introduction

International laws embodied within international conventions and treaties provide the legal framework for relations between States, as well as the treatment by States of individuals within their borders. Many States have recognized the need to foster and enhance close international cooperation in order to tackle transnational organized crime and trafficking in persons.

The United Nations Convention against Transnational Organized Crime (hereafter the TOC Convention), adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. Afghanistan signed and subsequently ratified the TOC Convention on 23 September 2003. States that ratify this instrument commit themselves to taking a series of measures against transnational organized crime including: the creation of domestic criminal offences (participation in an organized criminal group, money-laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation, and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.

The TOC Convention is further supplemented by three Protocols one of which is the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereafter the Trafficking Protocol), adopted by General Assembly resolution 55/25. The development of the Trafficking Protocol marked a significant milestone in international efforts to stop trafficking in persons. Today, 118 States are party to the Trafficking Protocol. It is the first global legally binding instrument with an agreed upon definition of trafficking in persons. The intention behind this definition is to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases. Additionally, the Trafficking Protocol aims to protect and assist the victims of trafficking in persons with full respect for their human rights.

Trafficking in persons is a multifaceted crime that generates many issues for consideration when addressing and implementing an effective response to trafficking in persons. In accordance with the Trafficking Protocol, trafficking in persons is a human rights violation constituting a crime against both the individual and the State, carrying with it important implications for the legislative approach to be taken in the recognition and punishment of the crime. This means that the implementation of interventions and actions, whether as part of prevention, prosecution or protection efforts, must seek to care for and protect individual humans, rather than solely being concerned with security of the state.

Trafficking in persons constitutes a severe form of violence, especially against women and children. It 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 traditional practices. On the other hand, some traditional practices, which may be considered as inherently harmful to human rights and dignity of persons, may also contribute to the trafficking infrastructure.

Trafficking in person is also disruptive to international markets, and is an illegal business which may capitalize on international migration flows. It 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 driven by lack of gender equality and lack of equal opportunity, stark intra and interstate economic inequality, corruption, 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 labour likewise contribute to the trafficking infrastructure.

Trafficking in persons is a global problem that transcends national boundaries. Trafficking in persons is 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 legal assistance. At the same time, trafficking in persons occurs simultaneously within national boundaries and should be addressed within domestic law.

Effectively preventing trafficking, prosecuting those who commit trafficking and protecting the rights of victims of trafficking in persons, 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, whose work may also be sabotaged by corrupt practices. Furthermore, identification of victims of trafficking may be a challenge, as victims are often fearful of deportation or reprisals from traffickers or in some instances their community.

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. For example, enacting laws that treat victims of trafficking as victims rather than criminals and engaging in public awareness campaigns aimed toward them, can have positive effects on their willingness to reveal their identity, thereby leading to prosecuting more cases. Enacting witness protection programmes that provide victims with comprehensive protection can encourage victims to testify, contributing to successful prosecutions. Effective prosecution, accompanied by severe punishment can serve as a deterrent to future traffickers.

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 the protection of their human rights. Moreover, immigration laws, labour laws, health laws, child protection laws, and other relevant legislation must be reviewed and amended to cover all aspects of trafficking, thereby ensuring a comprehensive framework for addressing the phenomenon. Further, these laws must be effectively enforced and monitored for the success of their implementation.

Therefore, States must act to build a comprehensive framework, one which aims to prevent victimization and to protect those who have suffered from the crime, as well as to prosecute the criminals. States must also act to combat those factors that contribute to



the trafficking infrastructure by striving to provide for their citizens in ways that diminish their vulnerability to trafficking. States can for example, diminish the demand for cheap labour and services, which is inherent in the exploitative nature of trafficking. States must be vigilant in enforcing laws and monitoring interventions so as to minimize the profits to be gained from trafficking in persons.

The Trafficking Protocol has yet to be signed or ratified by Afghanistan. This manual aims to provide practical recommendations for what parliamentarians in Afghanistan can do to combat trafficking in persons and subsequently ratify the Trafficking Protocol.

Global scope of trafficking in persons

Due to its clandestine nature, accurate information about worldwide trafficking levels is difficult to obtain. The lack of reliable statistics can be attributed to several factors. Many countries lack anti-trafficking in persons legislation. And even when legislation exists, laws may only define human trafficking as applying to certain exploitative practices, such as sexual exploitation, and not other forms of exploitative behaviour. Moreover, in many countries, the definition of human trafficking applies only to the exploitation of women and children overlooking the exploitation of adult male victims. If comprehensive laws do exist, they are not always enforced and victims may not be recognized as victims of crime but as smuggled migrants. Victims may be hesitant to provide information or cooperate with authorities often out of fear of harm to themselves or their families by either criminal networks or the legal authorities. Many countries lack a centralized agency or coordinated statistics system, so that the collection of trafficking data, if done at all, is done on an ad hoc basis. And if such figures on trafficking are given, they are usually based on estimates of the level of trafficking with, in most cases, no explanation of how these figures were calculated. A United Nations Office on Drugs and Crime (UNODC) global database was established to systematically collect and collate open-source information on trafficking in persons. According to the database, women are reported to be the largest group of victims of trafficking, and sexual exploitation is the most common form of exploitation, followed by forced labour.²

Human trafficking in south-central Asia

According to the UNODC global database on trends in trafficking in human beings, the cases of trafficking in the region are diverse, but some general trends can be observed. The majority of south-central Asian³ countries are countries of origin and destination. In particular, major countries of origin are Bangladesh, India, Nepal and Pakistan. Furthermore, some south-central Asian countries are used by traffickers as countries of transit, particularly India.

India and Pakistan are characterized as very important countries of destination while the Islamic Republic of Iran can be regarded as a less significant, but still noticeable recipient country.

²Kristiina Kangaspunta, "Mapping the Inhuman Trade: Preliminary findings of the Database on Trafficking in Human Beings", *Forum on Crime and Society*, vol. 3, Nos. 1 and 2, pp. 81-103.

³The source for the regional classification used is United Nations, *World Population Prospects: The 2004 Revision – Highlights* (New York, 1999). For the purpose of the database, South-Central Asia includes Afghanistan, Bangladesh, Bhutan, India, Iran, Maldives, Nepal, Pakistan and Sri Lanka.

Victims are mainly trafficked within the region, but there are also trends showing trafficking to destinations in Western Asia, the Gulf States and the European Union with other destinations such as Eastern Europe or the United States considered less frequent.

Therefore, the trafficking trends in relation to destination countries predominantly follow a consistent geographic pattern; that being that the victims are mainly transported into neighbouring countries within the south-central Asian region. Those victims who are trafficked further afield, are most often trafficked to the Gulf States.

Sexual exploitation is the most common form of exploitation in trafficking when victims are trafficked within south-central Asia. In the case of victims destined for the Gulf States and Western Europe, sexual exploitation and forced labour are the main purpose of human trafficking.⁴

Human trafficking in Afghanistan

Afghanistan is a country of origin, destination and transit for trafficking in persons. Indicators also show a high level of internal trafficking. Profiled victims are mainly reported to be women for the purpose of sexual exploitation. Trafficking in children, especially girls, is also reported.⁵

However, as suggested previously, accurate statistics on the magnitude of trafficking in persons are elusive and unreliable, and Afghanistan is no exception. Lack of security, absence of reporting mechanisms or legislation, lack of understanding of law enforcement actors, and sensitivity to sexual exploitation and gender, make substantiating trafficking cases difficult. Moreover, there is no terminology within Dari and the Pashto language to sufficiently convey trafficking in persons and can be confused with kidnapping and smuggling of migrants or goods. More research and reliable reporting mechanisms are needed, as much of the available data is anecdotal. However, general trends have been observed and some cases documented.

The 2003 “Trafficking in Persons: An Analysis of Afghanistan” by the International Organization of Migration (IOM) provides the best overall picture of trafficking in persons in Afghanistan. The report documents many forms of trafficking occurring in Afghanistan including sexual exploitation, forced labour, slavery and practices similar to slavery and trafficking for the purpose of the removal of body organs.

Country of origin

The IOM analysis reports Afghanistan as a source country for trafficking for the purpose of forced prostitution forced labour, slavery and practices similar to slavery and organ removal.⁶ The United States’ 2007 “Trafficking in Persons Report” indicates the trafficking of Afghan women occurs primarily to Pakistan and Iran for the purpose of sexual exploitation, and the trafficking of children occurs to Iran, Oman, Pakistan, Saudi Arabia

⁴United Nations Office on Drugs and Crime, *Trafficking in Persons: Global Patterns* (Vienna, United Nations, 2006), appendices, pp. 9-209.

⁵Ibid., p. 19.

⁶International Organization for Migration, *Trafficking in Persons: An Analysis of Afghanistan* (Kabul, IOM, 2003), pp. 39-40.



and Zimbabwe. The Afghan Independent Human Rights Commission (AIHRC) reports 150 cases of child trafficking to other states in 2005 alone, although many suspect the actual level of trafficking is higher.⁷ In another instance, provincial government leaders report that boys from the Aymak tribe in Sar-i Pul were being trafficked to Pakistan and Iran for forced labour.⁸ In October 2003, some 42 allegedly trafficked Afghan children to Saudi Arabia returned home in a single week. Reportedly abducted by force, the boys, 4 to 10 years of age, had been “living as slaves” in Saudi Arabia.⁹ Although not substantiated, there are further reports of young boys being trafficked to Pakistan for the purpose of organ removal. In one incident, a trafficker told a parent their child would be provided with schooling in a *Madrasa* but instead was taken to Pakistan, drugged, and operated on to remove a kidney for sale to a wealthy individual from the Gulf region.¹⁰ There are also reports of trafficking in men for forced labour, primarily to Iran.¹¹

Country of transit

There is anecdotal information that points to cases of Afghanistan as a country of transit between Iran and Pakistan, but few have been substantiated. IOM reports one substantiated case in its analysis:

“A large group of traffickers, predominately Afghan Baluchi refugees and a few Iranian women, were arrested and persecuted in Northeast Iran (Mashad), for selling Iranian girls into prostitution in Pakistan. According to one article, it is estimated that up to 250 girls were sold as sex slaves. The girls, aged 12-20 years, and their families were approached with offers of marriage. Once the offers were accepted, however, the girls were transported from Khorasan, Iran, through Afghanistan and into Pakistan. It is thought that the criminal network responsible for this operation could include up to 200 persons. Forty-three traffickers were sentenced to a total of 281 years in prison, 222 lashes, and other fines.”¹²

The trafficking network was exploiting poor families around Mashad and offering to marry off their daughters. However, the girls were taken instead through Afghanistan to Pakistan to be sold to brothels.¹³

Country of destination

IOM notes in its 2003 analysis of trafficking in Afghanistan that it received minimal information regarding Afghanistan as a country of destination. Much of the data received was unsubstantiated, yet responses to their questionnaire resulted in reports of forced prostitution, false marriage and forced sexual and domestic servitude. One response to the questionnaire reported an example of a female Afghan refugee in Iran being sold into

⁷United States of America, Department of State, *Trafficking in Persons Report: June 2007* (Office to Monitor and Combat Trafficking in Persons, 2007), p. 51.

⁸International Organization for Migration, p. 40.

⁹Sardar Ahman, “Child Smugglers Leave Hundreds of Afghan Families Traumatized”, Agence France Presse, 21 October 2003.

¹⁰Interview with government official, 29 January 2008.

¹¹United States of America, Department of State, p. 51.

¹²International Organization for Migration, p. 41.

¹³Donna Hughes, “Iran’s Sex Slaves Suffer Hideously under Mullahs”, *Insight on the News – World*, 28 May 2004 (see www.iranfocus.com/en/women/irans-sex-slaves-suffer-hideously-under-mullahs.html).

false marriages in Afghanistan. An unconfirmed report describes the trafficking of Iranian and Pakistani women to Kandahar in southern Afghanistan for the purpose of forced prostitution.¹⁴

UNODC's 2006 publication "Trafficking in Persons: Global Patterns" also draws attention to the foreigners' market for sexual services in Kabul. Sex providers, mostly Chinese, Philippine and Thai women, work out of Chinese restaurants in Kabul. It is not clear whether these women are indeed trafficking victims, but indications show the trade is highly organized with connections to local and Chinese criminal networks.¹⁵

Internal trafficking

There are significant reports of internal trafficking in Afghanistan. Forms of trafficking occurring within Afghanistan include exploitation of prostitution, prostitution of minors (most often girls but also boys), forced marriages, arranged marriages for debt release or dispute settlement, sexual/domestic servitude and forced labour.

Victims of forced marriage are most often abducted by force, married without a choice and reside in the abductors' house to perform the domestic and sexual services of a wife. Abductions occur while the women and girls are either outside of the home or by force from their homes.

Marriages are also arranged for debt release. Families or fathers alleviate a debt through arranging the marriage of a daughter to the debtor. The daughter is transported to the residence of her new husband, forced into marriage and performs the duties of a wife with no opportunity to object.

Domestic and sexual servitude occurs primarily in relation to women, girls and young boys. Women and girls are abducted by force and held in captivity for up to several months where they are subjected to rape and forced into domestic labour. There are also reports of boys trafficked, for example, within Afghanistan by men, primarily military commanders, for use as entertainment at celebrations. The boys, as young as 14, are forced to dance and provide sexual gratification to the men.¹⁶

In summary, a lack of security, absence of reporting mechanisms or legislation, lack of understanding of law enforcement actors, and lack of sensitivity to sexual exploitation and gender make substantiating trafficking cases difficult. More research and reliable reporting mechanisms are needed to replace anecdotal reports with substantiated and documented cases of trafficking in persons.

¹⁴International Organization for Migration, p. 41-42.

¹⁵United Nations Office on Drugs and Crime, p. 71.

¹⁶International Organization for Migration, p. 30-39.



module 1

THE INTERNATIONAL LEGAL FRAMEWORK TO COMBAT TRAFFICKING IN PERSONS



Learning objectives

At the end of this module you will be able to:

- Define the relationship of the Trafficking Protocol to the TOC Convention;
- Define the purpose of the Trafficking Protocol;
- Identify examples of international Conventions and Treaties which have addressed trafficking in persons in elements of their provisions.

1.1 Introduction

The growing concern about organized criminal groups and operations that cross national borders led an increasing number of countries to consider and adopt new laws, measures and strategies to deal with the problem. The United Nations Convention against Transnational Organized Crime (hereafter the TOC Convention) was negotiated and adopted in 2000 in this context. The TOC Convention entered into force in September 2003.

The purpose of the TOC Convention is to “promote cooperation to prevent and combat transnational organized crime more effectively.”¹⁷ It seeks to enlarge the number of countries that take effective measures against transnational crime and seeks to forge and strengthen the controllers’ cross border links. It respects the differences and specifics of the diverse legal traditions and cultures, while at the same time it promotes a common language that helps to remove some of the existing barriers to effective transnational collaboration.

Application of the TOC Convention is aimed at the prevention, investigation and prosecution of the four offences established by the TOC Convention:

1. Participation in an organized criminal group (article 5);
2. Laundering of proceeds of crime (article 6);
3. Corruption (article 8);
4. Obstruction of justice (article 23);

¹⁷United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, annex 1 (2000), art. 1 (see www.unodc.org/unodc/en/treaties/CTOC/index.html).

Furthermore, the TOC Convention applies to:

5. Other serious crimes according to article 2 (b); and
6. Offences established by the Protocols, including human trafficking and the smuggling of migrants (TOC Convention article 3, article 1 of the Protocols).

1.2 The creation of an international consensus to combat trafficking in persons

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereafter 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 source that defines State responsibilities in developing their national approaches to combat, prevent and punish trafficking in persons while protecting the internationally recognized human rights of victims of trafficking. Today, 118 States are party to the Trafficking Protocol.

Article 2 of the Trafficking Protocol establishes the three basic purposes:

- Prevention and combating of trafficking
- Protection and support of victims of trafficking; and
- Promotion of cooperation between State Parties.

The language of article 2 (a) requires “particular attention” to trafficking in women and children, though it maintains the basic principle that any human being, regardless of age or gender, could become a victim and that all forms of trafficking should be covered by the Trafficking Protocol.¹⁸ In addition to the general rules, more specific provisions may be needed in some areas to take into account the problems of women and children who are victimized.

Afghanistan signed and subsequently ratified the United Nations Convention against Transnational Organized Crime on 24 September 2003. The Trafficking Protocol or the Smuggling Protocol has yet to be signed or ratified.

Accompanying the Trafficking Protocol are the *travaux préparatoires* (official records) of the negotiations of the TOC Convention and the supplementing Protocols. The *travaux préparatoires* track the progress of the negotiations in the open-ended intergovernmental Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. The *travaux préparatoires* are intended to provide a comprehensive picture of the background of the TOC Convention and its Protocols and, by presenting the evolution of the texts, to provide the reader with an understanding of the issues confronted by the Ad Hoc Committee and the solutions it found. Thus, the publication intended to

¹⁸Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, annex II (2000), art. 2 (see www.unodc.org/unodc/en/treaties/CTOC/index.html).

prove a more in-depth understanding of the TOC Convention and its Protocols. When relevant, this manual will allude to the *travaux préparatoires* for reference.¹⁹

1.3 The relationship between the Trafficking Protocol and the TOC Convention

The TOC Convention and the Trafficking Protocol were drafted as a group. The Trafficking Protocol supplements the TOC Convention. Consequently, compliance with international standards to combat trafficking requires implementation of both international legal instruments.

The Protocols are not intended as independent treaties, so each State is required to be a State Party to the parent TOC Convention in order to become a Party to any of the Protocols. This ensures that in any case that arises under a Protocol, all of the general provisions of the TOC Convention are also available and applicable. Many specific provisions are drafted on this basis; the TOC Convention contains general requirements for mutual legal assistance and other forms of international cooperation.

The TOC Convention addresses several issues that are closely related to trafficking in persons. Parliamentarians should take these issues into consideration while enacting anti-trafficking legislation and ensure compatibility between anti-trafficking laws and related laws, including anti-money-laundering laws, anti-corruption laws, and procedural laws providing for the confiscation of the proceeds of the crime and the protection of witnesses.

Article 1 of the Trafficking Protocol and article 37 of the TOC Convention establish the following basic principles governing the relationship between the two instruments:

- **No country can be a Party to any Protocol unless it is also a Party to the TOC Convention.**²⁰ The language permits simultaneous ratification or accession but it should not be possible for a country to be subject to any Protocol obligation unless it is also subject to the obligations of the TOC Convention.
- **The TOC Convention and the Trafficking Protocol must be interpreted together.**²¹ In interpreting the instruments, all relevant instruments should be considered, and provisions that use similar or parallel language should be given generally similar meaning.
- **The provisions of the TOC Convention apply to the Trafficking Protocol, *mutatis mutandis*.**²² In the agreed notes for the travaux préparatoires, *mutatis mutandis* is defined as “with such modifications as circumstances require” or “with the necessary modifications”.²³ In applying the TOC Convention provisions to the Trafficking Protocol, minor modifications of interpretation or application can be made to take account of the circumstances that arise under the Trafficking Protocol, but that modifications should not be made unless necessary, and then only to the

¹⁹Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations, New York, 2006).

²⁰TOC Convention, art. 37(2).

²¹TOC Convention, art. 37(4), and Trafficking Protocol, art. 1(1).

²²Trafficking Protocol, art. 1(2).

²³On the meaning of *mutatis mutandis*, see Interpretive Notes A/55/383/Add.1, para. 62.

extent that is needed. This general rule does not apply where the drafters have specifically excluded it.

- **Trafficking Protocol offences shall be regarded as offences established in accordance with the TOC Convention.** This ensures that any offence or offences established by each country in order to criminalize trafficking in persons as required by the Trafficking Protocol article 5 will automatically be included within the scope of the basic TOC Convention provisions governing forms of international cooperation such as extradition (TOC Convention Article 16) and mutual legal assistance (TOC Convention Article 18).

1.4 Basic principles of criminalization established by the TOC Convention

The TOC Convention establishes several general principles of criminalization that apply to its Protocols:

- **Minimum standard.** Domestic crimes such as the crime of human trafficking may be broader in scope or more severe than those required by the Trafficking Protocol, as long as all conduct specified by the Trafficking Protocol is made a crime.²⁴
- **Offences must be “criminal” offences (except for legal persons).** Each of the offence provisions in the TOC Convention and the Trafficking Protocol states that offences must be established as offences in criminal law. This principle applies unless the accused is a legal person in which case the offence may be a criminal, civil or administrative offence.²⁵
- **Sanctions.** Sanctions adopted within domestic law must take into account, and should be proportionate to the gravity of the offences.²⁶
- **Non-inclusion of transnationality in domestic offences.** The element of transnationality is one of the criteria for applying the TOC Convention and the Protocols and has to be established before requesting international assistance, but transnationality should not have to be proven in a domestic prosecution.²⁷
- **Non-inclusion of “organized criminal group” in domestic offences.** As with transnationality, the involvement of an “organized criminal group” has to be established to invoke the obligation for international cooperation but should not have to be proven as an element of a domestic prosecution. Thus, the Trafficking Protocol offences should apply equally, regardless of whether the offence was committed by an individual, or was committed by individuals associated with an organized criminal group and regardless of whether this can be proven or not.²⁸
- **Jurisdiction.** The TOC Convention requires State Parties to establish jurisdiction to investigate, prosecute and punish all offences established by the TOC Convention and any Protocols to which the country in questions is a State Party.

²⁴TOC Convention, art. 34(3).

²⁵Ibid., art. 5,6,8 and 23.

²⁶Ibid., art. 11(1).

²⁷Ibid., art. 34(2).

²⁸Ibid.

1.5 The prohibition of trafficking in persons in international conventional law

Over the years, a variety of other international conventions have addressed trafficking in persons as an element of their provisions, and as such, constitute a commitment on the part of a States party to such conventions to combat trafficking. Alongside the Trafficking Protocol, these provisions in the respective conventions constitute an integral part of international legal framework to combat trafficking in persons. A number of international declarations have likewise condemned trafficking in persons and called on States to undertake to combat the phenomenon, signifying a commitment on the part of the international community to eradicate this human rights violation:

- The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others requires States to “undertake, in connection with immigration and emigration, to adopt or maintain such measures as are required, in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution.”²⁹
- The 1979 Convention on the Elimination of All Forms of Discrimination against Women calls upon States to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”³⁰
- The 1989 Convention on the Rights of the Child mandates that States must “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”³¹

The 2000 Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography mandates States to “take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism.”³²

The 2000 Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict requires States to ensure that “persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.”³³

- The 1990 Convention on the Protection on the Rights of All Migrant Workers and Members of their Families states that “1) No migrant worker or member of his or her family shall be held in slavery or servitude. 2) No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.”³⁴

²⁹Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, General Assembly resolution 317 (IV), annex (1949), art. 17.

³⁰Convention on the Elimination of All Forms of Discrimination against Women, General Assembly resolution 34/180, annex (1979), art. 6.

³¹Convention on the Rights of the Child, General Assembly resolution 44/25, annex (1989), art. 35.

³²Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, General Assembly resolution 54/263, annex II (2000), art. 10.

³³Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, General Assembly resolution 54/263, annex I (2000), art. 2.

³⁴International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Assembly resolution 45/158, annex (1990), art. 11.

- The 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption prohibits intercountry adoption in cases where parental consent is obtained as a result of payment or compensation. In addition, the Convention mandates that “No one shall derive improper financial or other gain from an activity related to an inter-country adoption.”³⁵
- The 1993 United Nations Declaration on the Elimination of Violence against Women defines violence against women to include “rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution”.³⁶
- The 1998 Rome Statute of the International Criminal Court defines crimes against humanity to include enslavement and defines enslavement to mean “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”³⁷
- The 1999 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour prohibits “(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”³⁸

The prohibition of trafficking in persons in international treaty law

In addition to these international instruments, a number of regional agreements aimed at combating trafficking in persons have been developed and serve as important additions to the international framework. For example, the 2004 League of Arab States Revised Human Rights Charter states in article 10 (1-2), “(1) All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances. (2) Forced labour, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited.”³⁹

³⁵Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993), art. 32 (see www.hcch.net/index_en.php?act=conventions.text&cid=69).

³⁶Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 (1993), art. 2.

³⁷Rome Statute of the International Criminal Court, United Nations Treaty Series, vol. 90 (1998), art. 7.

³⁸Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO 182), United Nations Treaty Series, vol. 2133, No. 37245 (1999), art. 3a-d.

³⁹League of Arab States, *Revised Human Rights Charter* (2004), (see www1.umn.edu/humanrts/instreet/loas2005.html).

The following is a list of international legal instruments both referred to in this manual and relevant to trafficking in persons. The current status of their signatory is also indicated.

INTERNATIONAL INSTRUMENT	STATUS
Convention concerning Forced or Compulsory Labour (ILO No. 29) (1930)	Not signed yet
Convention on the Suppression for the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)	Accession 21 May 1985
Supplementary Convention on the Abolition of Slavery, Servitude, Forced Labour and Similar Institutions and Practices Similar to Slavery (1956)	Accession 16 November 1966
Convention on the Elimination of All Forms of Discrimination Against Women (1979)	Signed 14 August 1980 Accession 5 March 2003
Convention on the Rights of the Child (1989)	Ratification 28 March 1994
Optional Protocol to The United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)	Accession 19 September 2002
Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)	Accession 24 October 2003
Convention on the Protection on the Rights of All Migrant Workers and Members of their Families (1990)	Not signed yet
Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption (1993)	Not signed yet
Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182) (1999)	Not signed yet
TOC Convention (2000)	Ratification 24 September 2003
Trafficking Protocol (2000)	Not signed yet

1.6 Implementing international human rights conventions as part of a comprehensive approach to combat human trafficking

A recognition and enforcement of these and other international human rights conventions is imperative toward the creation of a domestic legal framework that upholds the protection of human rights, including rights of victims of trafficking (box 1).

Box 1. Recognition of international law in adopting state policy to combat trafficking

“State policy in preventing and combating trafficking in persons, and in protection, assistance and rehabilitation of the (statutory) victims of trafficking in persons shall be determined in accordance with the obligations under the Constitution and international treaties of Georgia relative to combating the transnational organized crime and corruption and the protection of human rights.”

Georgia – Law on Combating Human Trafficking (2006)

In the meantime, ratification and implementation of the specific provisions of the Trafficking Protocol is the most effective and adequate means of comprehensively responding to trafficking in persons, aiming to achieve three main purposes outlined by article 2 of the Trafficking Protocol:

- “(a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among State Parties in order to meet those objectives.”

Additionally, the Trafficking Protocol recognizes that:

“...effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights”.⁴⁰

⁴⁰Trafficking Protocol, preamble.

1.7 Role of parliamentarians



Role of parliamentarians

Ensuring compliance with international legal obligations to combat trafficking in accordance with international conventional law

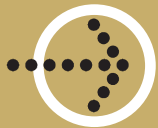
- Sign, ratify/or cause to be ratified and accede to, without reservations, international legal instruments, including the Trafficking Protocol supplementing the TOC Convention;
- Promote the signature by the Government of Afghanistan of the Trafficking Protocol and any other international instrument related to trafficking in persons;
- Strengthen the relationship between international legal instruments and Afghanistan's national legislation by:
 - Reviewing existing laws to ensure the consistency and conformity of international legal instruments with domestic legislation;
 - Enact laws that implement the international standards embodied in international human rights legal instruments;
 - Amending domestic legislation that may conflict with international legal instruments.
- Monitor the Government of Afghanistan's compliance in fulfilling its obligations under international law;
- Create and/or strengthen a parliamentary mechanism such as a committee to oversee and guide government policies on human rights protection, including protection of victims of trafficking in persons.



Self-assessment questions

These questions address the overall module in order to help you test your understanding of the material.

- When did the TOC Convention come into force?
- What is the purpose of the TOC Convention?
- What is the relationship between the Trafficking Protocol and the TOC Convention?
- Has Afghanistan ratified the TOC Convention and the Trafficking Protocol?
- What is the purpose of the Trafficking Protocol?



module 2

DEFINING TRAFFICKING IN PERSONS IN NATIONAL LEGISLATION



Learning objectives

At the end of the module you will be able to:

- Understand the concept of human trafficking;
- Define the chain of crimes (act of trafficking, means of trafficking, purpose of trafficking) that make up trafficking;
- Understand the correlation between kidnapping and trafficking

2.1 Introduction

For the development and implementation of effective national legislation on human trafficking, it is important for parliamentarians to have a firm understanding of the concept of trafficking in persons. The Trafficking Protocol provides an internationally agreed definition of trafficking in persons and should be used as a framework when developing national legislation.

2.2 Definition of trafficking in persons in the Trafficking Protocol

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 defines the key elements of trafficking in persons:

“Trafficking in persons shall mean:

- (a) the act of recruitment, transportation, transfer, harbouring or receipt of persons;
- (b) 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;
- (c) for the purpose of exploitation, which includes, 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”.

By providing an internationally agreed definition, the Trafficking Protocol standardizes approaches to fighting human trafficking. The definition can help ensure that legislative, enforcement and administrative measures at the national level are consistent from country to country. Moreover, it provides a common basis for statistical and research purposes.

As the definition is adopted at the national level, the focus of all investigative and prosecutorial efforts should be placed upon presenting sustainable evidence that supports these three elements.

While the new definition is crucial to an international response to trafficking in persons, it is important to remember that it is not an exhaustive definition and that the Trafficking Protocol is limited in scope. The Trafficking Protocol is intended to “prevent and combat” trafficking in persons and to facilitate international cooperation against such trafficking. It applies to the “prevention, investigation and prosecution” of Protocol offences, where these are “transnational in nature” and involve an “organized criminal group” as defined by the TOC Convention.

Hence, the definition of trafficking in persons in the Trafficking Protocol is essential to the fight against this crime, but it is not, and should not be, the only tool available. It is crucial that national legislation addresses the issue, in compliance with the Trafficking Protocol and other international law. The task does not end there: without implementation and enforcement of the national legislation, the law does not have any influence.

In other words, the definition is broken down into three elements:

- The acts of trafficking;
- The means of trafficking; and
- The purpose of trafficking (forms of exploitation).

2.3 The act, means and illicit purposes: 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:

- *Act (what is done)*: recruitment, transportation, transfer, harbouring, and receipt of persons

Some examples of common forms of recruitment include:

- (a) Individual recruiters looking for interested males and females in public and community spaces;
- (b) Recruitment via informal networks of families, friends or acquaintances;

- (c) Advertisements (Internet, newspapers, etc.) offering work or study abroad;
- (d) Agencies offering work, study, marriage or travel abroad;
- (e) False, arranged or forced marriages (box 2);
- (f) Purchasing of children from parents;
- (g) Individual recruiters searching cafes and public places in communities;
- (h) Purchasing of children from guardians.

Box 2. Forced marriage and human trafficking

The IOM 2003 analysis of trafficking in persons in Afghanistan identified some cases of forced marriage, the abduction of women and arrangements for debt release as instances of human trafficking. Within the definition of the Trafficking Protocol and forms of exploitation, these acts could be considered forms of slavery and slavery-like practices, sexual exploitation, domestic servitude and forced labour. It must be stressed that all elements of trafficking in persons as defined in the Protocol must be present for forced marriages to be considered cases of trafficking in persons.

Following a June 2005 Presidential Decree establishing a Commission for the Elimination of Violence against Women, a workshop was organized by the Afghanistan Ministry of Women's Affairs with the support of the United Nations Development Programme (UNDP) and the United Nations Development Fund for Women (UNIFEM). Following discussions and recommendations made by participants at the workshop, the Protocol for the Elimination of Violence against Women and the Elimination of Child and Forced Marriages was drafted and signed.

The Protocol aimed to:

1. Eliminate child and forced marriages by December 2008;
2. Amend existing laws to enable the eradication of child and forced marriages by December 2008;
3. Enforce the implementation of the existing and new laws to prevent the practice of child and forced marriages;
4. Harmonize the guideline and procedures for existing laws related to child and forced marriages.

Responsibilities for implementing the Protocol were agreed upon by participants and the Protocol was signed by:

Supreme Court, Attorney General Office, Ministry of Foreign Affairs, Ministry of Defence, Ministry of Interior, Ministry of Justice, Ministry of Information and Culture, Ministry of Education, Ministry of Higher Education, Ministry of Women's Affairs, Ministry of Haj and Islamic Affairs, Ministry of Labour and Social Affairs, Ministry of Refugees and Returnee Affairs, Ministry of Youth, and The Afghan Independent Human Rights Commission.

- *Means (how it is done)*: 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.

Some examples of means of recruitment are:

- (a) Complete coercion through abductions or kidnapping (box 2);
- (b) Selling a person, typically a child;
- (c) Deception by promises of legitimate employment/entry;
- (d) Deception through half-truths;
- (e) Deception about the working conditions;
- (f) Abuse of vulnerability

It is important to note that direct force does not have to be used, the *threat* of force is sufficient. Force might be implied, for example, by showing weapons and displaying violence to others in the presence of a victim. Furthermore, the force or threat does not have to be made directly to a victim of trafficking. Traffickers may threaten to harm a victim's family or other loved ones to gain the victims compliance.

Power can also be abused in a number of ways to exploit an individual's vulnerability. Authorities can abuse their power and contribute to trafficking through accepting bribes from those who transport the victims across international border. It could be argued that persuading a person from extreme poverty to donate an organ, endangering the persons life and health, is also an abuse of a position of vulnerability.

- *Exploitative purpose (why it is done)*: exploitation, which at a minimum, includes 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.

Traffickers do not have to intend to directly exploit the person themselves. If they take part in any elements of the trafficking process, and they are aware that the purpose of the process is exploitation, they are guilty of trafficking.

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) of the Trafficking Protocol 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.”



Discussion

What are some of the acts and means used by traffickers in Afghanistan to exploit individuals?

Box 3. Kidnapping and human trafficking

Kidnapping is a serious crime with potentially grave consequences for the individual victims, their families, communities, countries and, by implication, the international community.

Kidnapping is defined as the following:

“Kidnapping consists in unlawfully detaining a person or persons against their will for the purpose of demanding for their liberation an illicit gain or any other economic gain or other material benefit, or in order to oblige someone to do or not do something.” (United Nations Economic and Social Council Resolution 2002/16)

There is a growing tendency for organized criminal groups and terrorist groups to resort to kidnapping in Afghanistan, especially for the purpose of extortion, as a means of accumulating capital with a view to consolidating their criminal operations and undertaking other illegal activities, such as trafficking in persons, firearms, drugs, money-laundering and crimes related to terrorism.

Within the definition of trafficking in the Protocol, kidnapping can be considered the means of the threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim. Trafficking cases involving kidnapping or kidnapping statutes to charge trafficking offences in Afghanistan should look carefully if the act, means and purpose are for exploitation in line with the Trafficking Protocol.

2.4 The issue of consent

The question of the victim’s consent to trafficking is one of the key issues in developing a response to trafficking. The language of article 3(b) of the Trafficking Protocol is a compromise on the question of consent:

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

In many trafficking cases there is initial consent or cooperation between victims and traffickers. This is followed by more coercive, abusive and exploitive circumstances.

Different countries had various opinions on how to address the issue of consent in the definition of trafficking. Some States argued that any victim consent should be irrelevant. This ensures that the traffickers do not use the victim's initial consent as a defence against charges of later exploitation to which the victim did not consent. Other States felt that some element of consent was needed to limit the scope of the offence, to distinguish trafficking from legitimate activities and for constitutional reasons.

To resolve the issue, paragraph (b) of the definition clarifies that consent becomes irrelevant whenever any of the means of trafficking are used.⁴¹ Consent, therefore, cannot be used as a defence to absolve a person from criminal responsibility.

In trafficking cases involving children, the Trafficking Protocol also states that a child cannot give his or her consent, even if none of the means against him or her are used.

Article 3 (c) of the Trafficking Protocol asserts:

“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”.

In other words, even if a child is not threatened, no force is used against him or her, and she/he is not coerced, abducted or deceived, a child cannot give consent to the act of trafficking for the purpose of exploitation.

In other words, consent of the victim could still be used as a defence in domestic law, but it is nullified as soon as such elements as threats, coercion, or the use of force are established. The issue of consent is complex in that both consent and coercion take many forms.

Examples of the issue of consent

The following examples illustrate the question of trafficking in persons and consent.

Case study 1

Najibullah, 19 years old, left his village in Afghanistan when he was promised a job from a family friend as a shopkeeper in Iran. Seeking a way to earn money to support his family, he agreed to leave when a relative referred him to a “recruiter,” a man who then arranged his transport and travel documents into Iran. Once in Iran, he was not met at the bus station by the family friend, rather an individual who allegedly was a colleague of the family friend. Najibullah was forced into a van and transported to a house and locked in a room, his travel documents taken away. Two days later he was taken by another man to a farm where Najibullah was subjected to hard labour and construction without payment.

⁴¹Trafficking in persons consists of means of the threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim.

Najibullah's story is common in that he did consent to be taken to Iran for a job as a shopkeeper. In many trafficking cases, the false offer includes the promise of a valid work and residency permit. Sometimes the victims agree to being smuggled into a country illegally in order to find work. Victims clearly do not consent to the subsequent brutal exploitation. It is not possible under international law to consent to torture and abuse.

Case study 2

A "recruiter" brought a young Ukrainian woman to Germany. This young woman understood that she would be a prostitute and had given consent to be illegally transported into the country. However, upon arrival she found that she was required to repay an enormous amount of money to the trafficker. She fell into enslavement, was paid nothing and was regularly brutalized.

The fact that the victim knew in advance that she was going to engage in prostitution does not mitigate the criminality of the trafficker—the element of exploitation remains. The gravity of the crime is not diminished because the victim is aware of the nature of the work but not of the working conditions.

It is not just trafficking of women into prostitution that leads from consent to enslavement. There are also cases of men recruited to work, for example, in construction who consented to what they believed were legitimate temporary jobs only to find themselves locked in to the work site, paid nothing and physically abused.

Case study 3

In 2003, Nigerian police rescued 116 male children and young adults from slave camps inside Nigeria. The rescued victims were only some of those enslaved in child-slave camps discovered in the western Nigerian states. The victims, of Beninese nationality, were camped in the bush without any shelter and forced to sleep outside on the bare ground. They were used to crush granite and stones at quarry sites in the camps. The children's parents had allegedly released them to labour traffickers, many in hope of a better future for their children. Some of the children had been working in the quarries for up to four years.

It is important to note that a child under the age of 18 cannot give his or her consent even if none of the means of trafficking are used. In other words, even if a child is not threatened, no force is used against him or her, and s/he is not coerced, abducted or deceived, a child cannot give consent to the act of trafficking for the purpose of exploitation. Moreover, even the custodian of the child cannot give consent to the trafficking act for the purpose of exploitation.

This is why the young boys, who were rescued from Nigerian granite quarries and repatriated, were victims of human trafficking even if they gave their consent to working in the quarry and they were not deceived as to the working conditions. The boys had been recruited, transported across international borders—the act of trafficking—to the granite quarries and exploited for labour purposes—purpose of trafficking. Even if none of the means were utilized, the boys solely because of their age were victims of trafficking.

Use the following case studies to further examine the element of consent as well as the definition of trafficking in persons:

Case study 4

An Afghan farmer in Herat borrowed money from a provincial leader for growing and harvesting poppy fields. Due to drought, however, the harvest was not as successful as he imagined. With the outstanding debt, the father negotiated to offer his eight-year-old daughter to the provincial leader to offset the debt. The daughter, not having a choice in the decision, was taken to the home of the leader where she was given as a bride to one of the leaders' brothers. The daughter was not allowed to see her family or leave the confines of the home. She worked from 6am to 11pm providing domestic servitude to her husband and his other wives, eating and sleeping separately from the rest of the family.

Case study 5

Sapna, age 14, was walking home from school accompanied by her brother. A car pulled up and armed men jumped out. They hit Sapna's brother on the head with their weapons and grabbed Sapna and forced her into the car, driving away. They drove her to a neighbouring province and forced her to marry one of the kidnappers. At the home of her new husband, she carries out the duties of a wife—providing domestic services and sexual services. She is not allowed to leave the confines of the home. She works from 6am to 11pm and eats and sleeps separately from the rest of the family.

Case study 6

Xiang is a 20 year old woman from China. She is widowed and supports her two children selling fruits and vegetables from a street stand. One day one of her friends introduces Xiang to a colleague, Ta. They get along well and Ta informs Xiang he is recruiting Chinese nationals to work in Kabul in Chinese restaurants. Ta says that she would join a group of women also recruited for the jobs and that the recruitment company will cover all of the costs and travel arrangements if Xiang will repay the company once she begins working. Xiang was hesitant to take the offer as she did not want to leave her children. However, Ta informed her that she would be earning 20 times her current salary. Knowing that the extra income would benefit the family, Xiang leaves her children with her mother and travels to Beijing to meet Ta. In Beijing, Xiang meets the others who are also travelling to Kabul and they stay in a house together while they receive their passports. Work visas are not required, they say, as the company has friends at airport immigration.

They arrive in Kabul, where Ta takes care of all of the logistics and handling of their passports at immigration. The women are taken to a private house in an urban area of Kabul. There are four Afghan men who welcome them. The women are showed rooms where they will stay. Ta has a conversation with the men, shakes their hands and hands over a stack of passports and cash. It is the last time that Xiang sees Ta.

Over a period of two weeks, the men repeatedly physically and sexually abuse the women. They are not allowed to leave the premises and are watched by an armed guard. One of the women tries to escape and is beaten. She is told that if she escapes, the police will put her in prison for prostitution and will never see her children again. Other men also visit the house and Xiang is forced to have sex with them, for which her captors receive payment. She is not allowed to retain any of the money and is not allowed to leave the building.

After two weeks Xiang and the women are taken to a restaurant where they are forced to serve as prostitutes every day without receiving any payment. After a year there is a police raid. Xiang and the others are placed in jail for prostitution and serving alcohol to Afghans. After serving a jail sentence they are all deported back to China.

Case study 7

Zahir lives in Kabul, Afghanistan. He is 35 years old and does not have a permanent job. He earns some money in seasonal construction work but it is not enough to sustain him, his wife and their two small children. While working on a construction site in central Kabul, he hears about a man who is looking for people interested in selling one of their kidneys for organ transplant purposes. This man organizes trips to South Africa, where the kidney is removed by medical professionals. Most of the recipients of the kidneys are Europeans who pay up to \$US 60,000 for a trip to South Africa in order to receive a healthy kidney.

Although worried whether he will be able to live a good life with only one kidney, Zahir agrees to travel to Durban, South Africa to have his kidney removed. He is promised \$US 30,000 for his kidney, in addition to full payment of all travel expenses and accommodation for recovery in a nice and comfortable environment. The organizer assists Zahir in applying for a passport and visa and makes all the travel arrangements for him. Zahir flies to Johannesburg by plane. Upon arrival he is questioned by the immigration officials, but because he can show that he has a return ticket, he is allowed entry. He is met at the airport by a Dari-speaking South African man named Luis and is taken to Durban where the actual operation will take place. He is accommodated in a small apartment which is clean but far from the luxury accommodation he was promised by the organizers. After a couple of days' rest, during which he is not allowed to leave the apartment, he is taken to a modern private hospital where the operation takes place. Before the operation, Zahir signs a paper in English but as his English is very limited, he does not quite understand what he signs.

After the operation, Zahir is taken back to the apartment, where he recovers for one week. He then gets his payment from Luis. He only receives \$US 5,000 instead of the \$US 30,000 he was promised. Zahir gets angry with Luis and demands the rest of his money. Luis tells him that according to South African legislation, the trade of organs, tissues and other body parts is strictly prohibited, and if Zahir wants to approach the police, he will himself end up being arrested and deported. Luis also points out that since Zahir signed a paper stating that the donor and recipient of the organ were relatives and that no money was being exchanged, Zahir cannot prove that he in fact is to be paid anything. Zahir decides that it is after all better to receive \$US 5,000 than nothing, so he agrees. Zahir is then taken back to Johannesburg to return to Afghanistan.

Case study 8. Afghanistan – Pakistan

Muna was an 18 year-old girl who lived in the Bamyan province. Muna's parents were approached by a neighbour regarding an arranged marriage between their nephew, named Zemar, and Muna. Although she did not know the nephew, Muna knew that the dowry would be very helpful to support her family. She hesitantly agreed to marry Zemar. A month later there was a traditional wedding ceremony for Zemar and Muna after which Muna left her family to live with Zemar in another province. En route to Zemar's house, Zemar said he had to go to the store, leaving Muna in the van. When he returned, Zemar was with another man. The man gave Zemar money and Zemar began to walk away. Confused, Muna began shouting. The man stepped into the van, punched Muna and told her that if she said another word, he would kill her. They drove further down the road. At night, the man pulled over to the side of the road and raped Muna. He tied her hands and hit her again on her face. When she woke up, she was told she was in Pakistan. She was locked in a house and forced into domestic servitude and prostitution.

2.5 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:

- (a) the exploitation of the prostitution of others or other forms of sexual exploitation,
- (b) forced labour or services,
- (c) slavery, or practices similar to slavery,
- (d) servitude or the removal of organs”.⁴²

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, debt release, transaction marriage, temporary marriage or marriage for child-bearing; or
- **Labour trafficking**, which may include domestic servitude, sweatshop or agricultural or construction labour or armed conflict.
- Other forms of exploitation include **removal of organs** and **use in criminal activities** as well as **begging**.

Importantly, **children** may likewise be **adopted** for the purposes of exploitation.

⁴²Trafficking Protocol, art. 3(a).

It is important to note that the Trafficking Protocol mentions these forms of exploitation as a minimum, and consequently countries may choose to add other forms of exploitation to define more specifically the various forms of trafficking in persons that are to be criminalized under national legislation.

2.6 Defining forms of exploitation in accordance with international conventional law

In referring to these various forms of exploitation, the Trafficking Protocol does not define them specifically and leaves it up to the legislator to utilize definitions offered by existing international conventions. Some of these include:

- **Forced labour:** “...forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁴³
- **Slavery:** “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁴⁴

Practices similar to slavery: “The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto”, and “the act of mutilating, branding or otherwise marking a slave or a person of servile status in order to indicate his status, or as a punishment, or for any other reason, or of being accessory thereto”.⁴⁵

Servitude: Early drafts of the Trafficking Protocol define servitude as the “status or condition of dependency of a person who is unjustifiably compelled by another person to render any service who reasonably believes that he or she has no alternative but to perform the service”.⁴⁶

Prostitution: Importantly, “exploitation of the prostitution of others” and “other forms of sexual exploitation” are not defined by the Trafficking Protocol and are only addressed in the context of trafficking in persons. Therefore, the issue of prostitution is to be addressed by the particular domestic laws enacted in each State.⁴⁷

Illegal adoption: The Trafficking Protocol also covers trafficking for the purpose of illegal adoption “where illegal adoption amounts to a practice similar to slavery”.⁴⁸

⁴³Convention concerning Forced or Compulsory Labour (ILO No. 29), United Nations Treaty Series, vol., No. 612 (1930), art. 2(1).

⁴⁴Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention, League of Nations Treaty Series, vol. 212, No. 2861 (1926), art. 2(1).

⁴⁵Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, United Nations Treaty Series, vol. 226, No. 3822 (1956), art. 3(1) and art. 5.

⁴⁶Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, p. 342.

⁴⁷Ibid., p. 347.

⁴⁸Ibid.

Expanding trafficking in persons beyond the traditional definition of slavery

Two additional terms are relevant. These are:

- **Slave trade:** “The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”⁴⁹
- **Debt bondage:** “Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his 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 the length and nature of those services are not respectively limited and defined.”⁵⁰

However, in applying these definitions, it must be noted that the Trafficking Protocol does not limit trafficking in persons to slavery in its traditional definition (box 4).

Box 4. Defining slavery in its traditional form

“(1) Slavery—the partial or full possession of rights of other person treated like a property—shall be punished by imprisonment from 5 to 10 years.

(2) If the subject of the deeds described above is a child or it has been done with a view to trafficking it shall be punished by imprisonment from 7 to 10 years.

(3) Slave trade, i.e. forcing into slavery or treatment like a slave, slave keeping with a view to sale or exchange, disposal of a slave, any deed related to the slave trading or trafficking, as well as sexual slavery or divestment of sexual freedom through slavery, shall be punished by the imprisonment from 5 to 10 years.”

Azerbaijan—Criminal Code (2006)

While there are forms of trafficking that may entail ownership and buying and selling of persons, in most cases of trafficking, a victim is merely under control, influence, or domination, and consequently trafficking in persons is more accurately defined as a **modern form of slavery** (box 5).

⁴⁹Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention, art. 1(2).

⁵⁰Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 1(a).

Box 5. Defining trafficking in persons as a crime in which control is exercised over another person

“Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable to imprisonment...”

Canada—Bill C-49, “An Act to Amend the Criminal Code (Trafficking in Persons)” (2006)

The United Nations Working Group on “Contemporary Forms of Slavery” never defined the term. It only compiled a list of a variety of human rights violations that it considered as forms of modern-day slavery. The list includes:

- Sale of children
- Child prostitution
- Child pornography
- Child labour
- Sex tourism
- Use of children in armed forces
- Exploitation of migrant workers
- Illegal adoption
- Trafficking in persons
- Trafficking in human organs
- Exploitation of prostitution of others
- Violence against women
- Early marriages
- Debt bondage
- Forced labour

Trafficking in human organs

The Trafficking Protocol explicitly mentions the trafficking in persons for the purpose of organ removal as a form of trafficking. Other international and domestic legal instruments have also placed prohibitions on human organ transplantation when carried out by means of a commercial transaction and/or without the donor’s consent (box 6).

Box 6. Prohibiting the transplantation of human organs by means of a commercial transaction

“The human body and its parts cannot be the subject of commercial transactions. Accordingly, giving or receiving payment (including any other compensation or reward) for organs should be prohibited.”

World Health Organization draft guiding principles on human organ transplantation (1989)

“This Principle is designed to prohibit traffic in human organs for payment. The method of prohibition, including sanctions, will be determined independently by each jurisdiction. The Principle does not prohibit payment of reasonable expenses incurred in donation, recovery, preservation and supply of organs for transplantation.”

Commentary on the World Health Organization draft guiding principles on human organ transplantation (1989)⁵¹

2.7 Transnationality and the involvement of organized crime shall not be requisites for establishing the offence of trafficking in persons

As the TOC Convention and the Protocols are interlinked and must be interpreted together, the Trafficking Protocol is limited in scope of application. According to article 4, the Trafficking Protocol only applies to the offences of trafficking in persons “where those offences are transnational in nature and involve an organized criminal group”.⁵² These limits also apply to the TOC Convention itself and all other Protocols.

Accordingly, it seems that the Trafficking Protocol thus does not apply to:

- domestic trafficking (trafficking that takes place within national borders); or
- individual traffickers or trafficking conducted by less than 3 persons.

However, the TOC Convention specifically provides that elements of transnationality or organized crime should not be requirements for the establishment of the offence of trafficking under the domestic law of any particular country.

⁵¹World Health Organization. *World Health Organization draft guiding principles on human organ transplantation* (1993), (see www.who.int/ethics/topics/transplantation_guiding_principles/en/index.html).

⁵²The TOC Convention defines organized crime in article 2 as: “...a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”

Article 34(2) of the TOC Convention states that:

“The offences established in accordance with Articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group.”

Thus, while States Parties should have to establish some degree of transnationality and organized crime when requesting cooperation or assistance from other State Parties, prosecutors should not have to prove either element in order to obtain a conviction pronounced by a judge for trafficking in persons or any other offence established by the TOC Convention or its Protocols.

Furthermore, in domestic cases, transnationality and the involvement of an organized criminal group can constitute an aggravated circumstance that enhances the penalty. Aggravated circumstances will be discussed further in module 4.

These provisions are of particular importance in Afghanistan where common forms of trafficking in persons occur within the national borders and often times not by an organized criminal group. IOM’s analysis of trafficking in persons in 2003 identified several forms of internal trafficking in persons often not involving organized crime. The research found incidents of trafficking in persons for the purpose of sexual exploitation, abductions for forced marriage, debt release, exchange of women and girls for dispute settlement and sexual or domestic servitude.

In cases of trafficking in persons, domestic offences should apply even where transnationality and the involvement of organized criminal groups do not exist or cannot be proven.

2.8 Role of parliamentarians



Role of parliamentarians

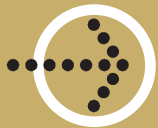
Defining trafficking in persons in national legislation

- To familiarize and understand the definition of human trafficking in all forms provided by the Trafficking Protocol;
- To understand and address the three key elements of trafficking in persons (act, means and purpose) in national legislation.



Self-assessment questions

- What are the trafficking acts according to the Trafficking Protocol?
- What are the means of trafficking according to the Trafficking Protocol?
- What are the purposes of trafficking according to the Trafficking Protocol?
- What does the Trafficking Protocol stipulate with regard to consent to trafficking?



module 3

DISTINGUISHING BETWEEN TRAFFICKING IN PERSONS AND SMUGGLING OF MIGRANTS



Learning objectives

At the end of the module you will be able to:

- Understand the concept of smuggling of migrants;
- Make a distinction between human trafficking and smuggling of migrants.

3.1 Introduction

This manual addresses the subject of trafficking in human beings. Nevertheless, it is vitally important to be able to make the distinction between trafficking in human beings and smuggling of migrants as they share common elements and are often difficult to distinguish between each other.

3.2 Smuggling of migrants

In order to address the smuggling of migrants, the TOC Convention also included a separate Protocol against Smuggling of Migrants by Land, Sea and Air (hereafter the Smuggling Protocol). The purpose of the Smuggling Protocol is “to prevent and combat the smuggling of migrants as well as promote cooperation among State Parties, while protecting the rights of smuggled victims.”

Smuggling of migrants is defined by the Smuggling 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 a permanent resident”.⁵³

⁵³Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, annex III (2000), art. 3(a) (see www.unodc.org/unodc/en/treaties/CTOC/index.html).

In other words, the definition is broken into three elements:

- Procurement of illegal entry;
- For financial or other material gain;
- Across a border into another State.

3.3 Differences between trafficking in persons and smuggling of migrants

By this definition, many of the activities of the traffickers (such as the use of fraudulent travel documents) are also smuggling. However, trafficking goes beyond simply the “procurement of illegal entry” into a State.

This means that it is often difficult to know whether a particular case falls under the definition of smuggling of migrants or trafficking in human beings. Consequently, in investigation and prosecution it is sometimes necessary to rely on measures against smuggling until the investigators or prosecutors discover the additional elements of trafficking. For this reason, it is important that law enforcement personnel as well as judiciary who work in trafficking are familiar with both concepts. For example, the provisions of the two Protocols that concern border controls and travel documents are the same, which demonstrates that smuggling and trafficking in persons share some activities.

The definition of smuggling of migrants and the definition of trafficking in persons also recognize that while victims of trafficking in persons should be treated as victims of criminal activity, migrants who were not exploited are not necessarily victims of crime. It is important to note that trafficked victims are victims of crime regardless of their possible illegal entry into and stay in the country. Law enforcement and judiciary must treat the victims accordingly. The Smuggling Protocol provides some provisions on protection and support for migrants, but these provisions are not as extensive as those for victims of trafficking in persons.⁵⁴

In other words, trafficking in persons is often smuggling *plus* coercion or deception at the beginning of the process and exploitation at the end.

⁵⁴It should be stressed that the intention in the Smuggling Protocol is to create criminal offences applicable to the *smugglers*. Smugglers are those who smuggle others for gain. The intention of the Smuggling Protocol is not to criminalize the migrants, i.e. those who procure only their own illegal entry. Neither does it intend to criminalize those who procure the illegal entry of others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in the movement of refugees or asylum-claimants.

Hence, while there are many similar components within the two types of crime, there are three important differences:

Consent

The smuggling of migrants, while often undertaken in dangerous or degrading conditions, involves migrants who have consented to the smuggling. Trafficking victims, on the other hand, have either never consented or, if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive actions of the traffickers.

Exploitation

Smuggling ends with the migrants' arrival at their destination, whereas trafficking involves the ongoing exploitation of the victims in some manner to generate illicit profits for the traffickers. From a practical standpoint, victims of trafficking also tend to be affected more severely and in greater need of protection from revictimization and other forms of further abuse than are smuggled migrants.

Transnationality

Finally, smuggling is always transnational, whereas trafficking may not be. Trafficking can occur regardless of whether victims are taken to another country or only moved from one place to another within the same country.

Many victims of trafficking in persons initially consent to be smuggled from one country to another. This causes some overlap between the phenomena and definitions of trafficking and smuggling that may be confusing. Smuggling and trafficking both involve moving human beings for profit, but in smuggling the relationship between migrants and offenders (the smugglers) usually ends upon arrival in the destination country. The criminal profits from the process of smuggling the migrant alone. In cases of trafficking, some subsequent exploitation for profit, such as coerced labour or sexual exploitation is also involved.

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.

3.4 Case studies: human trafficking versus smuggling of migrants

The following case studies are based on hypothetical examples that have been created to generate consideration of the distinction between human trafficking and smuggling of migrants within the context of articles 3 of both Trafficking and Smuggling Protocols. It is important to remember that there is no exact right or wrong answer to any of the problems and that the goal of the problem scenarios is to encourage discussion.

Case study 9. Afghanistan

Nasima is a 25-year-old girl from Helmand, Afghanistan. She was given away by her family to a smuggler when she was 24. Because her father owed a huge amount of money to an opium dealer and was unable to return the money or the quantity of opium he promised, he offered his daughter to the smuggler, who already had a wife and four kids. Since the members of the smugglers family considered Nasima as an extra burden, she was enduring a bitter life. Amongst others she got beaten by her husband almost daily. After one year, Nasima finally decided to put an end to her harsh life. As a member of a local women's council she grabbed during a council meeting the AK-47 from the police officer guarding the meeting in southern Helmand and killed herself.

Case study 10. Afghanistan – Pakistan

An Afghan boy Qari, aged 17, was studying English at a language centre in Pakistan. An Uzbek man spent a lot of time at the centre, talking to him and befriending the students. He convinced some of the boys to accept his offer of employment. Qari and some other boys were taken to another province, where they were locked in a room. The boys were not allowed to talk to each other. They were forced to work breaking stones and making bricks. The traffickers were apparently holding them while arrangements were made to sell them. In the mean time, Qari's parents became worried about him and they started looking for their son. Due to the father's insistency, he found his son in a carpet shop, where he had to pay money for the child's release.

Case study 11. Africa

Akpan is a 12-year-old boy from a rural area in Calabar, Nigeria. His mother Femi is a widow with six children. Because of the harmful widowhood practices, caring for the children has become an increasingly difficult task. As the eldest boy in the family, Akpan feels responsible for his siblings, and he would like to help his mother feed them. Before his father's death, he would occasionally do odd jobs for neighbours, but these days no one has anything with which to pay him. One day, Akpan's mother meets a man called Nelson who is looking for strong boys to work on farms in Gabon. When Femi told him that she had a 12-year-old son who was looking for work, Nelson offered her the equivalent of \$US 10 for his services, promising that her son would have food and accommodation at his place of employment. To Femi, \$US 10 is a significant amount of money that enables her to feed her other children for some time. The added benefit of one less mouth to feed while Akpan was away encouraged her to agree to the deal.

Although Akpan was sad to leave his family, he was pleased to be able to help his family in this way. Akpan and four other boys who Nelson had also recruited travelled together to the Gabonese border on foot and by lorry. At the border, Nelson smuggled the boys into Gabon. He led them along the edges of several large sugar cane farms, occasionally negotiating with men he found there. After a few days journey, a man named Malam Sule paid Nelson the equivalent of \$US 50, and Nelson left the boys. Malam Sule supervised a large number of workers; some of these were boys Akpan's age. He made sure that they all worked very hard in the fields. Their workday started before the sun rose and ended after it set. They were given no payment for their work, but were fed two meals a day, one in the morning and one in the evening. At night, the boys all slept in a small room with a hard dirt floor, without mats or mattresses, although each had a thin wool blanket. After many months, Akpan grew tired of his poor living conditions and felt very homesick. He had no idea how to return home to his family, but he decided to leave the farm anyway, telling no one of his intention to do so. Shortly after leaving the farm, the police apprehended him as an illegal alien.

Case study 12. Latin America and the United States

Pablo, Chico and Raoul are three Ecuadorian men aged 18 to 21. They grew up together in the same rural village in central Ecuador and have been friends for many years. All three are unemployed and there is no prospect of work in their village or in the surrounding towns. Frustrated by the lack of employment and shortage of money, Pablo in particular is desperate to earn some money. His mother suffers from detached retinas and is becoming increasingly blind. She needs a \$US 5,000 medical treatment to save her vision.

Manolo, Pablo's friend, has recently been deported as an illegal immigrant from the United States. Manolo tells Pablo of a criminal network based in the capital, La Paz, that can get the three men across the borders of Central America and Mexico and into the United States. There they will be able to earn substantial wages working as agricultural labourers in the large fruit and vegetable farms of Southern California. Manolo says that the working hours are very long and the work is extremely arduous. They will be paid much less than the minimum legal wage in the United States, but at least they will have work and some money. Finally, if Pablo, Chico and Raoul want to get to the United States, the criminals in La Paz will want \$US 1,000 each in advance.

Pablo speaks to Chico and Raoul about his plan to get to the United States, but they both turn him down, as they cannot raise the \$US 1,000. Pablo speaks with his mother and explains to her that if she can lend him the money from her small amount of life savings, he will be able to get to the United States and earn enough money to send home to her to pay for the surgery. His mother is sceptical and anxious for his safety but agrees to loan him the money. Manolo accompanies Pablo to La Paz and introduces him to members of the criminal network. Pablo pays the \$US 1,000 and, after a delay of two days, they conceal him and four other men in a secret compartment in the back of a long-distance truck. The journey takes four days during which time they are allowed out of the compartment for very short periods and are given only a small amount of food and water. Eventually, the criminals take Pablo and the other men out of the truck in an empty desert area. They then walk for about an hour during the night until the criminals stop and inform them that they have now successfully illegally crossed into the United States. The criminals indicate the direction of the nearest major road and tell the men that they will be able to follow the road for a number of miles until they come to the agricultural area where they can get work with the local farmers. They then leave the scene. Pablo sets out alone and eventually arrives at a large farm where he can see a number of Latin American males working in the fields picking vegetable and fruit crops. He approaches them and they direct him to the farm foreman who takes him on as a crop-picker. The foreman tells Pablo that the pay is just two dollars an hour for a sixteen-hour working day, seven days a week and that he will stay in a communal hut with the other workers. Accommodation costs \$US 10 per week. He will also have to pay for his own food.

Nonetheless, Pablo agrees and accepts the job offer. After he has been working for just over two weeks, the United States Border Patrol and Immigration services raids the farm and Pablo and the other farm labourers are arrested as illegal aliens. Pablo is deported back to Ecuador.

Case study 13. Afghanistan – Pakistan – Iran (Islamic Republic of)

Smugglers in a village in the northwest provinces of Afghanistan approached a family with two boys. They offered Ramin and Nafis, aged 15 and 17, jobs on farms in Pakistan as well as facilitating their documentation and transportation into Pakistan. The family paid the smuggling fee so that the smugglers would arrange the documentation. One month later, the boys were smuggled across the border into Pakistan. Ramin and Nafis were taken to a house outside Quetta. Upon arrival, Ramin and Nafis received food and housing while the arrangements were made for them to go to the farm. The smugglers told them that there was a problem with the arrangement with the farmer and that the two youth were no longer required. The smugglers offered to return the money but informed Ramin and Nafis that they had contacted colleagues outside Zahedan, Iran where there was indeed work, again on a farm. Not wanting to return home without money for their family and having learned to trust the smugglers, the boys agreed. Upon arrival in Zahedan, the boys were not taken to a farm but rather to another house where they were locked in a room with other Afghan and Pakistani boys. Ramin and Nafis stayed there for one year and were sexually abused and forced into prostitution.

Case study 14. Afghanistan – Islamic Republic of Iran

Ajani and Zalmai are age 18 and 19, respectively. They have an uncle who lives in Iran who sends word to the boys' family that his friend can provide a job for the boys in a brick factory. The boys already work in their town selling fruit on the street, but it is barely enough for their family to survive. They are hopeful to be able to make more money to support their family. Their uncle sends enough money, around \$US 10,000 to the family to pay a smuggler. The smuggler picks up the boys, drives them to the border, bribes the border police and takes the boys across the Chaman border to Zahedan. Following a six-day journey, the uncle meets Ajani and Zalmai in Zahedan. Another two-day journey brings the boys to a house where they live with other labourers. The next day Ajani and Zalmai are introduced to their new boss and begin working. They work very hard but have one day off a week and receive a monthly pay check to send back to their families. They walk into town on one of their days off and are stopped by police. The police ask for their document and papers. They have been smuggled so do not have proper documentation. Ajani and Zalmai are placed in prison and are deported back to Afghanistan as illegal immigrants.

Case study 15. Tajikistan – Uzbekistan – Kazakhstan

For the last five years Armeen has left his home in Tajikistan to travel to Kazakhstan to work on large farms during harvest. He has no passport, but Armeen's employer arranges a smuggler to meet a large group of labourers along the border with Uzbekistan. The same smuggler has taken them together as a group to the farm every year. Armeen and the others each pay \$US 40 to cross the two borders it takes to get to Kazakhstan. Before the Uzbek and Kazakhstan border, the labourers get out of the car and move into the woods and cross the border by foot to avoid the border control. Thereafter, they rendezvous with the driver further down the road. The labourers work six days a week at the farm. They work long hours but are compensated fairly for their work. After the harvest, the smuggler takes the labourers back to Tajikistan.

Case study 16. Afghanistan – United Kingdom

Police officers in Leeds, England raided a house and found several Afghan men with no legal documentation living in horrific conditions. After finding an interpreter, the Afghans reported to the police that they migrated through Iran to Patras in Greece. In Patras they were approached by men who claimed they would be able to get them to the United Kingdom for around \$US 1,200. They promised jobs in a factory with a minimum wage of \$US 15 and good accommodation for \$US 50 per week. The Afghans were provided with fake passports and transportation to the United Kingdom. The group of Afghans were transported by a driver who looked Chinese and spoke no English. The Afghans spoke some English but were not able to communicate with the driver where they were going, what they would do or the name of their boss. This, in addition to not having any money made them feel helpless and totally dependent on the driver. They arrived at a house in Leeds in the middle of the night and told to wait outside the van. Meanwhile, a group of Bulgarian men walked out of the house throwing their belongings into bags. The Bulgarian men boarded the van the Afghans just arrived in and were not seen again.

The Afghans lived in the house with no furniture, only old mattresses on the floor. The house was covered in trash and had an awful smell. They slept on the mattresses and worked from 7am-10pm in a caning factory. Bodyguards stood by the doors of the factory and house to prevent them from leaving. They received only \$US 200 per week for work, much less than what was promised to them. Sometimes they did not even receive a pay check, but there was no one to complain to. There was a high amount of their salary also being taken away for taxes and their housing even though they were sleeping on mattresses on the floor. The bodyguards threatened them with eviction and deportation by the police if they told anyone about their conditions.



Discussion: case studies 9-16

Please note that, as will always be the situation in real life cases, cases can only be considered in the light of the information available.

On the basis of the Trafficking and Smuggling Protocols, can it be stated that these are cases of human trafficking or smuggling of migrants?

Are the three elements of trafficking there? In these cases, what is the act of trafficking? What are the means used to commit the trafficking act? What is the goal of the whole process?

3.5 Role of parliamentarians



Role of parliamentarians

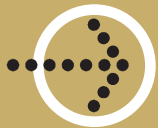
Distinguishing between trafficking in persons and smuggling of migrants

To understand and clearly distinguish the crime of human trafficking from other forms of organized immigration crime including smuggling of migrants.



Self-assessment questions

- What are the main differences between human trafficking and smuggling of migrants?



module 4

CRIMINALIZING ALL FORMS OF TRAFFICKING IN PERSONS, PROVIDING FOR APPROPRIATE, DISSUASIVE AND PROPORTIONATE SANCTIONS



Learning objectives

At the end of the module you will be able to:

- Understand underlying offences to trafficking in persons and identify offences specific to Afghanistan relevant to the crime of trafficking in persons;
- Recognize aggravating circumstances regarding the offender, victim and act in the crime of trafficking in persons;
- Identify who and how legal persons can contribute to the crime of trafficking in persons;
- Understand principles which are key to ensuring procedural law is in line with protection afforded by legislation.

4.1 Introduction

The definitions associated with human trafficking discussed in module 2 provide a basis for the development of national human trafficking legislation.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking (hereafter OHCHR Recommended Principles and Guidelines) stresses the importance of establishing a domestic legal framework to combat trafficking in persons:

“The lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation.”⁵⁵

⁵⁵Office of the United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1) (2000), guideline 4.

Indeed, 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 as part of their constitutional law.

4.2 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 (boxes 7-9). 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.”⁵⁶

Box 7. Enacting constitutional provisions on the prohibition of trafficking in persons

“Forced labour, slavery, slave trade, trafficking in women and children, and sex trade shall be prohibited.”

Iraq – Constitution of Iraq (2005)

Box 8. Enacting constitutional provisions on the prohibition of trafficking in persons

“All forms of forced labour and traffic in human beings are prohibited.”

Pakistan – Constitution of Pakistan (2004)

In other words, it is not sufficient to criminalize some of the underlying offences to human trafficking but human trafficking itself needs to be criminalized.

⁵⁶Trafficking Protocol, art. 5.

In addition to the criminalization of the trafficking crime, the Trafficking Protocol requires the criminalization of the attempt to commit the trafficking crime, participation as an accomplice and organizing or directing others to commit trafficking.

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.”

Box 9. Criminalization of the attempt to commit the crime of trafficking and of the participation as an accomplice in the commission of the crime of trafficking

“Any accomplice or instigator, or any one who is involved in the commission of the crime of trafficking in persons, whether by giving instructions or instigating the perpetrator or helping the perpetrator and his associates by facilitating the execution of the crime, or providing weapons and ammunition or tools, machines, money and shelter, will be punished as a perpetrator.

The punishment for the crime of trafficking shall be imposed on anyone who attempts to commit an act of trafficking.”

The League of Arab States Model Law to Combat Human Trafficking

4.3 Other applicable provisions of criminal law—underlying offences

Although States are not required to do so under the Trafficking Protocol, many States have also criminalized many of the conducts related to human trafficking. Other crimes may be committed to ensure the compliance of victims, maintain control, protect trafficking operations or maximize profits. Victims may be subjected to threats, physical and sexual violence or other mistreatment. Passports and other identification documents may be taken from them. They may be forced to work without payment, often in occupations that are unpleasant, difficult, dangerous or illegal in the State there why occur, such as prostitution, the making of pornography and trafficking illicit commodities such as narcotic drugs. Apart from other offences committed against victims, former victims who assist authorities may be threatened with or subject to retaliatory violence and public officials may be subject to corruption, threats or both.

Such offences include:

Slavery;
 Slavery-like practices;
 Involuntary servitudes;
 Forced or compulsory labour;
 Debt bondage;
 Forced marriage;
 Forced prostitution;
 Forced abortion;
 Forced pregnancy;
 Torture;
 Cruel, inhuman or degrading treatment;
 Rape or sexual assault;
 Causing bodily injury;
 Murder;
 Kidnapping;
 Unlawful confinement;
 Labour exploitation;
 Withholding of identity papers;
 Corruption.



Example

A Provincial Court in Austria sentenced a trafficker to eight years in prison. The court found him not only guilty of trafficking, but also of other criminal offences, including bodily injury, rape, forced abortion, forgery of documents and damage to property.

These acts constitute criminal offences in most States and could be invoked to address certain elements of the full range of crimes. Investigation and prosecution of individual acts as mentioned above can be particularly useful in situations and in countries where:

- A distinct criminal offence of trafficking does not yet exist;
- Penalties for trafficking do not sufficiently reflect the nature of the crime and do not have any deterrent effect; or
- In cases where the existing evidence is not sufficient in order to prosecute the suspect for trafficking, but may be sufficient enough to prosecute such cases as bodily injury or sexual assault/rape.

It is important to emphasize, however, that where domestic anti-human trafficking legislation is in place, such offences should not replace investigation or prosecution for trafficking, but should be invoked along with those charges.

Therefore, States must ensure that legislative frameworks enacted to combat trafficking strive to chip away at the role of these contributing elements of the trafficking infrastructure.



Discussion

Discuss different types of crime that take place in connection to human trafficking in Afghanistan or the region. Are there provisions in the criminal law of Afghanistan that account for these criminal acts? On the basis of the legislation in Afghanistan, how would you investigate/prosecute these criminal acts?

4.4 Recognition of trafficking in persons as a serious crime that warrants a serious penalty

The prosecution of accused individuals for additional or overlapping offences may also be useful in demonstrating to courts the seriousness of a particular trafficking operation (e.g. total number of victims, length of time of the operation, the corruption involved and the seriousness of the harm done to the victims), which may be only fully revealed by bringing additional charges before the court. Anti-trafficking legislation must recognize trafficking as a serious crime, and one which carries penalties similar to those of other serious crimes such as 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 organization;
- The offender is a parent, sibling, guardian, spouse, partner or a person who exercises authority over the trafficked person;
- 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;
- The offence is committed by a public official;
- The offender has been previously convicted for the same or similar offence.

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 a person with a physical or mental disability;
- The offence involves more than one victim.

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;
- A child has been adopted for the purpose of human trafficking.

Criminal sanctions may also include fines and confiscation of assets. In this regard, the TOC Convention states in article 12:

“State Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

- (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
- (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.”

4.5 Providing for the liability of legal persons

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. Complex criminal structures can often hide the true ownership, clients or particular transactions related to trafficking.

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 catalogue, trans-actioal 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 parlours, strip-clubs and escort services.

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

4.6 Providing for the liability of the public person and combating corruption

In a number of cases, corrupt state officials are also involved in trafficking through issuing fraudulent travel documents, forging birth certificates, etc. These acts constitute criminal offences in most countries. Investigation and prosecution can include these additional criminal acts to address the full range of crimes in a trafficking case.

The TOC Convention mandates:

“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.”⁵⁷

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.

⁵⁷TOC Convention, art. 8(1).

4.7 Procedural law on victim and witness assistance and protection for trafficking in persons

Critically, procedural law must be amended or new procedural provisions enacted such that trafficking victims and witnesses 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 important 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 human rights approach strives to ensure that victims and witnesses 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. These include:

Providing effective witness protection

Module 4 reviews the importance of recognizing the trafficked person as a victim of a crime entitled to internationally recognized human rights, more specifically the right to safety. However, in regards to procedural law on trafficking in persons and providing effective witness protection, it is important that a victim is identified and treated first and foremost as a victim of crime. In some States, societal norms and practices can lead to further victimization of a victim of trafficking and a victim may never actually be considered a victim or receive the right to protection. Victims of trafficking in persons for the purpose of sexual exploitation, for example, can be shamed by their families and communities. Instead of being treated as a victim of a crime, they can be rejected by their communities or in some cases, for example, requested by their families to commit suicide to re-establish honour to their families and communities. It is important for victims of trafficking in persons or of any serious crime to be treated as victims first and foremost with access to justice.

Thus, protection is critical to securing the safety of victims and witnesses of trafficking who wish to testify against the traffickers. The availability of strong witness protection mechanisms and procedural measures may be an important factor in a victim's decision to cooperate with authorities in the prosecution of a case. The TOC Convention mandates the following:

“Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.”⁵⁸

Article 6(5) of the Trafficking Protocol also reiterates the importance for States to take steps to protect victims of trafficking. Protection measures could include:

- Procedures for the physical protection of the victims or witnesses

⁵⁸TOC Convention, art. 24(1).

Procedures for the physical protection of witnesses can include close protection, regular patrolling around a witness's house, escort to and from the court and the provision of emergency contacts. This ensures that he or she does not come into contact with the traffickers, their friends or family members.

- Relocation

It can be a challenge to ensure protection and anonymity of victims and witnesses. Temporary residence in a shelter or change of residence to a relative's house or a nearby town or province may be necessary to protect the witness temporarily, but long-term relocation may have to be considered.
- Non-disclosure or limitation on the disclosure of information regarding the identity or whereabouts of victims

Protection measures to limit the information regarding the identity or whereabouts of victims, include keeping records of the witness's identity separately from the transcript of the trial and in a secure location and as mentioned below, sanction or prosecute in accordance with the law any attempt to reveal an anonymous witness's identity.

Non-governmental organizations (NGOs) and shelters can play important roles in providing protection and assistance to victims and witnesses of trafficking. As victims of trafficking often fear arrest, prosecution or deportation if they approach authorities, they are more likely to approach and trust NGOs and shelters than the police or state authorities.

States are also required to address the question of obstruction of justice. Article 23 of the TOC Convention requires the criminalization of various forms of obstruction, including the use of physical force, threats or intimidation. The TOC Convention mandates the following in this regard:

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

- (a) The use of force, threats or intimidation or the promise, offering or giving an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention”.⁵⁹

The Council of Europe Convention on Action against Trafficking in Human Beings extends the provision on obstruction of justice to cover placing protective measures in place, in particular, during court proceedings:

“Each Party shall adopt such legislative or other measures as may be necessary to ensure in the course of judicial proceedings:

- (a) the protection of victims' private life and, where appropriate, identity;
- (b) victims' safety and protection from intimidation, in accordance with the conditions under its internal law and, in the case of child victims, by taking special care of children's needs and ensuring their right to special protection measures.”⁶⁰

⁵⁹TOC Convention, art. 23.

⁶⁰Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series No. 197 (2005), art. 30.

The experience of States that have established witness protection schemes suggests that a broader approach to implementing this requirement may be needed to afford effective protection to witnesses. Witness schemes should consider extending protection to all persons who cooperate with or assist in investigations until it becomes apparent that they will not be called upon to testify and to persons who provide information that is relevant but not required as testimony or not used in court because of concerns for the safety of the informant or other persons.

States have also enacted various witness protection mechanisms, which are not necessarily specific to victims of trafficking, but can and should be applied in cases of trafficking in persons. States which do not currently have in place such witness protection mechanisms should strongly consider enacting witness protection laws (box 10).

Box 10. Enacting effective witness protection provisions

“(a) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;

(b) provide housing for the person;

(c) provide for the transportation of household furniture and other personal property to a new residence of the person;

(d) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

(e) assist the person in obtaining employment;

(f) provide other services necessary to assist the person in becoming self-sustaining;

(g) disclose or refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure...;

(h) protect the confidentiality of the identity and location of persons subject to registration requirements as convicted offenders under Federal or State law, including prescribing alternative procedures to those otherwise provided by Federal or State law for registration and tracking of such persons.”

United States of America—Witness Protection Act of 1982, 18 USC 3521 (1982)

Protection of privacy in court proceedings

The protection of a victim’s privacy in court proceedings is likewise critical to ensuring the safety and security of a victim of trafficking who chooses to cooperate with authorities

in the prosecution of a case of trafficking in persons. The threat of intimidation or reprisals from traffickers targeting the victim or the victim's family members may be heightened if the victim's identity is not protected during court proceedings (box 11).

If in the interest of justice, court proceedings should be declared closed in cases of trafficking (box 12).

Box 11. Granting protection to victims and members if their families during court proceedings

"Full protection will be provided for witnesses and victims of trafficking in persons and the members of their families up until the first grade of consanguinity and the first degree of in-law relatives, including the spouse and permanent partner, for the entire duration of the court proceedings or for as long as it is required by security factors."

Colombia—Law No. 985 (2005)

Box 12. Protecting the privacy of victims of trafficking in court proceedings

"Court sessions in cases involving crimes of trafficking in human beings [...] and child pornography [...] shall not be open to the public."

Romania—Law on the Prevention and Combat of Trafficking in Human Beings (2002)

Witness protection measures such as the use of video for taking victim testimony are effective yet require technical equipment, well-trained personnel and adequate financial resources. Practical protective measures such as anonymous witness statements or testimony behind screens are just as effective and more cost-effective ways to protect the privacy of victims. For example, due to assassination and intimidation attempts, Iraqi courts often allow witnesses to testify behind a curtain and do not reveal the names of the witnesses or victims. In Japan, screening is done in such a way that the defence counsel can still see the witness, so the right to face-to-face examination is not greatly affected.

Double witness rule

The "double witness rule" or the "corroborative evidence rule" does not allow the admission of evidence of only one witness, unless his/her testimony is corroborated by another witness or other material evidence implicating the accused. The rule is

sometimes applied in criminal procedure codes of some countries to deny a victim of trafficking in persons the status of a credible witness. Such rules must be examined and reconsidered to allow the views of a victim of trafficking to be fully heard in court.

Inadmissibility of past behaviour

Another important legislative consideration concerning procedural law has to do with the inadmissibility of a trafficked victim's past behaviour in court proceedings. To question the personality of the victim adds to the disrespect shown against him/her, intensifies his/her guilt and the inclination to blame him or herself, and therefore, can cause secondary victimization. It is important to consider in legislation that past behaviour of the victim is inadmissible in court. This is particularly important in the prosecution of cases of sex trafficking as it is irrelevant what sexual experiences the victim had before the crimes occurred (box 13).

Box 13. Legislating for the inadmissibility of past behaviour of the victim of trafficking in the prosecution of cases of trafficking

"A trafficked person's past sexual behaviour is irrelevant and inadmissible for the purpose of proving that the trafficked person was engaged in other sexual behaviour or to prove the trafficked person's sexual predisposition."

Malaysia—Anti-Trafficking in Persons Act (2007)

Gender sensitivity

Since victims of trafficking are predominantly women, it is important to take into consideration a gender-sensitive approach when legislating against trafficking. Given traumatization and existing gender stereotypes in societies, efforts should be made to create an environment that is less intimidating and one that builds trust.

Such consideration would imply, for example, including women in the police units (also female social welfare workers and interpreters) investigating trafficking cases. In one referral shelter in Afghanistan, female victims of violence can seek legal council and temporary housing. Female social workers conduct the interviews with victims only in the evening so as to protect the identity of the victim. The social workers act as intermediaries between law enforcement officers and the victim so that the victim is not required to make a statement in the police station or to a male law enforcement officer.

Reduction of the reliance on victim's testimony

Reliance on a victim's testimony alone often decreases the numbers of prosecutions of traffickers. Victims, especially women and children, are vulnerable to fear of retaliation by the trafficker towards themselves or their family and are less likely to testify. Overburdening victims as the only source of evidence in a trafficking case when he/she is already a victim, can ignore their interests as a person whose rights to an extent have already been violated.

The OHCHR Recommend Principles and Guidelines provide that States, intergovernmental and NGOs should consider:

“Providing law enforcement authorities with adequate investigative powers and techniques to enable effective investigation and prosecution of suspected traffickers. States should encourage and support the development of proactive investigatory procedures that avoid over-reliance on victim testimony.”⁶¹

Further consider, for instance, the important recommendation made by the Norwegian Government's Plan of Action to Combat Human Trafficking [2006-2009]:

“The Government will consider the possibilities of using anonymous witnesses in human trafficking cases. The Government will also consider the possibility of using special forms of examination to avoid strain on and repeated examination of especially vulnerable aggrieved parties in human trafficking cases. This may entail examination by video-link, more gentle ways of conducting examinations during the main proceedings (judicial examinations out of court) and/or recordings of statements made in the first instance.”⁶²

The child victim witness

Children have special needs that must be taken into consideration in the procedures utilized in the prosecution of trafficking cases involving child victim witnesses. Children are particularly vulnerable, and as such, require extra measures of protection that go above and beyond those that should be afforded to adult victim witnesses. This concerns, in particular, special techniques of interviewing when working with child victim witnesses and special procedures to avoid the trauma of testifying in court.

To this end, some countries provide for audio-visual recording of hearings of children and others allow children to appear before the court by videoconference (box 14).

⁶¹Office of the United Nations High Commissioner for Human Rights, guideline 5(3).

⁶²Norwegian Ministry of Justice and Police, *The Norwegian Government's Plan of Action to Combat Human Trafficking* [2006-2009] (see www.regjeringen.no/upload/kilde/jd/rap/2007/0001/ddd/pdfv/304170-stop_human_trafficking_0107.pdf), measure 21.

Box 14. Enacting provisions to protect child victim witnesses

“The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

- (i) The child is unable to testify because of fear.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- (iii) The child suffers a mental or other infirmity.
- (iv) Conduct by defendant or defence counsel causes the child to be unable to continue testifying.”

United States of America—Child Victim Witness Protection Act, USC 3509

Non-applicability of statute of limitations/prescription period

A statute of limitations or prescription period sets forth the maximum period of time, after certain events, that legal proceedings based on those events may be initiated. Another important way to ensure that trafficking in persons is treated as a serious crime in domestic legislation is to mandate that a statute of limitations or a prescription period does not apply to such crimes. Alongside severe penalties commensurate with the gravity of the crime of trafficking, such a provision may serve to send a strong message of deterrence.

The TOC Convention partially applies this rule by stating that:

“Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.”⁶³

⁶³TOC Convention, art. 11(5).

4.8 Role of parliamentarians



Role of parliamentarians

Criminalizing all forms of trafficking in persons, providing for appropriate, dissuasive and proportionate sanction 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 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 the prosecution of cases of trafficking, several initiatives may be advocated by parliamentarians in Afghanistan:

- Create a specialized Anti-Trafficking Police Unit within the Afghanistan Ministry of Interior;
- 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 of the legal proceedings;
- 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.



Self-assessment questions

- How can legal persons contribute to the crime of trafficking in persons? Can you provide any examples in Afghanistan of legal persons who facilitate trafficking in persons?
- Which principles are key to ensuring procedural law is in line with protection afforded by legislation for victims of trafficking?
- What are some of the aggravating circumstances regarding the offender, victim and act in the crime of trafficking in persons?



module 5

RECOGNIZING THE TRAFFICKED PERSON AS A VICTIM ENTITLED TO INTERNATIONALLY RECOGNIZED HUMAN RIGHTS



Learning objectives

At the end of the module you will be able to:

- Understand a human rights approach to trafficking in persons, particularly the provisions of victim protection and assistance for individuals identified as victims of trafficking;
- Understand the notion of non-criminalization of a victims of trafficking;
- Identify indicators of trafficking in persons in Afghanistan.

5.1 Introduction

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

The OHCHR Recommended Principles and Guidelines provide that:

“Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.”⁶⁴

5.2 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

⁶⁴Office of the United Nations High Commissioner for Human Rights, guideline 1.

does not mention the identification of victims explicitly, the OHCHR 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.”⁶⁵

To this end, guideline 2(1) calls on States, intergovernmental organizations and NGOs to consider:

“Developing 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.



Discussion

Indicators of trafficking in persons

As indicated above, the identification of victims is the first step in the recognition of trafficked persons as victims entitled to human rights protection and prosecution of traffickers.

This crucial step requires a multidisciplinary approach involving all actors who may come into contact with victims of trafficking. For a list of possible indicators of victims of trafficking, see annex II.

Discussion: What are some possible indicators of victims of trafficking specific to Afghanistan?

In order to provide the protective services that victims of trafficking require, they must be accurately defined as such. 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 identify victims of trafficking, 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:

⁶⁵Tbid., guideline 2.

Defining a victim of trafficking as a victim of a crime

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 United Nations 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, including those laws proscribing criminal abuse of power.”⁶⁶

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 (box 15).

Box 15. Defining a victim of trafficking in persons in national legislation

“Victim means any person who is the subject of exploitation or any act prohibited by this Law or other Law or prescribed treaty punishable under this Law.”

Cyprus—Law on Combating of Trafficking in Persons and Sexual Exploitation of Children (2000)



Discussion

How is a victim of a crime defined in the criminal code in Afghanistan?

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.

⁶⁶Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 (1985), annex A(1).

The *travaux préparatoires* to the Trafficking Protocol state that:

“The reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”⁶⁷

This qualification of a vulnerable victim becomes particularly important when States consider establishing guidelines for the status of a victim of trafficking and the types of benefits he or she may receive from the State. Victims of trafficking, as vulnerable victims, are in a situation where they have no choice but to submit to exploitation, and therefore cannot be held liable for criminal acts that may be committed as a result of their being trafficked (box 16).

Box 16. Defining a vulnerable victim in anti-trafficking legislation

“Vulnerable situation—a situation where a person is materially or otherwise dependent on other person, where because of physical or mental disability a person is unable to realistically comprehend the existing situation, where a person has no other realistic option but to obey the violence applied against him/her.”

Georgia—Law on Combating Human Trafficking (2006)

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.

Trafficked persons are sometimes treated as criminals rather than as victims, whether in States of destination, transit or origin. In States of destination, they may be prosecuted and detained because of irregular migration or labour status. Alternatively, immigration authorities may simply deport them to the State of origin if their immigration status is irregular. Trafficked persons returning to their State of origin may also be subjected to prosecution for using false documents, having left the State illegally, or for having worked in the sex industry. Criminalization limits the trafficking victims’ access to justice and protection and decreases the likelihood that they will report their victimization to the authorities. Given the victims’ existing fears for their personal safety and of reprisals by the traffickers, the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.

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

⁶⁷Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, interpretive notes on art. 3.

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 OHCHR 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.”⁶⁸

States should therefore ensure that:

“...trafficked 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.”⁶⁹

In particular, States should ensure that:

“...legislation 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.”⁷⁰

Without this approach, victim assistance and support programmes are rendered ineffective and meaningless.

Non-liability provisions can ensure that victims of trafficking are not prosecuted or punished for offences committed by them. 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

In the duress model, the person was compelled to commit the offences (box 17).

Box 17. 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 (2005)

⁶⁸Office of the United Nations High Commissioner for Human Rights, principle 7.

⁶⁹Ibid., guideline 2(5).

⁷⁰Ibid., guideline 4(5).

The causation model

In the causation model, the offence is directly related to the trafficking (box 18).

Box 18. 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.”

United Nations Mission in Kosovo—Regulation on the Prohibition of Trafficking in Persons in Kosovo (2001)

“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—Anti-Trafficking in Persons Act (2003)

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 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”.⁷¹

The child victim

Child victims of trafficking are sometimes in need of urgent action to secure their safety because of their increased vulnerability to exploitation, in particular, physical, psychosocial and psychological harm. Action to ensure the safety of children must be respectful of their rights. Thus, 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.”⁷²

⁷¹Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A(2).

⁷²Trafficking Protocol, art. 6(4).

The OHCHR Recommended Principles and Guidelines likewise state:

“Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.”⁷³

In particular, the guidelines stress how evidence of deception, force and coercion should not form part of the definition of trafficking when the victim is a child.

Where appropriate States should also consider:

- Appointing, as soon as the child victim is identified, a guardian to accompany the child throughout the entire process until a durable solution in the best interest of the child has been identified and implemented;
- Making certain law enforcement officers are trained in the specificities of interviewing child victims of trafficking;
- Ensuring that, during investigation, prosecution and trial hearings, direct contact between the child victim and the suspected offender is avoided. Unless it is against the best interest of the child, child victims do have the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings;
- Providing appropriate shelters for child victims in order to avoid the risk of revictimization. Child victims should be hosted in safe and suitable accommodation, taking in account their age and special needs;
- Establishing special recruitment practices and training programmes so as to ensure the individuals responsible for the care and protection of child victims understand their needs, are gender-sensitive and possess the necessary skills both to assist children and ensure the safeguard of their rights.

5.3 The bill of rights of victims of trafficking

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 the following rights victims of trafficking 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

⁷³Office of the United Nations High Commissioner for Human Rights, principle 10.

The right to safety

Victims of trafficking should be entitled to the right to safety. Because of the association of the crime of trafficking in persons with organized crime or the cultural sensitivity of the crime, victims of trafficking face serious safety concerns. Traffickers may target victims of trafficking to intimidate and threaten them, ultimately preventing their testifying. If a victim of trafficking is required 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.”⁷⁴

Likewise, the OHCHR Recommended Principles and Guidelines provides 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.”⁷⁵

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. This is important 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 (box 19).

Box 19. Providing for the safety of the victim of trafficking

“Security measures applied with regard to persons who suffered from human trafficking shall continue until the danger is completely past including preliminary investigation about crimes connected with human trafficking, court examination, as well as the period after declaring the final decision of the court. False names can be used with an aim to ensure anonymity of the personality of persons who suffered from human trafficking.”

Azerbaijan—Law on Fight against Human Trafficking (2005)

⁷⁴Trafficking Protocol, art. 6.

⁷⁵Office of the United Nations High Commissioner for Human Rights, guideline 6(6).

The right to safety should include also the right to receive housing. 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 in cooperation with NGOs or international organizations, where appropriate (box 20).

Box 20. Legislating for the creation and operation of shelters

“Temporary shelters for accommodating the victims of human trafficking shall be created to provide the victims of human trafficking with decent living conditions, to ensure their security, to provide them with food and medicine, first medical aid, psychiatric, social and legal assistance. The victims of human trafficking shall have the possibility to make phone calls and to use translator’s services in shelters. Separate areas shall be allocated for confidential conversations.”

Azerbaijan—Law on Fight against Human Trafficking (2005)

The right to privacy

Victims of trafficking should be entitled to the right to privacy. The Trafficking Protocol article 6(1) requires that measures be taken to protect the privacy and identify of victims. Such protection includes the confidentiality of legal proceedings to the extent that this is possible under domestic law. Procedural laws may require amendment to ensure that courts have the authority to shield the identities or otherwise protect the privacy of victims in appropriate cases. This may include various means of keeping the proceedings confidential including excluding members of the public or media representatives, imposing limits on the publication of specific information, presenting evidence anonymously or by conducting the interview only in the presence of the judge, the prosecutor, an interpreter and support persons.

The right to information

Victims of trafficking should be entitled to the right to information (box 20). Accordingly, article 6 of the Trafficking Protocol provides that State parties should make available to victims of trafficking “information on relevant court and administrative proceedings” and “counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand”.

Victims of trafficking need information in a language that they understand about the justice process and their own rights and responsibilities as participants in criminal proceedings. Access to information is an important starting point for the participation of victims of trafficking in the criminal process. The most extensive list of rights is of no practical use to victims if they are not informed of those rights. Information helps to prepare and

familiarize victims with the criminal proceedings and to ease their psychological stress and anxiety. It is also a means of empowerment and enables victims to participate actively in the case and enforce their rights.

Some parliamentarians have pushed for the establishment of a legal duty of authorities involved in criminal proceedings to provide information to victims of crime. Part of the advantage of such an approach is that it raises the officials' awareness of their responsibility towards victims.

The mere existence of a legal obligation is not sufficient to ensure that victims have access to information. Additional measures, such as the provision of translation services and legal assistance, are necessary to ensure victims can effectively use this information.

The right to legal representation

Victims of trafficking should be granted the right to legal representation (box 21). The OHCHR 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.”⁷⁶

Box 21. Recognizing the right of victims of trafficking to legal representation

“Victims of trafficking will receive the following services:

[...] Counselling and information regarding their legal rights, in a language that the victims of trafficking in person can understand.”

Bahrain—Law on the Prevention of Human Trafficking (2007)

Victims are often deterred from participating in various legal proceedings because simple, accessible and timely legal advice is not available to them. Thus, legal advice should be made available as part of the integrated support offered by the victim assistance programme. Because many victims of trafficking are fearful of government and bureaucratic authorities, the provision of legal assistance and representation is especially important.

The task of legal counsels is to inform victims about their right and roles in criminal proceedings and to accompany them throughout the process. They assist victims in expressing their views and enforcing their procedural rights. Legal counselling also prepares victims for the criminal proceedings and can reduce the risk of imposing further traumatizing experiences on the victims. It increases the chance of sound and coherent witness statements and contributes to the successful prosecution of the traffickers.

⁷⁶Office of the United Nations High Commissioner for Human Rights, guideline 6(5).

NGOs can play a crucial involvement to support victims and provide legal assistance in cooperation with legal counsels. In cases of extreme traumatization, NGOs can be an important support vehicle to provide a sense of safety and support to the victim through the legal process, including advocating on the victim's behalf for obtaining compensation. The development of close links between NGOs providing legal assistance and law enforcement agencies can greatly facilitate the protection of victims and their rights and thus, the development of formal and informal protocols and procedures between these agencies should be part of any integrated victim assistance strategy.

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 and allowed to present concerns which could include either written submissions or oral statements. This is to be done in a manner not prejudicial to the rights of the defence.

The right to compensation for damages

Victims of trafficking in persons have a right to receive compensation for the physical or mental harm suffered at the hands of the trafficker. Receiving compensation is important for victims of trafficking not only because of the financial component but also because it has a symbolic meaning, expressing an official acknowledgement that something illicit has been done to them and constituting a first step to overcoming the trauma inflicted by the abuses they suffered at the hands of the traffickers. 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.”⁷⁷

Likewise, the OHCHR 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.”⁷⁸

Five basic models on victim compensation may be utilized by the legislator in enacting appropriate civil compensation provisions, including: mandatory restitution, confiscation

⁷⁷Trafficking Protocol, art. 6(6).

⁷⁸Office of the United Nations High Commissioner for Human Rights, guideline 9.

of assets, and 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”.⁷⁹

The Trafficking 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.”⁸⁰

The most critical factor in assistance and support programmes is that they should be both comprehensive and integrated. Assistance in medical, psychological, legal services, accommodation, education and training will not exist satisfactorily in isolation. To plan and provide services in a coordinated and collaborative manner is in the best interests of victims.

⁷⁹Trafficking Protocol, art. 6(3).

⁸⁰*Ibid.*

Medical

Victims of trafficking will probably have immediate medical needs, which need to be addressed in the destination State as a first concern. They may have physical injuries or have been exposed to the risk of disease. They may have been forced to consume narcotics or psychoactive drugs as a means of controlling them. The victims themselves may have developed drug addictions to assist them to cope with the situation. They may have mental health problems with associated physical conditions. They may have been unaware of sexual health issues and been made to endure unsafe and violent sexual practices, which increases the risk of contracting HIV/AIDS and other sexually transmitted diseases. Initial medical examinations and discussion, preferably undertaken in partnership with appropriate NGOs who can provide a support person and interpreter are a first step so that obvious injuries can be identified and a treatment plan initiated.

Psychological

The trafficking experience may create a systematic disruption of basic and core attachments to families, friends and religious and cultural systems. Brutal acts including torture and rape can result in the destruction of central values about human existence and the creation of shame. Relationships may have changed, including those with the general community and authority figures, leading to a general sense of mistrust of others and a fear of forming new relationships. Strategies and assistance for the victims of trafficking should focus in the goals of recovery and re-establishment of the person's life, primarily in the State of origin.

Legal

Victims of trafficking require legal assistance, in particular when they consent to act as a witness in a criminal prosecution of the traffickers and in their position as an illegal immigrant. Because many victims of trafficking will be fearful of governments and bureaucratic authorities, the role of providing legal assistance is particularly significant.

Language and translation

Victims of trafficking remain vulnerable when the services they receive are in a language they cannot understand. Language and cultural considerations are important factors in service delivery and the provisions of information. Services that are provided in conjunction with liaison staff from cultural and linguistic groups allow the victims to gain a better understanding of the bureaucratic processes they need to endure.

Rehabilitation, skill training and education

Whether victims of trafficking are permitted to remain in the destination State or eventually return home, education, training and rehabilitation assistance should be provided as soon as possible.

Shelter

In order to escape the control of the traffickers, victims of trafficking need a safe and secure refuge. Despite the prospect of continued abuse, victims do not leave the abusive

or exploitative situation because they do not have a safe place to go to. Assistance programmes for victims recognize the requirement for both immediate and long-term shelter and should attempt to provide different types of shelter based on the needs of the victims at the state of recovery they have reached.

The right to seek residence

A victim of trafficking should be entitled to the right to seek residency in the country of destination. The expulsion and immediate repatriation of victims of trafficking does not encourage them to give evidence or to testify against traffickers and goes against their basic rights as victims. Victims of trafficking very often do not have a regular residence status in the State of destination, either because they have arrived illegally or because their residence permit has expired. However, the immediate return of the victims to their home countries may be unsatisfactory both for the victims and for the law enforcement authorities endeavouring to combat trafficking. For the victims, this means that they or even their family or friends in the country of origin might be vulnerable to reprisals by the traffickers. For law enforcement, if the victims continue to live clandestinely in the country or are removed immediately, they cannot give information to effectively combat trafficking. The more confident victims are that their rights and interests will be protected, the more likely they are to provide better information.

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.”

States are not obligated to adopt legislation governing status of the victim. However, several countries have adopted measures to provide temporary or permanent residence for victims of trafficking. Indications show that adoption of these measures by States lead to victims coming forward to testify against traffickers and NGOs organizations encouraging victims to whom they provide services to report incidents to the government.

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 a dignified return to their country of origin.

Article 8 of the Trafficking Protocol provides that States 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” and victims should be provided with all necessary assistance to ensure a dignified return.

Upon a request of the receiving State, States of origin must verify whether the trafficked person is a national or had the right to permanent residence at the time of entering the receiving State. If the person has no proper documentation, the State of origin must also issue the necessary travel or other documents to enable the person to travel and to re-enter its territory. States are obligated to guarantee that any return is with due regard both for the safety of the returnee and for the status of any legal proceedings related to the fact that the person is a victim of trafficking.

The returned victims may still be traumatized and suffering from medical and psychological problems as a result of the experience and/or still fear retribution from the trafficker. The essential elements to address these issues may be regulated through international or bilateral treaties between countries of origin and countries of destination (box 22).

Box 22. Providing for a dignified return of the victim of trafficking to his/her country of origin

“If the victim of human trafficking wishes to leave the territory of the Republic of Azerbaijan, assistance in providing him/her with relevant documents, covering travel and other necessary expenses shall be provided and recommendations on reducing a risk of becoming a victim of human trafficking in the country of destination shall be given.”

Azerbaijan—Law on Fight against Human Trafficking (2005)

5.4 The role of parliamentarians



Role of parliamentarians

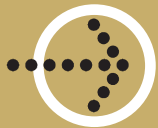
Recognizing the trafficked person as a victim entitled to internationally recognized human rights

- 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
 - Privacy
 - Information
 - Legal representation
 - Be heard in court
 - Compensation for damages
 - Seek residence
 - 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;
- 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 for the setting up of specialized centres to assist victims and provide them with assistance;
- Support organizations and agencies that provide reintegration assistance;
- Adopt special measures to protect and promote the right of women victims of trafficking that should take into account the potential for double marginalization, as women and as victims.



Self-assessment questions

- What are some of the indicators of trafficking in persons?
- Explain the principle of non-criminalization in regard to victims of trafficking in persons.
- Are offenders of trafficking in persons entitled to the same rights as a victim?
- What are the protective services for victims of trafficking that are identified based on international human rights? Why are they important?



module 6

PREVENTING TRAFFICKING IN PERSONS



Learning objectives

At the end of the module you will be able to:

- Understand general underlying causes or push/pull factors of trafficking in persons as well as those specific to the trafficking context in Afghanistan;
- Identify measures to prevent trafficking in persons;
- Recognize related laws which together with anti-trafficking law can more comprehensively combat and prevent trafficking in persons.

6.1 Introduction to preventing trafficking in persons

Effective action to prevent and combat trafficking in persons requires a comprehensive international approach, including measures to prevent such trafficking, to protect victims of such trafficking and to prosecute traffickers. Countries have a wide choice when it comes to legislation regarding prevention since the needs of prevention are so wide-ranging in scope. Article 9 of the Trafficking Protocol outlines these measures States are required to endeavour to undertake:

- “2. ...measures such as research information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.
3. Polices, programmes and other measures established in accordance with the article, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.
4. State Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.
5. State Parties shall adopt or strengthen legislative or other measures such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”

In addition, article 9(1)(b) of the Trafficking Protocol mandates that victims of trafficking in persons must be protected against revictimization. Doing so is in itself a prevention mechanism against cases of re-trafficking. Avoiding revictimization requires serious efforts to rehabilitate victims and help them reintegrate into the society.

Any comprehensive anti-trafficking strategy must incorporate robust trafficking prevention programmes, 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 in this module will be divided into the following categories: addressing root causes, awareness-raising, research, addressing demand, prevention of revictimization and prevention in trafficking related legislation.

6.2 Addressing root causes

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.

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

Push factors of human trafficking refer to what is pushing an individual away from their homes and communities.

Pull factors of human trafficking refer to what is drawing the individual to the destination.

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 information, as well as violence against women, sexual violence 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 catalogue or mail order brides and other forms of sexual exploitation, all of which contribute to the trafficking infrastructure. Furthermore, 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, the 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 favourable environment for organized crime, including trafficking in persons.

What are some push/pull factors making individuals vulnerable to human trafficking in Afghanistan?

6.3 Awareness-raising: awareness campaigns, media and education

Awareness-raising activities serve as important tools 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. This is particularly the case among those persons who may come into contact with potential victims of trafficking, as well as the general public.

Within the general population, specific groups can be targeted with more specific messages or by specific means.

Awareness-raising campaigns provide potential victims of trafficking with sufficient information about the risks of human trafficking, the possibilities for legal migration to work and enable them to make informed decisions about migration, to evaluate whether job offers are realistic, and to seek help in the case of trafficking. Awareness-raising campaigns should also address the health risks, such as unwanted pregnancies and sexually transmitted diseases, including HIV/AIDS, associated with sexual exploitation. Other messages to be conveyed include vigilance and public accountability, information about anti-trafficking programmes and criminal penalties for trafficking.

The media can be used as a valuable and useful tool to spread awareness and understanding of human trafficking amongst national populations. Media outlets include television, radio and newspapers, all of which have been used to disseminate information on human trafficking. Some governments have incorporated the media into their human trafficking prevention policy as a means of awareness-raising.

Education is another important tool toward the prevention of trafficking in persons by providing information on the risks of trafficking to children and young persons. School children are an important target group. States can utilize different ways of 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. States can also ensure

that schools provide children with an education that avoids gender stereotypes and can enhance teachers' training to ensure the incorporation of gender equality into their teaching.

6.4 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 effective tool in galvanizing momentum to address trafficking in persons, as accurate statistics can serve to bring attention to its importance.

Over the past decade and even more so after the adoption of the Trafficking Protocol international awareness of the crime of human trafficking has increased significantly. This is also reflected in the burgeoning number of reports, documents and research studies published on the topic. While many of these reports provide valuable qualitative insights into trafficking patterns, research should also be based on hard data. However, there is still a lack of quantitative information or understanding regarding the scope and development of the crime of human trafficking around the world. Even basic criminal justice data on trafficking in persons offences is not publicly available for many countries and regions of the world, making the compilation of accurate statistics on human trafficking elusive and unreliable at any level.

What is needed for the design of adequate policies, therefore, is a more credible information base on which to base research on trafficking in persons. The most direct way of generating this information base is to focus on the universe of known trafficking cases that directly result from the criminal justice response to this crime. Gathering accurate criminal justice statistics, supplemented by information on the institutional and legal framework in which the crime of trafficking in persons is defined and pursued, as well as on services available to victims from governmental and non-governmental actors alike, is necessary to understand where the major information gaps are, and how to improve national responses to trafficking in persons.

6.5 Addressing demand

Trafficking can be dealt with from both the demand and supply sides. It is important to ensure that prevention policies also address discouraging the demand that fosters all forms of exploitation of persons that leads to human trafficking.

Article 9(5) of the Trafficking Protocol states that:

“State Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”

Furthermore, the OHCHR Recommended Principles and Guidelines call on States to ensure that “strategies aimed at preventing trafficking shall address demand as a root cause for trafficking.”⁸¹

⁸¹Office of the United Nations High Commissioner for Human Rights, principle 4.

In particular, according to article 1 in the OHCHR Recommended Principles and Guidelines, States should analyse “the factors that generate demand for exploitative commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues.”

Some countries have addressed the issue of demand by criminalizing the use of services from persons with the knowledge that they are victims of trafficking (box 23).

Box 23. Punishing the use of services of victims of trafficking by imprisonment

“Those who with full cognizance accept the work of a victim of trafficking are punished with imprisonment of six months minimum.”

Hellenic Republic—Presidential Decree 233 (2003)

6.6 Revictimization

Article 9(1)(b) of the Trafficking Protocol mandates that victims of trafficking in persons must be protected against revictimization. Doing so is in itself a prevention mechanism against cases of re-trafficking. Avoiding revictimization requires serious efforts to rehabilitate victims and help them reintegrate into the society (box 24).

Box 24. Rehabilitation and reintegration of victims to avoid revictimization

“The Secretary of State and the Administrator of the USAID, in consultation with appropriate non-governmental organizations shall establish and carry out programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement, as appropriate of victims of trafficking. Such programs and initiatives shall be designed to meet the appropriate assistance needs of such persons and their children.”

United States of America—Trafficking Victims Protection Act (2000)

Although each jurisdiction is different, the general experience in transnational trafficking cases is that victims are often repatriated. Many of the issues surrounding repatriation and reintegration revolve around the level of support received by the victim when they return to their location of origin and the assistance that they are given in the return process. Such support and assistance can be provided by specialist national NGOs

and/or international NGOs. As a general rule, the more support a victim of trafficking is given, the less likely they will be a victim of trafficking in the future. It is therefore important that support structures and services are established together with civil society actors which have the capacity to support returning trafficked victims when they are repatriated.

6.7 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 multifaceted 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 labour, labour 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 important 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:

- Labour laws and codes, including laws governing domestic service labour;
- 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, other laws may serve to penalize crimes that contribute to the trafficking infrastructure, create the demand for trafficking in persons or may be linked in other ways to the phenomenon.

6.4 Role of parliamentarians



Role of parliamentarians

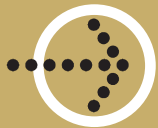
Preventing trafficking in persons

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



Self-assessment questions

- What are some push/pull factors of human trafficking? What are some factors specific to Afghanistan?
- Identify actions that could be taken to prevent human trafficking in Afghanistan.
- What are some measures to prevent revictimization of victims of trafficking?



module 7

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



Learning objectives

At the end of the module you will be able to:

- Understand what type of information sharing the TOC Convention and the Protocol encourage;
- Identify the various purposes of the forms of international cooperation.

7.1 Introduction

Trafficking in persons is recognized by the Trafficking Protocol as a crime that must be dealt with not only at a national level but also regionally and globally between all countries involved in the trafficking process. A significant proportion of cases are transnational and even those cases within a single jurisdiction may involve victims or offenders who originate outside that jurisdiction.

Thus, transnational responses are required to effectively address trafficking in persons. International cooperation in criminal matters can be very challenging and requires knowledge, planning and awareness of practical issues at stake in both the requested and the requesting State.

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

7.2 Establishment of jurisdiction, including on an extraterritorial basis

Article 15 of the TOC Convention requires State Parties to establish jurisdiction to investigate, prosecute and punish all offences established by the TOC 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 TOC Convention obligation to prosecute offenders who cannot be extradited on request because of their nationality.⁸²

The TOC Convention also encourages, but does not require, the establishment of jurisdiction on an extraterritorial basis. Extraterritorial jurisdiction is the legal ability of a government to exercise authority beyond its normal boundaries (box 25).

Extraterritorial jurisdiction can be exercised to cover 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*.⁸³

Box 25. Applying extraterritorial jurisdiction to the crime of trafficking in persons

“Offences committed by any person in any country outside of the Republic, which if they were committed in the Republic should be considered [sexual exploitation, pornography and trafficking in persons], shall be triable by an appropriate Court of the Republic exercising criminal jurisdiction.”

Cyprus—Law on Combating of Trafficking in Persons and Sexual Exploitation of Children (2000)

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 has addressed these issues with regard to peacekeeping missions. Rule 4 of the United Nations Peacekeeper Code of Conduct states that United Nations peacekeepers should “not indulge in immoral acts of sexual, physical, or psychological abuse or exploitation”.⁸⁴

⁸²TOC Convention, 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.

⁸³TOC Convention, art. 15, para. 1 (mandatory jurisdiction) and art. 15, para. 2 (optional jurisdiction).

⁸⁴Mohamed Mattar, “Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention”, *Tulane Journal of International and Comparative Law*, vol. 14, No. 2 (2005), p. 61.

Nationals of a particular country engaging in conduct abroad which may result in their knowingly utilizing the services of a victim of trafficking should likewise be held liable under extraterritorial jurisdiction. For example, child sex tourism, which often involves the use of a trafficked child by the perpetrator, should be a crime dealt with by the government by extraterritorial jurisdiction (box 26).

Box 26. Applying criminal liability for crimes connected to trafficking in persons

“Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.”

United States of America—United States Protect Act (2003)

7.3 Extradition

Perpetrators of transnational crimes may be in a different State or flee a State to avoid prosecution. Extradition proceedings are then required to bring them to justice in the prosecuting State.

Extradition is a formal and, most frequently, a treaty-based process, leading to the return or delivery of fugitives to the jurisdiction in which they are wanted. 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 TOC 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.”

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 offence (box 27).

Box 27. Making trafficking in persons an extraditable offence

“The offences [of sexual exploitation, pornography and trafficking in persons] shall be deemed as having been included in the Schedule to the Extradition of Fugitives Law of 1970.”

Cyprus—Law on Combating of Trafficking in Persons and Sexual Exploitation of Children (2000)

7.4 Mutual legal assistance

Mutual legal assistance is a form of international cooperation by which States seek and provide assistance in gathering evidence for use in the investigation and prosecution of criminal cases. It covers a wide and ever expanding range of assistance and between countries of origin, transit and destination is conducive to meeting various needs in the fight against trafficking, including effective action to ensure not only investigation and prosecution of traffickers, but also the protection of and assistance to victims.

The international mobility of offenders and the use of advanced technology, among other factors, make it more necessary than ever that law enforcement and judicial authorities collaborate and assist the State that has assumed jurisdiction over the matter.

Bilateral 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 and countries of destination in matters including request for:

- (a) Taking evidence or statements;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures and freezing;
- (d) Examining objects and sites;
- (e) Providing information;
- (f) Evidentiary items and expert evaluations;
- (g) Providing relevant documents and records;
- (h) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (i) Facilitating the voluntary appearance of persons;
- (j) And other types of assistance.

7.5 Law enforcement cooperation, including exchange of information

The TOC Convention requires States to cooperate closely with one another to enhance the effectiveness of law enforcement action to combat the offences covered by the TOC 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 either on a voluntary basis or in accordance with existing agreements or arrangements.

Article 10 of the Trafficking Protocol states that State 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.”

Cooperation and exchange of information is also necessary to assist and protect victims of trafficking in persons, in particular to facilitate and speed up the repatriation of victims to their countries of origin, if they wish so (box 28).

Box 28. Enacting a bilateral agreement providing for mechanisms to combat trafficking and protect victims of trafficking in conformity with various international human rights mechanisms

“The Parties shall undertake necessary legal reform and other appropriate measures to ensure that the legal frameworks in their respective jurisdictions conform with the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and other international human rights instruments which both Parties have ratified or acceded to and are effective in eliminating trafficking in children and women and in protecting all rights of children and women who fall victims to trafficking.”

Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003)

Likewise, legislators should look to their international commitments under free trade treaties to ensure that provisions are embedded in such treaties underscoring the parties' commitments to international human rights standards, especially in the areas of workers' rights protections and prohibitions on exploitative or forced labour. The inclusion of such provisions should be made a part of the negotiation process of any new free trade agreements. Legislators can utilize these negotiations and the provisions themselves to raise awareness of these important issues among trade partners, to obtain their commitment to addressing them, and to make sure that protections for workers are in place. The inclusion of such provisions in international free trade agreements is likewise a declaration on the part of the parties of the centrality of fair labour practices, eradication of trafficking in persons, and human rights standards to international trade (box 29).

Box 29. Including labour protection mechanisms in international free trade agreements

"Recognizing that cooperation provides enhanced opportunities to promote respect for core labour standards embodied in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up and compliance with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, and to further advance other common commitments, the Parties establish a Labour Cooperation Mechanism".

United States—Singapore Free Trade Agreement (2003)

7.6 Role of parliamentarians



Role of parliamentarians

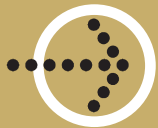
Taking the necessary measures for the promotion of international cooperation to combat trafficking in persons

- 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 labour rights are part of any trade agreement approved.



Self-assessment questions

- What are the forms of international cooperation identified in this module?
- What are some examples of circumstances in which each form of international cooperation would be required?



module 8

REPORTING ON THE STATUS OF TRAFFICKING IN PERSONS



Learning objectives

At the end of the module you will be able to:

- Identify the types of mechanisms which can monitor and report on government policies and actions against trafficking in persons;
- Understand the role reporting mechanisms play to contribute to combating trafficking.

8.1 Introduction

Monitoring and reporting on government policies and actions against trafficking in persons creates an effective mechanism to ensure promises made materialize into action and the implementation of corresponding legal and administrative provisions. Monitoring and reporting can lead to an increase in national ownership of anti-trafficking policies, significantly raises the quality and level of anti-trafficking responses of the country and provides the authorities with assessments and recommendations for future actions.

A suitable mechanism is needed whereby this progress can be measured. 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. To maximize outcomes, any reporting mechanisms should aim to involve multidisciplinary and cross-sector participation.

Parliamentarians globally have identified possible models of mechanisms for legislators to achieve this. These include an office of a National Rapporteur, parliamentary committees and hearings and inter-ministerial task forces.

8.2 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:

“Provide or explore the possibilities for the appointment of national rapporteurs who report to governments on the scale [of] the prevention and combating of trafficking in women;

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;

Encourage the cooperation of national rapporteurs on a regular basis.”⁸⁵

National Rapporteurs can be independent government entities or national ministries. For example, in Sweden, the National Police Board was appointed as the National Rapporteur on Trafficking in Women in Sweden in 1998, and thus Sweden became the first country to implement the 1997 Hague Declaration. The Rapporteur works with the police to document instances of trafficking, which are recounted in an annual Situation Report. The report also provides a proposal of measures toward implementation by the government of recommendations made in the report.

In 2001, the Netherlands likewise appointed a National Rapporteur on Trafficking in Human Beings in accordance with the 1997 Hague Declaration. The National Rapporteur was asked to report annually on the problem of trafficking in human beings and provide recommendations on implementing the Dutch anti-trafficking law.⁸⁶

8.3 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.

For example, the United States monitors and reports on trafficking in human beings by means of holding Congressional hearings on the subject. Conducting investigative and legislative hearings is one facet of Congressional oversight. The source of Congress’s power in this context is implicit in the United States Constitution; this investigatory and supervisory capacity is an inherent power of Congress, which as a representative assembly, enacts the public law. Moreover, the express constitutional powers of Congress, such as appropriating funds and enacting laws, require Congress to know the details of federal programmes and policies. Not only does Congressional oversight serve as a check on the Executive branch to rein in federal policies, but the investigatory function

⁸⁵Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation (“Hague Declaration”) (1997) (see www.legislationline.org/legislation.php?tid=178&lid=6945&less=false), III 1.4.

⁸⁶Examples detailed in section 8.1 were first cited in “The Appropriate Legal Responses to Combating Trafficking in Persons: A Handbook for Parliamentarians [draft].”

of the oversight can also lead to the development of new law within the Legislative branch. A number of Congressional Committees in both houses of the United States Congress regularly hold hearings on trafficking in human beings.

In Canada, the Standing Committee on the Status of Women in Canada published a report in February 2007 covering various aspects of trafficking. In Recommendation 18 of this report, this Committee urged that a National Rapporteur be established to collect and analyse data on trafficking in persons, and that the National Rapporteur submit an annual report to Parliament. Under the Committee's recommendation, the National Rapporteur would be required to consult with stakeholders as to how best to implement a data collection and tracking system that would protect the integrity of police information, as well as protect victims of trafficking. The Federal Interdepartmental Working Group on Trafficking in persons was established in 1999 and is co-chaired by the Department of Justice and the Department of Foreign Affairs.

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. Additionally, 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.⁸⁷

8.4 Inter-ministerial task forces

The reporting, monitoring and evaluation function has also been entrusted to multi-agency anti-trafficking task forces. 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.

In 2003 the United States Trafficking Victims Protection Reauthorization Act entrusted the Department of Justice as a member of the anti-trafficking Task Force with monitoring and reporting missions. As stipulated by Congress, the report must include information on what federal agencies are doing to implement the provisions of the Trafficking Victims Protection Act.

In Romania, the government established an Inter-Ministerial Working Group for Coordination and Evaluation of Activities for Preventing and Combating Trafficking in Persons in 2001. The Working Group is responsible for publishing a report to monitor the scope of the problem of trafficking and efforts made in Romania to combat the problem. The work carried out by the Working Group was translated into two very important actions: a new anti-trafficking law (Law 678 of 2001) and the approval of the National Action Plan for Preventing and Combating Child Trafficking (in August of 2004).

In Croatia, a National Committee for the Suppression of Trafficking in Persons was established in 2003. The Commission prepared a Report on the Implementation of the National Plan of Action, which was adopted in November of 2002. Members of the National Committee are representatives of all relevant ministers and state governing

⁸⁷Examples detailed in section 8.2 were first cited in "The Appropriate Legal Responses to Combating Trafficking in Persons: A Handbook for Parliamentarians [draft]."

organizations, the Croatian Parliament, the State Attorney's Office and representatives of NGOs and the media.

In Moldova, the National Committee to Combat Trafficking in Human Beings adopted a National Plan of Action to Combat Trafficking in Human Beings in November 2001. The Action Plan included steps to be taken toward prevention of trafficking by means of research and assessment. As elaborated in the Action Plan, assessment included research on the dimensions of the problem of trafficking, identification of victims of trafficking, causes of vulnerability of specific social groups, and methods of recruitment. The government called for the development of a standardized database and the creation of a research centre on combating trafficking.

In Greece in 2001, a Task Force against Trafficking in Human Beings was established under the Ministry of Public Order. In 2004, a Special Committee was established to draft an Action Plan against Trafficking in Human Beings. Monitoring progress made by the government is one of the main priorities of the Special Committee.

In Luxembourg, the Ministry of Justice coordinates efforts to combat trafficking, in close cooperation with the Commissioner for Human Rights, the Ministry for Equal Opportunity and the Ministry for the Advancement of Women.⁸⁸



Discussion

Which ministries would be most relevant to be included in a parliamentary committee and an inter-ministerial task force on human trafficking in Afghanistan?

⁸⁸Examples detailed in section 8.1 were first cited in “The Appropriate Legal Responses to Combating Trafficking in Persons: A Handbook for Parliamentarians [draft].”

8.5 Role of parliamentarians



Role of parliamentarians

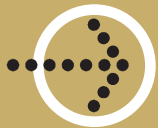
Monitoring the status of trafficking in persons and the appropriate responses to combat the problem

- Create a special parliamentary mechanism or structure on combating trafficking in persons in Afghanistan;
- Request research and data collection on the scope of the problem of trafficking in Afghanistan and best practices to combat the phenomenon;
- Investigate specific violation of rights of victims of trafficking and inquire into remedies and assistance;
- Ensure timely and complete reporting by the Government of Afghanistan to the United Nations 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 without parliament.



Self-assessment questions

- What are the three identified key national mechanisms to report on the status of human trafficking?
- How can these reporting mechanisms contribute to combating trafficking in persons?



module 9

ENHANCING THE ROLE OF CIVIL SOCIETY IN COMBATING TRAFFICKING IN PERSONS



Learning objectives

At the end of the module you will be able to:

- Understand the obligation by the Trafficking Protocol mandating State cooperation with civil society;
- Identify various facets of civil society and why civil society is crucial in combating trafficking.

9.1 Introduction

The participation and engagement of civil society is a crucial element of any comprehensive approach to combating trafficking.

Thus, the Trafficking Protocol mandates that State parties must operate with NGOs in adopting prevention measures to combat trafficking and measures of assistance and protection. Article 9(3) of the Trafficking Protocol, while calling on State parties to establish measures for the prevention of trafficking, recommends that:

“Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”

Similarly, article 6 of the Trafficking Protocol states:

“Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”

Civil society is a broad concept and the Trafficking Protocol refers to NGOs and other elements of civil society. For the purpose of this material, in regards to the context of trafficking in persons in Afghanistan, civil society will refer to NGOs, local community structures and the public.

9.2 Role of civil society organizations in combating trafficking

Civil society organizations such as NGOs often find themselves in the front line in the fight against trafficking in persons. They can play an important role in preventing trafficking, raising awareness, providing assistance and protection to victims and assisting in their repatriation and reintegration. The following are examples of elements of anti-trafficking strategies that civil society can contribute to:

- **Prevention.** NGOs undertake measures to alleviate the vulnerability of people to trafficking, such as ignorance, poverty and lack of opportunity. NGOs are also important in raising awareness and discouraging demand through awareness campaigns, research, etc.,
- **Protection.** NGOs have been important in humanizing trafficking victims to sensitize policymakers and law enforcement officials to the need to protect victims of human trafficking and their treatment of victims of a serious crime with access to human rights and justice. NGOs can also assist victims of trafficking throughout criminal proceedings acting as their advocates and helping them understand national laws and regulations to identify the recourses that they may have under the law.
- **Prosecution.** The increasing involvement of the NGO sector in the provision of shelter and specialized assistance to trafficked victims has the potential to improve the preparedness of victims to become witnesses, provided that the criminal justice system develop proper procedures as to how to cooperate with the shelter providers. Victim assistance initiatives taken by a number of States in cooperation with NGOs are starting to show an increase in the number of victims who are prepared to cooperate with the criminal justice system.

Over the last few years in Afghanistan, there has been an increase in the number of NGOs and expansion in the scope of their activities. However, it is important to note that in Afghanistan, civil society has always played an integral role in society and communities. Community structures, for example, such as the *Shuras* or the *Jirgas* and religious institutions and leaders, play an important role in their communities. They can also contribute to combating trafficking in persons through prevention, raising awareness, collecting data, assisting victims and developing trafficking policy.



Discussion

In which ways are civil society organizations in Afghanistan working to combat trafficking in persons? For more information on civil society organizations in Afghanistan, go to www.ancb.org – Afghan NGO Coordination Bureau or the Agency Coordinating Body For Afghan Relief, www.acbar.org/index.php.

9.3 Ensuring civil society partnership

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

Providing security to NGOs

Because of the association of the crime of trafficking in persons with organized crime and the cultural sensitivity of the crime, NGOs providing assistance and protection to trafficking victims face serious safety concerns. Traffickers may target organizations to intimidate and threaten victims of trafficking as well as staff. Governments should attempt to assist NGOs in providing security to enable them to provide assistance to victims of trafficking.

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 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.

9.4 Forms of partnership between government and civil society

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 of NGOs, including local, national and international entities, and the public component is meant to represent the public at large. 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 NGOs concerned with the issue of trafficking as part of a national inter-agency body tasked with implementing anti-trafficking policies (boxes 30-31).

Box 30. Engaging NGOs as representatives in an anti-trafficking council

“A body to be known as the Council for Anti-trafficking in Persons shall be established.” The Council shall consist of various ministries and “not more than three persons from non-governmental organizations or other relevant organizations having appropriate experience in problems and issues relating to trafficking in persons including the protection and support of trafficked persons.”

Malaysia—Anti-trafficking in Persons Act (2007)

Box 31. Engaging NGOs in the provision of services to victims of trafficking

“Victims of trafficking in persons shall receive physical, psychological and social assistance as well as legal representation and information on their rights. Such assistance shall be provided by governmental entities in cooperation with non-governmental organizations and other elements of civil society.”

Dominican Republic—Law n. 137-03 on the Illicit Smuggling of Migrants and Trafficking in Persons (2003)

Consultation model

The consultation model, on the other hand, engages NGOs on a consultative basis. 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 (box 32). 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.

Box 32. Engaging NGOs in a consultative capacity with the government

“The Inter-Agency Task Force on Trafficking shall engage in consultation and advocacy with governmental and non-governmental organizations, among other entities.”

United States of America—Trafficking Victims Protection Act of 2000

9.5 Public engagement as a part of civil society

The general public’s participation in combating trafficking is crucial. First of all, public awareness and concern with trafficking in persons is important in holding the government accountable to its anti-trafficking responsibilities. Secondly, the public, 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 understand which policies can 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 identifying victims of trafficking (box 33).

Box 33. Engaging the public in anti-trafficking efforts

“The public participates in helping efforts to prevent and combat the crime of trafficking in persons. Public participation [. . .] is achieved through the actions of providing information and/or reporting the crime of trafficking in persons to law enforcers of the authorities.”

Indonesia—Law on the Suppression of the Crime of Trafficking in Persons (2007)

9.6 Role of parliamentarians



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 in Afghanistan;
- Consult civil society in public fora 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 memorandums of understanding between national authorities and NGOs to provide protection and assistance to victims of trafficking;
- Support NGOs working in the field, including financially.



Self-assessment questions

- What important roles can civil society play in combating trafficking?
- How are NGOs and civil society associations currently involved in combating trafficking in Afghanistan?



annex 1

NATIONAL LEGISLATION

Azerbaijan, Criminal Code (2006)

Azerbaijan, Law on Fight against Human Trafficking (2005)

Bahrain, Law on the Prevention of Human Trafficking (2007)

Canada, Bill C-49, An Act to Amend the Criminal Code (Trafficking in Persons) (2006)

Colombia, Law No.985 Diario Oficial 46.015 (2005)

Cyprus, Law on Combating of Trafficking in Persons and Sexual Exploitation of Children (2000)

Dominican Republic, Law on Illicit Smuggling of Migrants and Trafficking in Persons No. 137-03, (2006)

Georgia, Law on Combating Human Trafficking (2000)

Hellenic Republic, Presidential Decree 233 (2003)

Indonesia, Law on the Suppression of the Crime of Trafficking in Persons (2007)

Iraq, Constitution of Iraq (2005)

Malaysia, Anti-Trafficking in Persons Act (2007)

Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003)

Pakistan, Constitution of Pakistan (2004)

Philippines, Anti-Trafficking in Persons Act (2003)

Romania, Law on the Prevention and Combat of Trafficking in Human Beings (2005)

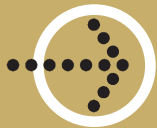
United States of America, Child Victim Witness Protection Act, USC 3509

United States of America, Protect Act (2003)

United States of America, Trafficking Victims Protection Act (2000)

United States of America, Witness Protection Act of 1982, 18 USC 3521 (1982)

United States of America – Singapore, Free Trade Agreement (2003)



annex 2

INDICATORS OF TRAFFICKING IN PERSONS

Not all the indicators listed below are present in all situations involving trafficking in humans. Although the presence or absence of any of the indicators neither proves nor disproves that human trafficking is taking place, their presence should lead to investigation.

Victims of trafficking in humans can be found in a variety of situations. You can play a role in identifying such victims.

General indicators

People who have been trafficked may:

- Believe that they must work against their will
- Be unable to leave their work environment
- Show signs that their movements are being controlled
- Feel that they cannot leave
- Show fear or anxiety
- Be subjected to violence or threats of violence against themselves or against their family members or loved ones
- Suffer injuries that appear to be the result of an assault
- Suffer injuries or impairments typical of certain jobs or control measures
- Suffer injuries that appear to be the result of the application of control measures
- Be distrustful of the authorities
- Be threatened with being handed over to the authorities
- Be afraid of revealing their immigration status
- Not be in possession of their passports or other travel or identity documents, as those documents are being held by someone else
- Have false identity or travel documents
- Be found in or connected to a type of location likely to be used for exploiting people
- Be unfamiliar with the local language
- Not know their home or work address
- Allow others to speak for them when addressed directly
- Act as if they were instructed by someone else
- Be forced to work under certain conditions
- Be disciplined through punishment
- Be unable to negotiate working conditions
- Receive little or no payment
- Have no access to their earnings
- Work excessively long hours over long periods
- Not have any days off
- Live in poor or substandard accommodations
- Have no access to medical care
- Have limited or no social interaction
- Have limited contact with their families or with people outside of their immediate environment
- Be unable to communicate freely with others
- Be under the perception that they are bonded by debt
- Be in a situation of dependence
- Come from a place known to be a source of human trafficking
- Have had the fees for their transport to the country of destination paid for by facilitators, whom they must pay back by working or providing services in that country
- Have acted on the basis of false promises

Children

Children who have been trafficked may:

- Have no access to their parents or guardians
- Look intimidated and behave in a way that does not correspond with behaviour typical of children their age
- Have no friends of their own age outside of work
- Have no access to education
- Have no time for playing
- Live apart from other children and in substandard accommodations
- Eat apart from other members of the “family”
- Be given only leftovers to eat
- Be engaged in work that is not suitable for children
- Travel unaccompanied by adults
- Travel in groups with persons who are not relatives
- The following might also indicate that children have been trafficked:
- The presence of child-sized clothing typically worn for doing manual or sex work
- The presence of toys, beds and children’s clothing in inappropriate places such as brothels and factories
- The claim made by an adult that he or she has “found” an unaccompanied child
- The finding of unaccompanied children carrying telephone numbers for calling taxis
- The discovery of cases involving illegal adoption

Sexual exploitation

People who have been trafficked for the purpose of sexual exploitation may:

- Be under 30 years old, although the age may vary according to the location and the market
- Move from one brothel to the next or work in various locations
- Be escorted whenever they go to and return from work, shops etc.
- Have tattoos or other marks indicating “ownership” by their exploiters
- Work long hours or have few if any days off
- Sleep where they work
- Live or travel in a group, sometimes with other women who do not speak the same language
- Have very few items of clothing
- Have clothes that are mostly the kind typically worn for doing sex work
- Only know how to say sex-related words in the local language or in the language of the client group
- Have no cash of their own
- Be unable to show an identity document

The following might also indicate that people have been trafficked for sexual exploitation:

- There is evidence that suspected victims have had unprotected and/or violent sex.
- There is evidence that suspected victims cannot refuse unprotected and/or violent sex.

- There is evidence that a person has been bought and sold.
- There is evidence that groups of women are under the control of others.
- Advertisements are placed for brothels or similar places offering the services of women of a particular ethnicity or nationality.
- It is reported that sex workers provide services to a clientele of a particular ethnicity or nationality.
- It is reported by clients that sex workers do not smile or do not cooperate.

Labour exploitation

People who have been trafficked for the purpose of labour exploitation are typically made to work in sectors such as the following: agriculture, construction, entertainment, service industry and manufacturing (in sweatshops). People who have been trafficked for labour exploitation may:

- Live in groups in the same place where they work and leave those premises infrequently, if at all
- Live in degraded, unsuitable places, such as in agricultural or industrial buildings
- Not be dressed adequately for the work they do: for example, they may lack protective equipment or warm clothing
- Be given only leftovers to eat
- Have no access to their earnings
- Have no labour contract
- Work excessively long hours

- Depend on their employer for a number of services, including work, transportation and accommodation
- Have no choice of accommodation
- Never leave the work premises without their employer
- Be unable to move freely
- Be subject to security measures designed to keep them on the work premises
- Be disciplined through fines
- Be subjected to insults, abuse, threats or violence
- Lack basic training and professional licenses

The following might also indicate that people have been trafficked for labour exploitation:

- Notices have been posted in languages other than the local language, except for key notices on health and safety, for example.
- There are no health and safety notices.
- The employer or manager is unable to show the documents required for employing workers from other countries.
- The employer or manager is unable to show records of wages paid to workers.
- The health and safety equipment is of poor quality or is missing.
- Equipment is designed or has been modified so that it can be operated by children.
- There is evidence that labour laws are being breached.

- There is evidence that workers must pay for tools, food or accommodation or that those costs are being deducted from their wages.

Domestic servitude

People who have been trafficked for the purpose of domestic servitude may:

- Live with a family
- Not eat with the rest of the family
- Have no private space
- Sleep in a shared or inappropriate space
- Be reported missing by their employer even though they are still living in their employer's house
- Never or rarely leave the house for social reasons
- Never leave the house without their employer
- Be given only leftovers to eat
- Be subjected to insults, abuse, threats or violence

Begging and petty crime

People who have been trafficked for the purpose of begging or committing petty crimes may:

- Be children, elderly persons or disabled migrants who tend to beg in public places and on public transport
- Are children carrying and/or selling illicit drugs
- Have physical impairments that appear to be the result of mutilation
- Be children of the same nationality or ethnicity who move in large groups with only a few adults

- Be unaccompanied minors who have been "found" by an adult of the same nationality or ethnicity
- Move in groups while travelling on public transport: for example, they may walk up and down the length of trains
- Participate in the activities of organized criminal gangs
- Belong to gangs composed of members of the same nationality or ethnicity
- Be part of large groups of children who have the same adult guardian
- Be punished if they do not collect or steal enough
- Live with members of their gang
- Travel with members of their gang to the country of destination
- Live, as gang members, with adults who are not their parents
- Move daily in large groups and over considerable distances
- The following might also indicate that people have been trafficked for begging or for committing petty crimes:
 - New forms of gang-related crime appear.
 - There is evidence that the group of suspected victims has moved, over a period of time, through a number of countries.
 - There is evidence that suspected victims have been involved in begging or in committing petty crimes in another country.



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Printed in Austria
V.08-54166—July 2008—2,500