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

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Background paper by the Secretariat

I. Introduction

1. In its decision 4/4, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime acknowledged that the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Organized Crime Convention, was the principal legally binding global instrument to combat trafficking in persons. The Conference further decided to establish an open-ended interim working group on trafficking in persons, which, to date, has held four sessions.

2. In resolution 6/1, the Conference decided that the mandates for the Working Group should be continued and that its areas for future work should reflect, as appropriate, the recommendations contained in the report of the Working Group on its fourth session (see CTOC/COP/WG.4/2011/8, paras. 46-51). The Working Group had, inter alia, recommended to the Conference that continued focus on key

* CTOC/COP/WG.4/2013/1.



concepts of the Protocol, including, inter alia, consent, should be one of the topics considered for its future sessions.

3. The present background paper was prepared by the Secretariat with the view to aid in the deliberations of the fifth session of the Working Group.¹

II. Development of appropriate measures

4. Member States might consider the following points, among others, in implementing the key concept of “consent” in article 3 (b) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Organized Crime Convention:

(a) When does national law deem victim consent to trafficking in persons relevant and when irrelevant?

(b) Is there a connection between the “means” used by traffickers and the issue of consent?

(c) What is the object of “consent” — victim consent to intended or actual exploitation or to the “act” of trafficking?

(d) Does domestic legislation approach the issue of “consent” to trafficking in persons in the same manner as victim consent to crimes other than trafficking?

(e) Does national law distinguish between the relevance of consent of adults to the crime of trafficking in persons, and that of children or, for example, persons of diminished capacity?

(f) How is victim consent or lack of consent proved? Is a connection made in national legislation between the severity of the exploitation and the burden of proof regarding consent or lack of consent?

III. Overview of issues

5. Article 3 (b) of the Trafficking in Persons Protocol states that “[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used”. The means mentioned in article 3 (b) are enumerated in article 3 (a) as follows: “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”.

¹ For additional information on the key concepts of the Trafficking in Persons Protocol, also see the issue paper by the Secretariat, entitled “Analysis of key concepts: focus on the concept of “abuse of power or of a position of vulnerability” in article 3, Trafficking in Persons Protocol” (CTOC/COP/WG.4/2011/3).

6. The issue of “consent” is one of the key concepts in the definition of trafficking in persons. Article 3 (b) represents an explicit statement on the place of victim consent and its connection to the “means” used by the trafficker.

7. This connection between the “means” and victim consent is absent in the Protocol’s approach to child² trafficking. This is clearly stated in article 3 (c) of the Trafficking in Persons Protocol.³ Thus, as regards child trafficking, consent is irrelevant, whether or not “means” have been used by the trafficker.

8. The discourse about the relevance of victim consent is not limited to the crime of trafficking in persons, but rather underlies domestic criminal justice systems in general, in regard to the same two issues addressed by the Protocol:

(a) **Consent as a defence:** Most jurisdictions recognize crimes in which the consent of the alleged victim may serve as a defence to the crime — for example, certain forms of sexual assault. However, even in these cases, the ambit of consent may be restricted — for example in regard to excluding victims who are minors or persons of diminished capacity. In addition, in crimes of severe violence, “consent” cannot generally serve as a defence.

(b) **Means which vitiate consent:** Most criminal justice systems recognize “means” which may vitiate consent, even in cases where consent may serve as a defence to the crime.

9. The issue of consent is particularly difficult in view of the competing values involved in the concept. Respect for the autonomy and freedom of the person competes with other public policy goals, such as protection of vulnerable populations or the intrinsic inalienability of certain rights such as individual freedom, as recognized in international law. States address these dichotomies in various manners.

10. National systems which follow the lead of the Trafficking in Persons Protocol and forge a connection between consent and the “means” used, may choose to include all the “means” mentioned in the Protocol or, in some cases, only the “means” which clearly vitiate consent, such as force, coercion, fraud and deception and not those “means”, which less clearly vitiate consent, including “abuse of a position of vulnerability”.

11. In trafficking in persons, in particular, complex situations may arise, which States should consider so as to delineate the area where consent is irrelevant. There may be a series of interactions between trafficker and victim, making it difficult to determine to which acts the victim has consented. Furthermore, it may remain unclear if the alleged victim has consented to the “act”, to the “intended exploitation” or to the actual exploitation and which of these should be the relevant stages for the purpose of addressing “consent”.

12. Another important question is which categories of victims should receive special treatment, in that their consent is irrelevant, whether or not “means” have

² For the definition of “child” see article 3 (d) of the Trafficking in Persons Protocol: “‘Child’ shall mean any person under eighteen years of age.”

³ Article 3 (c) states: “The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article.”

been employed. The Trafficking in Persons Protocol mentions only one such category — children. However, there are other populations, which, given their nature, may be considered at the national level — for example, persons of diminished mental capacity.

13. In addition, questions of proof may arise in regard to the alleged victim's consent. A relevant factor may include the severity of the exploitation, under the assumption that the more severe the exploitation, the less likely the victim would be to consent to it.

14. It is particularly important to elucidate the place of victim consent in the crime of trafficking in persons, in view of typical victim behaviour, which may lead to the possibly erroneous conclusion that a victim has consented to his or her intended exploitation. This behaviour may include accepting a situation without protest for long periods of time; not fleeing the situation, even when given the opportunity to do so; not submitting a complaint at the first opportunity; or returning to an abusive employer.⁴ On the other hand, there is a danger in focusing proceedings on the issue of victim consent, in that victim behaviour, rather than criminal behaviour, may become central to the proceedings.

IV. Guidance for response

A. Organized Crime Convention and Trafficking in Persons Protocol

15. In the Trafficking in Persons Protocol, the consent of the victim to the intended exploitation is irrelevant if one of the “means” described in the Protocol is used. The discussions which preceded the adoption of the Trafficking in Persons Protocol, reveal widely different views as to the standing of victim consent. These range from versions which stated that consent was entirely irrelevant, to suggestions not to allude to consent at all, lest this imply that under some circumstances it would be possible to consent to trafficking in persons, even though force or fraud were employed.⁵ The final version of the Protocol text is a compromise — while it does not espouse the position that consent negates the crime, it also does not adopt the opposing position that consent is always irrelevant. Rather, it states that consent is irrelevant when one of the “means” in the definition are used.

16. The interpretative note to article 3 (b) to the Trafficking in Persons Protocol states that it should not be interpreted as imposing restrictions on the right of

⁴ See UNODC Anti-human Trafficking Manual for Criminal Justice Practitioners, modules 3 and 4. Also see OSCE, Office of Special Representative and Coordinator for Combating Trafficking in Human Beings, the following publications: “Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude” 2010, report of the Tenth Alliance against Trafficking in Persons Conference, Vienna, 17-18 June 2010; A Summary of Challenges to Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region, Background paper for the Alliance against Trafficking in Persons High-Level Conference, Vienna, 16-17 November 2006; A Summary of Challenges on Addressing Human Trafficking for Labour Exploitation in the Agricultural Sector in the OSCE Region, Background paper for the Alliance against Trafficking in Persons Conference: Vienna, 27-28 April 2009.

⁵ See interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add. 1).

accused persons to a full defence and to the presumption of innocence. It should also not be interpreted as imposing on the victim the burden of proof (see A/55/383/Add.1, para. 68). Thus, it is still incumbent upon the prosecution to prove all three elements of the trafficking crime and the statement on the irrelevance of victim consent does not shift the burden of proof to the shoulders of the defence.

17. The commentary to the UNODC Model Law against Trafficking in Persons views article 3 (b) of the Protocol as restating existing international legal norms by which it is “logically and legally impossible to “consent” when one of the means listed in the definition is used.” It recommends that States include a separate paragraph on consent only “if there is any doubt about the issue of consent in national domestic law”. It recommends that this separate paragraph should follow the language of the Trafficking in Persons Protocol. This commentary addresses the inherent circularity in the Protocol’s approach, whereby consent is deemed to be irrelevant only when “means” are used, where, on the face of it, these “means”, of their nature, seem to vitiate consent.

18. The UNODC/UN.GIFT publication entitled *Combating Trafficking in Persons: A Handbook for Parliamentarians*, emphasizes the different stages of trafficking during which consent may change its form. It states that:

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

B. Conference of the Parties to the Organized Crime Convention and the Working Group on Trafficking in Persons

19. At its fifth session, in October 2010, the Conference of the Parties to the Organized Crime Convention requested the Secretariat to continue its work on the analysis of key concepts of the Trafficking in Persons Protocol (CTOC/COP/2010/17, resolution 5/2, para. 10).

20. At its second session, held in January 2010, the Working Group on Trafficking in Persons recommended that the Secretariat should prepare, in consultation with States parties, issue papers to assist criminal justice officers in penal proceedings, on subjects such as consent, harbouring, receipt and transport; abuse of a position of vulnerability; exploitation; and transnationality. In addition, the Secretariat should ensure that any new concepts were integrated into existing tools and materials (see CTOC/COP/WG.4/2010/6, para. 31 (b)).

21. At its first session, held in April 2009, the Working Group on Trafficking in persons recommended that, with regard to the definition of concepts that might require further clarity, the Secretariat should prepare, in consultation with States parties, issue papers⁶ to assist States parties in better understanding and interpreting key concepts of the Trafficking in Persons Protocol, especially legally relevant

⁶ Thus far, one such issue paper has been published by the Secretariat, entitled “Analysis of key concepts: focus on the concept of ‘abuse of power or of a position of vulnerability’ in article 3, Trafficking in Persons Protocol” (CTOC/COP/WG.4/2011/3).

definitions in order to assist criminal justice officers in penal proceedings (see CTOC/COP/WG.4/2009/2, para. 7).

C. Additional international guidance

22. The Recommended Principles and Guidelines on Human Rights and Human Trafficking, published by the United Nations High Commissioner for Human Rights, addresses in guideline 8.1⁷ the importance of treating child trafficking in a tailored way, stating that States should consider:

Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo Protocol, *evidence of deception, force, coercion, etc. should not form part of the definition of trafficking where the person involved is a child* (emphasis added).

D. Regional guidance

23. In its article 2, paragraph 4, European Union directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims, adopts the approach of the Trafficking in Persons Protocol in regard to consent by adult victims, but clarifies the object of that consent more widely as encompassing both intended and actual exploitation, stating that:

The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.

As regards the consent of a child victim, in its article 2, paragraph 5, the directive adopts the approach of the Trafficking in Persons Protocol that the consent of a child will be irrelevant, whether or not “means” have been used by stating that:

When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.

24. The Council of Europe Convention on Action against Trafficking in Human Beings reproduces, in its article 4, the definition of trafficking in human beings in article 3 of the Trafficking in Persons Protocol, including the statement on consent. The explanatory report on the Convention underlines the complexity of the issue of consent and provides guidelines regarding the key issues involved, including the stages at which “consent” may exist, stating that:

The question of consent is not simple and it is not easy to determine where free will ends and constraint begins. In trafficking, some people do not know what is in store for them, while others are perfectly aware that, for example, they will be engaging in prostitution. However, while someone may wish employment and possibly be willing to engage in prostitution, that does not

⁷ Available at http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf.

mean that they consent to be subjected to abuse of all kinds. For this reason, article 4 (b) provides that there is trafficking in human beings whether or not the victim consents to be exploited.

25. The Model Law to Criminalise People Trafficking, prepared in the framework of the Bali Process,⁸ provides an alternative way of addressing the issue, in that consent is deemed irrelevant without regard to the “means” used and the object of consent can be either the process of trafficking or the exploitation. Section 6 of the Model Law states that:

For sections 3, 4, and 5,⁹ it is not a defence that the trafficked person consented to the people trafficking or to the exploitation.

26. The League of Arab States Model Law to Combat the Crime of Trafficking in Persons, adopted by the Council of the Arab Ministers of Justice in November 2005 and by the Council of Arab Ministers of the Interior in 2006, espouses the general approach of the Trafficking in Persons Protocol whereby consent is irrelevant when “means” have been used, but includes special treatment, not only for children, but also for “persons deprived of legal personality”. Article 2 of the Model Law states that:

Consent of the victim to exploitation in trafficking offences is irrelevant where any of the means set forth in paragraph 1 or article 1 of this law is used. (unofficial translation)

The use of these means shall not be required in cases of trafficking in children or *in persons deprived of legal personality* and his/her guardian consent or the consent of his/her guardian shall be irrelevant in all cases. (emphasis added)

E. National response

27. States have adopted different approaches in regard to the place of victim consent in the crime of trafficking in persons. Some States have adopted the approach of the Trafficking in Persons Protocol in that they deem consent irrelevant if “means” have been employed, except in the case of child trafficking where consent is irrelevant, whether or not “means” have been employed. This includes the Spanish Criminal Code (sect. 177bis), Egypt’s People’s Assembly Law No. (64) of 2010 Regarding Combating Human Trafficking (sect. 3) and the Counter-Trafficking in Persons Act, 2010 of Kenya (sects. 3(2), 3(3)).

28. Another approach adopted at the national level is to follow the lead of the Trafficking in Persons Protocol and forge a connection between the “means” used by the trafficker and the issue of consent, while not including all the “means”

⁸ Since its inception in 2002, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process) has had as its goal to raise regional awareness of the consequences of people smuggling, trafficking in persons and related transnational crime, and has developed and implemented strategies and practical cooperation in response. More than 40 countries and numerous international agencies participate in this voluntary forum. The Model Law to Criminalise People Trafficking, prepared in the framework of the Bali Process is available at http://www.baliprocess.net/files/Legislation/Model_legislation.pdf.

⁹ Section 3 concerns the offence of people trafficking; section 4 concerns the offence of trafficking in children; and section 5 concerns the offence of exploiting a trafficked person.

mentioned in the Protocol such as “abuse of position of vulnerability” (see Thailand’s Anti-Trafficking in Persons Act B.E. 2551 (2008) (sects. 4 and 6(2)).

29. Some States deem victim consent irrelevant, without connection to the “means” used. This is the case for the Transnational Crimes Act 2005 of Tonga (sect. 26) and Indonesia’s Law on the Eradication of the Criminal Act of Trafficking in Persons, 2007 (sect. 26).

30. Other States, such as Belarus and the United Arab Emirates have no specific legislation that explicitly addresses consent to trafficking in persons. However, among the States which do not have specific legislation, some do have case law which deals with this issue.¹⁰

31. As regards child trafficking, many States adopt the approach of the Trafficking in Persons Protocol that consent of children is not relevant, whether or not “means” have been employed, as described above in paragraph 28. On the other hand, some States require means, even in the case of child trafficking, and in these cases there is no distinction drawn between the consent of a child and that of an adult; the consent of both is irrelevant, only if “means” have been used. An example of such legislation is the Trafficking in Persons (Prevention) Act, 2010 of Antigua and Barbuda (sect. 19).

32. In regard to categories of persons who are treated differently in the context of victim consent, some States go farther than the Trafficking in Persons Protocol in delineating categories whose consent is irrelevant without regard to the “means” used. For example, according to the Law No. 15 of 2011 On Combating Trafficking in Human Beings of Qatar, “persons who lack capacity” are treated specially, as are children (sect. 3).

33. An extensive section on issues related to consent, though not in relation to trafficking in particular, can be found in the Criminal Code of Grenada (sect. 15), which deems consent as void in a number of situations, including if obtained by means of deceit or of duress (sect. 15(b) or if given by a parent or guardian otherwise than in good faith for the benefit of the person on whose behalf it is given (sect. 15(d)).

34. An example of a definition of “consent” can be found in section 2 of the Counter Trafficking in Persons Act, 2010 of Kenya, which states that

“consent” in relation to a person means that the person agrees by choice and has the freedom and capacity to make that choice.

35. The United States Department of State Model Law to Combat Trafficking in Persons adopts the approach of the Trafficking in Persons Protocol, while clarifying that “the object of consent is intended or realized exploitation” (art. II, paras. 200 and 206).

¹⁰ This is the situation in Norway and Israel. For relevant Israeli cases, see the UNODC Human Trafficking Case Law Database at www.unodc.org/cld/index.jspx.

Annex

Key tools and recommended resources

UNODC

Model Law against Trafficking in Persons

The Model Law against Trafficking in Persons has been developed to assist States in implementing the provisions contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing that Convention. It aims to facilitate the review and amendment of existing legislation as well as the adoption of new legislation. The Model Law covers not only the criminalization of trafficking in persons and related offences, but also the different aspects of assistance to victims as well as establishing cooperation between different State authorities and NGOs. Each provision provided in the Model Law is accompanied by a detailed commentary, providing several options for legislators, as appropriate, and legal sources and examples. Of special relevance is article 5, which provides a first approach to the definition of the term “abuse of a position of vulnerability”.

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

UNODC

Anti-human Trafficking Manual for Criminal Justice Practitioners

The Anti-Human Trafficking Manual for Criminal Justice Practitioners is the result of a global cooperative process in which expert representatives from academia, NGOs, international organizations, law enforcement officers, prosecutors and judges from all over the world contributed their expertise and experiences. In line with the Trafficking in Persons Protocol, the purpose of the Anti-Human Trafficking Manual for Criminal Justice Practitioners is to support criminal justice practitioners in the prevention of human trafficking, the protection of its victims, the prosecution of its perpetrators and in the international cooperation needed to achieve these goals.

Module 3, on psychological reactions of victims of trafficking in persons, and Module 4, on control methods in trafficking in persons, present the complexity of gauging victims’ consent in trafficking situations.

Office of the United Nations High Commissioner for Human Rights Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking

The Commentary seeks to provide clear direction on the issue of legal status by identifying those aspects of the *Principles and Guidelines* that can be tied to established international legal rights and obligations. It uses the *Principles and Guidelines* to structure a detailed overview of the legal aspects of trafficking, focusing particularly, but not exclusively, on international human rights law. It provides court and tribunal decisions to illustrate the translation into practice of the *Principles and Guidelines*.

Principle 5 and Related Guidelines: Intervention to Address Factors Increasing Vulnerability, is oriented towards prevention, but also deals with the issue of victim vulnerability and could serve as an example of positions of special vulnerability.

Available at http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf.

UN.GIFT

Handbook for Parliamentarians: Combating Trafficking in Persons

The Inter-Parliamentary Union (IPU) and UNODC developed a handbook in the framework of UN.GIFT to inspire Parliamentarians to enact sound laws and adopt good practices that will strengthen national responses to human trafficking. Of note, the Handbook emphasizes the different stages of trafficking during which consent may change its form, underlining that while migrant smuggling generally involves the consent of those being smuggled, victims of trafficking, on the other hand, have either never consented or their initial consent has been rendered meaningless by the improper means used by the traffickers.

Available at http://www.unodc.org/documents/humantrafficking/UN_Handbook_engl_core_low.pdf.

Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude

This report by the OSCE's Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings is a report in the framework of the Alliance against Trafficking in Persons held in Vienna in June of 2010. This paper was written to provide a summary of national practices and challenges in legal responses to trafficking in human beings for domestic servitude, and is illustrated with cases reported in the OSCE Region. The aim is to assist participating States in the development and implementation of national anti-trafficking policy in compliance with OSCE commitments and other relevant international obligations, and to contribute to bridge the gap between international commitments, national anti-trafficking responses and the experiences of trafficked persons.

The case studies include situations in which victims appeared to consent to their exploitation and the reasons for this.

Available at <http://www.osce.org/cthb/75745>.

A Summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region

This report by the OSCE's Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings is a background paper for the Alliance against Trafficking in Persons held in Vienna in 2006. This paper was written to provide a summary of national practices and challenges in legal responses to trafficking in human beings for labour exploitation, and is illustrated with cases reported in the OSCE Region. The aim is to assist participating States in the development and implementation of national anti-trafficking policy in compliance with OSCE commitments and other relevant international obligations, and to

contribute to bridge the gap between international commitments, national anti-trafficking responses and the experiences of trafficked persons.

The document deals with cases in which victims appeared to consent to their exploitation.

Available at <http://www.osce.org/cthb/24342>.

A Summary of Challenges on Addressing Human Trafficking for Labour Exploitation in the Agricultural Sector in the OSCE Region

This report by the OSCE's Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings presents an analysis of labour trafficking in one particular economic sector, agriculture. It addresses the current challenges within the agricultural sector, and aims to assist participating States, policymakers and non-governmental organizations (NGOs).

The report includes cases showing a continuum between consent and coercion (see, for example, page 29).

Available at <http://www.osce.org/cthb/37937?download=true>.
