

Part Two

**LEGISLATIVE GUIDE FOR THE
IMPLEMENTATION OF THE PROTOCOL TO
PREVENT, SUPPRESS AND PUNISH
TRAFFICKING IN PERSONS,
ESPECIALLY WOMEN AND CHILDREN,
SUPPLEMENTING THE UNITED NATIONS
CONVENTION AGAINST TRANSNATIONAL
ORGANIZED CRIME**

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I. Background and general provisions

A. Introduction

1. Structure of the legislative guide for the implementation of the Trafficking in Persons Protocol

1. There is some overlapping of the provisions of the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I, “the Organized Crime Convention”), the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex II, “the Trafficking in Persons Protocol”), and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex III, “the Migrants Protocol”). Provisions of the instruments are intended to be complementary. Many of the provisions that have parallel or overlapping elements are likely to involve many of the same policy, legislative and administrative areas in the Governments of States that intend to become parties to one or more of the Protocols. Each of those legislative guides for the implementation of the Protocols therefore begins with subject matter that is often common to the Protocols, such as technical provisions, including important provisions of the Organized Crime Convention that apply to, and thus create additional obligations with respect to, offences established in accordance with the Protocols. Chapter II of the present legislative guide deals with matters specific to the Trafficking in Persons Protocol. To allow Governments to take maximum advantage of overlapping or parallel elements, reference has been made to related provisions and instruments.

2. For ease of access and convenient reference, chapter II of the present legislative guide contains sections on criminalization, providing victims with assistance and protection, prevention and cooperation.

3. The above-mentioned general topics do not necessarily correspond to specific provisions of the Protocols. Many of the provisions have multiple

aspects, including, for example, elements of prevention, protection and cooperation. Specific references to the relevant provisions of the Organized Crime Convention and its Protocols have been included wherever possible.

4. To facilitate further the use of the legislative guides, a common format has been used for each chapter wherever feasible. Each section starts by quoting the relevant provisions of the Protocol and, where appropriate, the Organized Crime Convention. That has been done to provide faster, easier access to the language of the instruments. Each section includes some or all of the following general elements: introduction; summary of the main requirements; main elements of the articles; implementation of the articles; related provisions; optional elements; and information resources.

5. The subsection entitled “Summary of main requirements” provides in a checklist the essential requirements of the article concerned.

6. The process by which the requirements of the Trafficking in Persons Protocol can be fulfilled will vary from State to State. Monist systems could ratify the Protocol and incorporate its provisions into domestic law by official publication. Dualist systems would require implementing legislation.

7. In sorting out the priorities and obligations under the Trafficking in Persons Protocol, the guidelines presented below should be kept in mind.

8. In establishing their priorities, drafters of national legislation should bear in mind that the provisions of the Organized Crime Convention and the Protocols thereto do not all have the same level of obligation. In general, provisions can be grouped into the following three categories:

(a) Measures that are mandatory (either absolutely or where specified conditions have been met);

(b) Measures that States parties must consider applying or endeavour to apply;

(c) Measures that are optional.

9. Whenever the words “States are required to” are used, the reference is to a mandatory provision. Otherwise, the language used in the legislative guide is “required to consider”, which means that States are strongly asked

to seriously consider adopting a certain measure and make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the legislative guide employs the words “may wish to consider”. Occasionally, States “are required” to choose one or another option (as in the case of offences established in accordance with article 5 of the Organized Crime Convention). In that case, States are free to opt for one or the other or both options.

10. The subsection entitled “Summary of main requirements” at the beginning of each section lists measures that are mandatory and measures that States parties must consider applying or must endeavour to apply. In the analysis that follows, measures that are mandatory are discussed first, and those measures which States parties must consider applying or must endeavour to apply and which are optional are discussed together.

11. In general, the articles of the Organized Crime Convention and the Protocols describe conduct that must be criminalized by domestic law, made punishable by appropriate sanctions and made subject to the various requirements governing extradition, mutual legal assistance and other forms of assistance and cooperation.

12. In several places, the Organized Crime Convention and the Protocols refer to criminalization using “such legislative and other measures as may be necessary”. The reference to “other” measures is not intended to require or permit criminalization without legislation. Such measures are additional to, and presuppose the existence of, legislation (see the interpretative notes (A/55/383/Add.1, para. 9)).

13. It is recommended that drafters of legislation check for consistency with other offences, definitions and other legislative uses before relying on formulations or terminology of the Organized Crime Convention, which was drafted for general purposes and addressed to Governments. Thus, the level of abstraction is higher than that necessary for domestic legislation. Therefore, in drafting legislation, care should be taken not to incorporate verbatim parts of the text but to reflect the spirit and meaning of the various articles. To assist in that process, interpretative notes will be cited throughout the legislative guide, providing context and insight into the intent and concerns of the negotiators of the Organized Crime Convention and its Protocols.

2. *Other materials to be considered in ratifying or acceding to¹ the Trafficking in Persons Protocol*

14. Legislators, drafters and other officials engaged in efforts to ratify or implement the Protocol should also refer to the following:²

(a) The text of the Organized Crime Convention (General Assembly resolution 55/25, annex I);

(b) The text of the Protocols (Assembly resolutions 55/25, annexes II and III, and 55/255, annex);

(c) 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);

(d) The legislative guides for the implementation of the Organized Crime Convention and the other Protocols.

15. For more detailed information about the nature and extent of the problem of trafficking and an assessment of related policy issues and options, the “anti-trafficking toolkit” prepared by the United Nations Office on Drugs and Crime may also be consulted. It should be noted, however, that the toolkit is not specifically oriented towards providing guidance on measures required to implement the Protocol.³

¹Those States which have signed the Organized Crime Convention and its Protocols by the date prescribed for each instrument may become parties by filing an instrument of ratification. Those which did not sign within that period may become parties at any time once the instrument is in force by acceding to the instrument. Information about the exact requirements may be obtained from the Office of Legal Affairs, United Nations Headquarters. For the sake of simplicity, references in this guide are mainly to “ratification”, but the possibility of joining an instrument by accession should also be borne in mind.

²The texts of all of the documents in all official languages of the United Nations, as well as other information about the legislative history of the instruments and their present status, can be obtained from the web site of the United Nations Office on Drugs and Crime (<http://www.unodc.org>).

³See also A. Kartusch, *Reference Guide for Anti-Trafficking Legislative Review with Particular Emphasis on South Eastern Europe* (Warsaw, Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, 2001) and *Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices*, United Nations Economic and Social Commission for Asia and the Pacific (available at <http://www.unescap.org/esid/gad/04widresources/05pubreport/combat%2D1.pdf> and <http://www.unescap.org/esid/gad/04widresources/05pubreport/combat%2D2.pdf>).

B. Scope and technical provisions of the Trafficking in Persons Protocol and its relationship to the United Nations Convention against Transnational Organized Crime

Trafficking in Persons Protocol

“Article 1

“Relation with the United Nations Convention against Transnational Organized Crime

“1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

“2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

“3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.”

“Article 2

“Statement of purpose

“The purposes of this Protocol are:

“(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 States Parties in order to meet those objectives.”

“Article 4

“Scope of application

“This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.”

“Article 14

“Saving clause

“1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention⁴ and the 1967 Protocol⁵ relating to the Status of Refugees and the principle of non-refoulement as contained therein.

“2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”

“Article 17

“Entry into force

“1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

“2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.”

Organized Crime Convention

“Article 37

“Relation with protocols

“1. This Convention may be supplemented by one or more protocols.

⁴United Nations, *Treaty Series*, vol. 189, No. 2545.

⁵*Ibid.*, vol. 606, No. 8791.

“2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

“3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

“4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.”

1. Main elements of the articles

(a) Application of the Organized Crime Convention to the Trafficking in Persons Protocol (article 1 of the Protocol and article 37 of the Convention)

16. Article 37 of the Organized Crime Convention and article 1 of each of the Protocols thereto together establish the basic relationship between the Convention and its Protocols. The four instruments were drafted as a group, with general provisions against transnational organized crime (for example, extradition and mutual legal assistance) in the Convention and elements specific to the subject matter of the Protocols in each of the Protocols (for example, offences established in accordance with the Protocol and provisions relating to travel and identity documents). As the Protocols are not intended to be independent treaties, to become a party to any of the Protocols, a State is required to be a State party to the Convention. That ensures that, in any case that arises under a Protocol to which the States concerned are parties, all of the general provisions of the Convention will also be available and applicable. Many specific provisions are drafted on this basis: the Convention contains general requirements for mutual legal assistance and other forms of international cooperation, for example, while requirements to render specific assistance such as the verification of travel documents or the tracing of a firearm, are found only in the appropriate Protocol or Protocols. Additional rules established by the relevant articles deal with the interpretation of similar or parallel provisions in each instrument and the application of general provisions of the Convention to the offences established in accordance with the Protocol and other provisions.

17. Article 1 of the Trafficking in Persons Protocol and article 37 of the Organized Crime Convention establish the following basic principles governing the relationship between the two instruments:

(a) *No State can be a party to any of the Protocols unless it is also a party to the Convention* (art. 37, para. 2, of the Convention). Simultaneous ratification or accession is permitted, but it is not possible for a State to be subject to an obligation of any of the Protocols unless it is also subject to the obligations of the Convention;

(b) *The Convention and the Trafficking in Persons Protocol must be interpreted together* (art. 37, para. 4, of the Convention and art. 1, para. 1, of the Protocol). In interpreting the various instruments, all relevant instruments should be considered and provisions that use similar or parallel language should be given generally similar meaning. In interpreting one of the Protocols, the purpose of that Protocol must also be considered, which may modify the meaning applied to the Convention in some cases (art. 37, para. 4, of the Convention);

(c) *The provisions of the Convention apply, mutatis mutandis, to the Protocol* (art. 1, para. 2, of the Protocol). The meaning of the phrase *mutatis mutandis* is clarified in the interpretative notes (A/55/383/Add.1, para. 62) as “with such modifications as circumstances require” or “with the necessary modifications”. This means that, in applying provisions of the Convention to the Protocol, minor modifications of interpretation or application may be made to take account of the circumstances that arise under the Protocol, but modifications should not be made unless they are necessary, and then only to the extent that is necessary. This general rule does not apply where the drafters have specifically excluded it;

(d) *Offences established in accordance with the Protocol shall also be regarded as offences established in accordance with the Convention* (art. 1, para. 3, of the Protocol). This principle, which is analogous to the *mutatis mutandis* requirement, is a critical link between the Protocol and the Convention. It ensures that any offence or offences established by a State in order to criminalize trafficking in human beings as required by article 5 of the Protocol will automatically be included within the scope of the basic provisions of the Convention governing forms of international cooperation such as extradition (art. 16) and mutual legal assistance (art. 18).⁶ It also links the Protocol and the Convention by making applicable to offences established in accordance with the Protocol other mandatory provisions of the Convention. In particular, as discussed below in chapter III, on criminalization, obligations in the Convention concerning money-laundering (art. 6), liability of legal persons (art. 10), prosecution,

⁶In most cases, the drafters used the phrase “offences covered by this Convention” to make this link. See, for example, article 18, paragraph 1, which sets the scope of the obligation to extradite offenders.

adjudication and sanctions (art. 11), confiscation (arts. 12-14), jurisdiction (art. 15), extradition (art. 16), mutual legal assistance (art. 18), special investigative techniques (art. 20), obstruction of justice (art. 23), witness and victim protection and enhancement of cooperation (arts. 24-26), law enforcement cooperation (art. 27), training and technical assistance (arts. 29 and 30) and implementation of the Convention (art. 34) apply equally to the offences established in the Protocol. Establishing a similar link is therefore an important element of national legislation on the implementation of the Protocols;

(e) *The Protocol requirements are a minimum standard.* Domestic measures may be broader in scope or more severe than those required by the Protocol, as long as all obligations specified in the Protocol have been fulfilled (art. 34, para. 3, of the Convention).

(b) *Application of other relevant international instruments
(article 14 of the Protocol)*

18. The Trafficking in Persons Protocol is only the latest in a series of international instruments that deal with trafficking in human beings or related subjects. Slavery and different forms of trafficking in humans have long been a matter of concern, and other attempts have been made to prevent and combat the problem. That made it necessary, in the course of drafting the Protocol, to consider carefully the language of the various provisions and how they would interact with principles already established in international law.

19. The basic principle established is that any rights, obligations or responsibilities applied to a State party prior to the Protocol are maintained and not affected by the Protocol. The Protocol does not narrow or diminish rights, obligations or responsibilities; it only adds to them to the extent that is provided for in the text (art. 14 of the Protocol). Thus, for example, requirements established by different instruments for dealing with asylum-seekers and victims of trafficking would apply jointly to the same case whenever a victim requests political asylum. At the same time, care has also been taken to recognize that not all States that become parties to the Protocol are parties to some of the other relevant international instruments. While the Protocol refers to principles of international humanitarian and human rights law, becoming a party to the Protocol does not indirectly make those principles applicable to a State to which they had not previously applied (see the interpretative notes (A/55/383/Add.1, para. 85)). However, given the number of overlapping principles that may apply to any State

party in both developing and applying legislation, drafters and legislators are advised to review the scope of any pre-existing obligations under customary international law and any instruments that apply, as well as any national legislation previously enacted or adopted to implement those obligations, in order to ensure that any measures undertaken in conformity with the Protocol are consistent. Apart from the basic humanitarian and human rights principles, a number of specific attempts have also been made to deal with slavery or other earlier concepts of trafficking in human beings. A list of instruments that might be considered or consulted by drafters is found at the end of the present section.

(c) *Non-discrimination (article 14 of the Protocol)*

20. Article 14, paragraph 2, of the Trafficking in Persons Protocol states that the measures set forth in the Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. This focuses on the interpretation of the Protocol and not the national law that implements it; however, drafters may wish to consider the principle of non-discrimination in drafting specific provisions, particularly where they deal with victims.⁷

(d) *Interpretation of the Trafficking in Persons Protocol
(articles 1 and 14 of the Protocol and
article 37 of the Convention)*

21. The interpretation of treaties is a matter for States parties to the Protocol. This is generally covered by the 1969 Vienna Convention on the Law of Treaties,⁸ and will not be discussed in detail in the present guide. One factor in interpreting treaties, however, is that interpretative principles may be established by the treaty itself. A number of specific interpretative references appear in both the Convention and the Protocol,⁹ and the dispute settlement provisions of the instruments, where the States parties concerned

⁷See also the Vienna Declaration and the Programme of Action, adopted on 25 June 1993 by the World Conference on Human Rights (A/CONF.157/24 (Part I), chap. III) (available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)).

⁸United Nations, *Treaty Series*, vol. 1155, No. 18232. The text of the Vienna Convention is made available online by the International Law Commission (<http://www.un.org/law/ilc/texts/treaties.htm>).

⁹See, for example, article 16, paragraph 14, of the Convention, which makes the principle of non-discrimination a limit on the interpretation and application of the basic obligation to extradite offenders.

have agreed to be bound by them, all require negotiations, followed by arbitration, as the means of resolving any disputes over interpretation or application matters. Specific references will be raised in relation to the subject matter to which they apply, but there are also two general provisions which apply to the Protocol. The first, described above, established by article 37 of the Convention and article 1 of the Protocol, is that elements of the Convention must be taken into consideration when interpreting the Protocol. These involve the relationship between the two instruments and will therefore be covered below. The second is found in article 14, paragraph 2, of the Protocol, which requires that the measures set forth in the Protocol should be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. Further, the interpretation and application of those measure should be consistent with internationally recognized principles of non-discrimination.

2. Purposes of the Trafficking in Persons Protocol (article 2 of the Protocol)

22. Three basic purposes of the Protocol are established by article 2: the prevention and combating of trafficking; the protection and support of victims of trafficking; and the promotion of cooperation between States parties. Article 2, subparagraph (a), requires that “particular attention” be paid to combat and prevent trafficking in women and children, while maintaining 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 Protocol. That reflects a decision taken by the General Assembly to expand the scope of the Protocol after the negotiations had already commenced.¹⁰ In drafting legislation on the implementation of the Protocol, legislators should generally bear in mind that, although anyone could become a victim, in addition to general rules, more specific provisions may be needed in some areas to take into account the problems of women and children who are victimized.

3. Scope of application (article 4 of the Protocol)

23. The range of activities and circumstances in which the Protocol will apply, as well as exclusions to its application, are governed by article 4 of

¹⁰The original mandate (General Assembly resolution 53/111, para. 10) refers only to trafficking in women and children, which was expanded (see Assembly resolution 54/126, para. 3) to the formula which appears in the final title and the text of article 2, subparagraph (a).

the Protocol and articles 2 and 3 of the Convention, which apply to the Protocol, *mutatis mutandis*. Except as otherwise provided therein, the provisions of the Convention limit the application of the Protocol to cases where at least one of the offences involved has some element of transnationality and some degree of involvement of an “organized criminal group”, limits that also apply to the Convention itself and all of the other Protocols (see the relevant chapters of the legislative guide for the implementation of the Organized Crime Convention for a detailed discussion of these concepts).

24. In addition, article 4 of the Protocol further limits the Protocol to matters relating to trafficking in persons. That illustrates the importance of ensuring that any legislation on the implementation of the Convention and the Protocols is drafted in a consistent and coordinated manner. For example, it is easy to imagine a single case in which investigators encounter trafficking (the Trafficking in Persons Protocol and the Convention), money-laundering (the Convention) and the smuggling of migrants (the Migrants Protocol) and in which the extradition of offenders is sought (the Convention); it will be important to ensure that all of those forms of cooperation are handled by the States involved in a consistent manner. Notwithstanding the comment in paragraph 23 about the Convention dealing only with situations having an element of transnationality or organized crime, it will be noted that the relevant provisions of the Convention and the Protocol must be reviewed carefully. The text of the provisions is relatively broad.

25. It is important for drafters of legislation to note that the provisions relating to the involvement of transnationality and organized crime do not always apply. While in general the reader should consult the legislative guide for the implementation of the Organized Crime Convention (paras. 29-31) for details about when the criteria apply and do not apply, it is important to emphasize that, for example, article 34, paragraph 2, of the Convention provides that legislators must not incorporate elements concerning transnationality or an organized criminal group into domestic offence provisions.¹¹ Together, these establish the principle that, while States parties should have to establish some degree of transnationality or involvement of an organized criminal group with respect to most aspects of

¹¹The only exception to this principle arises where the language of the criminalization requirement specifically incorporates one of these elements, such as art. 5, para. 1, of the Convention (presence of an organized criminal group). These requirements are discussed in more detail in the legislative guide for the implementation of the Organized Crime Convention.

the Protocol, their prosecutors do not have to prove either in order to obtain a conviction for trafficking in persons or any other offence established by the Convention or its Protocols. In the case of trafficking in persons, domestic offences should apply even where transnationality and the involvement of organized criminal groups do not exist. As another example, the first paragraphs of the articles on extradition (art. 16) and mutual legal assistance (art. 18) of the Convention set forth certain circumstances in which one or both of these elements are to be considered satisfied. Regarding the definition of organized criminal group, it should be noted that, according to the interpretative notes to article 2, subparagraph (a), of the Convention (A/55/383/Add.1, para. 3), the *travaux préparatoires* should indicate that the words “in order to obtain, directly or indirectly, a financial or other material benefit” should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members. Finally, it is also important for drafters of legislation to note that the Trafficking in Persons Protocol also applies to the protection of victims regardless of transnationality and involvement of an organized criminal group.

4. Implementation

26. In general, most of the provisions discussed in the present chapter govern the interpretation and application of the other provisions. Thus they may provide for assistance and guidance to be given to Governments, drafters and legislatures, but they do not themselves require specific measures for implementation.

27. However, there may be a need for legislation to ensure the fulfilment of the requirements that the Organized Crime Convention be applied *mutatis mutandis* to the Protocol and that offences covered by the Trafficking in Persons Protocol be regarded as offences established in accordance with the Convention. The measures required as a result of these provisions are described in detail in chapter II, section A, below.

5. Information resources

28. Drafters of national legislation may wish to refer to the related instruments listed below.

(a) *Other instruments*

(i) *Humanitarian, human rights and other instruments of general application*

1948 Universal Declaration of Human Rights
General Assembly resolution 217 A (III)
<http://www.unhchr.ch/udhr/index.htm>

1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
United Nations, *Treaty Series*, vol. 75, No. 970
http://www.unhchr.ch/html/menu3/b/q_genev1.htm

1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
United Nations, *Treaty Series*, vol. 75, No. 971
http://www.unhchr.ch/html/menu3/b/q_genev2.htm

1949 Geneva Convention relative to the Treatment of Prisoners of War
United Nations, *Treaty Series*, vol. 75, No. 972
<http://www.unhchr.ch/html/menu3/b/91.htm>

1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War
United Nations, *Treaty Series*, vol. 75, No. 973
<http://www.unhchr.ch/html/menu3/b/92.htm>

1950 Convention for the Protection of Human Rights and Fundamental Freedoms
United Nations, *Treaty Series*, vol. 213, No. 2889
<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

1951 Convention relating to the Status of Refugees
United Nations, *Treaty Series*, vol. 189, No. 2545 p. 137
http://www.unhchr.ch/html/menu3/b/o_c_ref.htm

1966 International Covenant on Civil and Political Rights
United Nations, *Treaty Series*, vol. 999, No. 14668 p. 171
http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

1967 Protocol relating to the Status of Refugees
United Nations, *Treaty Series*, vol. 606, No. 8791
http://www.unhchr.ch/html/menu3/b/o_p_ref.htm

1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

United Nations, *Treaty Series*, vol. 1125, No. 17512

<http://www.unhchr.ch/html/menu3/b/93.htm>

1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

United Nations, *Treaty Series*, vol. 1125, No. 17513

<http://www.unhchr.ch/html/menu3/b/94.htm>

1979 Convention on the Elimination of All Forms of Discrimination against Women

United Nations, *Treaty Series*, vol. 1249, No. 20378

<http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>

1989 Convention on the Rights of the Child

United Nations, *Treaty Series*, vol. 1577, No. 27531

<http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm>

1993 Vienna Declaration and the Programme of Action adopted by the World Conference on Human Rights

Document A/CONF.157/24 (Part I), chap. III

[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)

2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

General Assembly resolution 54/263, annex I

<http://www.unhchr.ch/html/menu2/6/crc/treaties/opac.htm>

2000 Optional 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

<http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>

(ii) *Instruments against trafficking or slavery in general*

1926 Slavery Convention

United Nations, *Treaty Series*, vol. 212, No. 2861

<http://www.unhchr.ch/html/menu3/b/f2sc.htm>

1930 Convention concerning Forced or Compulsory Labour

International Labour Organization Convention No. 29

<http://www.ilo.org/ilolex/english/convdisp1.htm>

1953 Protocol amending the Slavery Convention
United Nations, *Treaty Series*, vol. 182, No. 2422
<http://www.unhchr.ch/html/menu3/b/f2psc.htm>

1956 Supplementary Convention on the Abolition of Slavery, the Slave
Trade, and Institutions and Practices Similar to Slavery
United Nations, *Treaty Series*, vol. 266, No. 3822
<http://www.unhchr.ch/html/menu3/b/30.htm>

1957 Convention concerning the Abolition of Forced Labour
International Labour Organization Convention No. 105
United Nations, *Treaty Series*, vol. 320, No. 4648
<http://www.ilo.org/ilolex/english/convdisp1.htm>

1973 Convention concerning Minimum Age for Admission to
Employment
International Labour Organization Convention No. 138
United Nations, *Treaty Series*, vol. 1015, No. 14862
<http://www.ilo.org/ilolex/english/convdisp1.htm>

1999 Convention concerning the Prohibition and Immediate Action for
the Elimination of the Worst Forms of Child Labour
International Labour Organization Convention No. 182
United Nations, *Treaty Series*, vol. 2133, No. 37245
<http://www.ilo.org/ilolex/english/convdisp1.htm>

(iii) *Instruments concerning slavery or trafficking related to
sexual exploitation*

1904 International Agreement for the Suppression of the White Slave
Traffic
League of Nations, *Treaty Series*, vol. 1, p. 83

1910 International Convention for the Suppression of the White Slave
Traffic
League of Nations, *Treaty Series*, vol. VIII, p. 278

1921 International Convention for the Suppression of the Traffic in
Women and Children
League of Nations, *Treaty Series*, vol. IX, p. 415

1933 International Convention for the Suppression of the Traffic in
Women of Full Age
League of Nations, *Treaty Series*, vol. CL, p. 431

1947 Protocol to amend the 1921 Convention for the Suppression of the Traffic in Women and Children and the 1933 Convention for the Suppression of the Traffic in Women of Full Age

United Nations, *Treaty Series*, vol. 53, No. 770

(See also the 1921 International Convention for the Suppression of the Traffic in Women and Children, as amended by the 1947 Protocol (United Nations, *Treaty Series*, vol. 53, No. 771) and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age, as amended by the 1947 Protocol (United Nations, *Treaty Series*, vol. 53, No. 772))

1949 Protocol amending the 1904 International Agreement for the Suppression of the White Slave Traffic, and the 1910 International Convention for the Suppression of the White Slave Traffic

United Nations, *Treaty Series*, vol. 30, No. 446

(See also the 1904 International Agreement for the Suppression of the White Slave Traffic, as amended by the 1949 Protocol (United Nations, *Treaty Series*, vol. 92, No. 1257) and the 1910 International Convention for the Suppression of the White Slave Traffic as amended by the 1949 Protocol (United Nations, *Treaty Series*, vol. 98, No. 1358))

1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

United Nations, *Treaty Series*, vol. 96, No. 1342

<http://www.unhchr.ch/html/menu3/b/33.htm>

II. Specific obligations of the Trafficking in Persons Protocol

A. Definition and criminalization of trafficking in persons

Trafficking in Persons Protocol

“Article 3

“Use of terms

“For the purposes of this Protocol:

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

“(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;

“(c) 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;

“(d) ‘Child’ shall mean any person under eighteen years of age.”

“Article 5

“Criminalization

“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.

“2. 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.”

29. Several general principles of criminalization established in the Organized Crime Convention apply to its Protocols. It may also be important in some legal systems to ensure that criminal offences established in accordance with the Convention and the Protocols are coherent to support the investigation and prosecution of organized criminal groups and their members for any offence, or combination of offences, established in accordance with the instruments. In many cases, for example, organized criminal groups involved in firearms trafficking are also engaged in smuggling or trafficking human beings or narcotic drugs or other commodities, or in other crimes such as money-laundering, and national legislatures will need to ensure that the formulation of provisions on the relevant criminal offences pursuant to the Convention and its Protocols will support coordinated efforts to investigate and prosecute all of those activities together, where appropriate (see also the section entitled “Definition and criminalization of the smuggling of migrants” of the legislative guide for the implementation of the Migrants Protocol, in particular paras. 27-30, for a discussion of the definition of “smuggling of migrants” and the distinctions between illegal migration, smuggling of migrants and trafficking in persons).

1. Summary of main requirements

30. In the Trafficking in Persons Protocol, States parties are required to establish as criminal offences:

(a) The conduct set forth in article 3 of the Protocol, when committed intentionally (art. 5, para. 1);

(b) Subject to the basic concepts of its legal system, attempting to commit that offence (art. 5, para. 2 (a));

(c) Participating as an accomplice in that offence (art. 5, para. 2 (b));

(d) Organizing or directing other persons to commit that offence (art. 5, para. 2 (c)).

States parties are also required in article 1, paras. 2 and 3, of the Protocol to apply numerous provisions of the Organized Crime Convention to such conduct, as described in section 3 below.

2. *Main elements of the articles*

(a) *Definition of the term “trafficking in persons”*

31. Article 3 of the Protocol represents the first clear, internationally agreed definition of trafficking in persons (see also paras. 25-62 of the section entitled “Definition and criminalization of the smuggling of migrants” in the legislative guide for the Protocol). This forms the basis of the subject matter covered in the Protocol, the basis of international cooperation and other fundamental elements of the treaty. Prominent among these is the obligation to establish criminal offences: all States parties to the Protocol are obliged by article 5 to criminalize trafficking, either as a single criminal offence or a combination of offences that cover, at a minimum, the full range of conduct covered by the definition. Unlike the other two Protocols, which require also the criminalization of other related conduct, the Trafficking in Persons Protocol requires the criminalization of only “trafficking in persons” as defined, although many States have voluntarily identified and criminalized other related conduct.¹² States parties to the Protocol are also obliged to criminalize participating as an accomplice and organizing or directing other persons to commit the offence. Attempting to commit the offence must also be criminalized, but only “subject to the basic concepts” of the legal system of each State party (art. 5). The obligation applies to both natural persons and legal persons, though in the case of the latter the liability established need not necessarily be “criminal” liability (see art. 10 of the Convention).

32. The basic obligation to establish criminal offences is directly linked to the definition of “trafficking in persons” and it is this definition which is

¹²The Migrants Protocol requires the criminalization of enabling illegal residence and certain conduct in relation to travel or identity documents; and the Firearms Protocol requires the criminalization of multiple offences in relation to illicit manufacturing and trafficking, as well as a further offence of tampering with serial numbers or other markings of firearms. Additional offences adopted by some countries to supplement the trafficking in persons offence include conduct in relation to child abduction and the sale of children. These also supplement pre-existing offences such as abduction or kidnapping, which are already present in most countries.

therefore central to any legislation seeking to implement the Protocol. As defined, trafficking consists of a combination of three basic elements, each of which must be taken from a list set out in the definition. As defined in article 3 of the Protocol, “trafficking in persons” consists of:

(a) *The action 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,¹³ or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;

(c) *The purpose of exploitation*, which include, *at a minimum*: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery,¹⁴ servitude or the removal of organs.

33. The obligation is to criminalize trafficking as a combination of constituent elements and not the elements themselves. Thus, any conduct that combines any listed action and means and is carried out for any of the listed purposes must be criminalized as trafficking. Individual elements such as abduction or the exploitation of prostitution¹⁵ need not be criminalized, although in some cases supplementary offences may support the purposes

¹³Examples already adopted in national legislation include specific positions of vulnerability such as illegal or uncertain immigration or residency status, minority status, or conditions such as illness, pregnancy, or physical or mental disability (Belgium, *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (Law of 15 December 1980 on entry, stay, status and removal of aliens), art. 77 bis, para. 1). In other countries (such as Bulgaria), legislation has taken a more general approach, referring to abuse of authority and allowing the courts to define and apply the term to the facts of cases as they arise.

¹⁴“Forced labour” is not defined in the Protocol. There are, however, several international instruments in this regard, for example: the 1930 Convention concerning Forced or Compulsory Labour (Convention No. 105) of the International Labour Organization; and the 1957 Convention concerning the Abolition of Forced Labour (Convention No. 105) of the International Labour Organization. “Slavery” is not defined in the Protocol, but numerous international instruments, as well as the domestic laws of many countries, define or deal with slavery and similar practices (see, for example, article 4 of the 1948 Universal Declaration of Human Rights; the 1926 Slavery Convention, as amended by the 1953 Protocol (United Nations, *Treaty Series*, vol. 212, No. 2861); the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (United Nations, *Treaty Series*, vol. 266, No. 3822); the 1999 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention No. 182) of the International Labour Organization; article 11, paragraph 1, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (General Assembly resolution 45/158, annex); and article 4 (Prohibition of slavery and forced labour) of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms).

¹⁵Dealing with prostitution and related matters outside of the scope of trafficking in persons is specifically reserved for the laws and policies of individual States parties (see the interpretative notes (A/55/383/Add.1, para. 64)).

of the Protocol and States parties are free to adopt or maintain them if they wish to do so. The offence defined in article 3 of the Protocol is completed at a very early stage. No exploitation needs to take place.

34. Several additional interpretative issues specific to the definition and criminalization requirements are dealt with in part in the interpretative notes. The reference to the words “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 (A/55/383/Add.1, para. 63). Forms of sexual exploitation other than in the context of trafficking in persons are not covered by the Protocol (A/55/383/Add.1, para. 64). The removal of a child’s organs for legitimate medical or therapeutic reasons cannot form an element of trafficking if a parent or guardian has validly consented (A/55/383/Add.1, para. 65). References to slavery and similar practices may include illegal adoption in some circumstances (A/55/383/Add.1, para. 66).

(b) Criminalization of trafficking in persons

(i) Rationale

35. The main reason for defining the term “trafficking in persons” in international law was to provide some degree of consensus-based standardization of concepts. That, in turn, was intended to form the basis of domestic criminal offences that would be similar enough to support efficient international cooperation in investigating and prosecuting cases. Apart from direct advantages in that area, it was also hoped that the agreed definition would also standardize research and other activities, allowing for better comparison of national and regional data and giving a clearer global picture of the problem. The requirement to criminalize trafficking was intended as an element of a global counterstrategy that would also include the provision of support and assistance for victims and that would integrate the fight against trafficking into the broader efforts against transnational organized crime.

(ii) Implementation

36. Where such offences do not already exist, the adoption of criminal offences covering the full range of trafficking in persons, as well as organizing, directing and participating as an accomplice in any form of trafficking, is a central and mandatory obligation of all States parties to the

Protocol. Similar action must be taken in respect of attempts if that can be done within the basic concepts of the legal system of the country concerned. Liability must extend to both natural and legal persons, although for legal persons it can be criminal, civil or administrative liability. As discussed in section 4 below, entitled “Other general requirements for legislation criminalizing trafficking in persons”, it is important that the meaning of the Protocol, rather than the actual language used, should be reflected in national law. Generally simple incorporation of the definition and criminalization elements into national law will not be sufficient; given the nature and complexity of trafficking and other forms of transnational organized crime, drafters of legislation and legislators are advised to consider, draft and adopt the criminal offences and related provisions with great care.

37. Once it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence.

38. Article 3, subparagraphs (c) and (d), of the Protocol reflects the fact that no improper means need to be established when persons under 18 years of age are involved.¹⁶ Thus, in a prosecution in which the victim of trafficking is less than 18 years old, the prosecution must prove only action such as recruitment or transportation of the minor for the purpose of exploitation.

39. In defining and criminalizing trafficking, legislators are not bound by other international legal instruments, but a number of provisions could be taken into consideration. This is particularly true where the country concerned is a State party to another international instrument that has previously been implemented in national law. In such cases, legislators will generally wish to ensure that the various provisions use similar terminology and are consistent, to the extent that this is possible, while still implementing the required elements of the Protocol. In reconciling other obligations, drafters should bear in mind that national legislation may generally be broader or “more strict and severe” (art. 34, para. 3, of the Convention) than is actually required without affecting national conformity. To avoid inconsistencies with major principles of humanitarian and human rights law, article 14, paragraph 1, of the Protocol provides that “nothing in the Protocol shall affect the rights, obligations and responsibilities of States and

¹⁶Drafters should ensure that this does not extend to cases where parents consent to the removal of a child’s organ for legitimate medical or therapeutic purposes (see the interpretative notes (A/55/383/Add.1, para. 65)).

individuals under international law”. Provisions of other instruments that may be considered include the following:

(a) The definition of the term “international traffic in minors” in article 2, subparagraph (b), of the 1994 Inter-American Convention on International Traffic in Minors;

(b) The definition of trafficking used in article 1, paragraph 3, of the 2002 South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution;

(c) Annex 2 of the Convention based on article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention);

(d) Council of the European Union Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings.¹⁷

(c) *Criminalization of attempted trafficking in persons*

40. Paragraph 2 (a) of article 5 reads:

“2. 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;”

(i) *Rationale*

41. Generally, the negotiators were of the view that attempts to commit the basic trafficking offence should also be criminalized. However, the concept of “attempts” does not apply widely in the criminal justice systems of some States. Thus, the language “subject to the basic concepts of its legal system” was incorporated to create a general obligation on States parties to criminalize attempts, while not making this fully mandatory for States where it would be inconsistent with basic systemic requirements for the application of the crime of attempt.

¹⁷This document provides additional clarification and analysis for the assistance of European countries seeking to ratify the Protocol. However, it reflects policies agreed within Europe, which in some areas go beyond those reflected in the Protocol. Many of these may be seen as useful supplements to the Protocol, but they are not necessarily required for conformity.

(ii) *Implementation*

42. Since States developing legislation to ratify or implement the Protocol will either already have ratified the Organized Crime Convention or be in the process of doing so, drafters and legislators may wish to consider action to be taken in respect of the criminalization requirement set out in article 6, paragraph 1 (b), of the Convention (on attempted money-laundering), in which the same basic conditional obligation applies in respect of an attempt (see paras. 110-112 of the legislative guide for the implementation for the Organized Crime Convention). Where a State's criminal law system includes the limited concept of attempt, legislative consideration could be given to supplementing the basic trafficking offences with additional offences (see para. 46 below) to ensure the covering of as many scenarios as possible where offences are partially completed.

43. Generally, legislation seeking to criminalize "attempt" requires a basic intent to commit the offence as well as some concrete action in furtherance of that intent. In some countries a single act may suffice, while in others a higher standard requires every action necessary to complete the offence to have been committed. Mere preparation for an offence generally does not constitute an attempt, and some legislative language will usually be needed to allow the courts to distinguish between mere preparation and acts done in commission of the offence.

**3. *Application of mandatory provisions of the
Organized Crime Convention to
the Trafficking in Persons Protocol***

44. In establishing the offences required by the Protocols, it is important to bear in mind that each Protocol must be read in conjunction with the Organized Crime Convention. As set forth in chapter I above, the provisions of the Convention apply to the Protocol, *mutatis mutandis*, and among States parties to the Protocol the offences established in accordance with the Protocol are to be considered offences established by the Convention. Application of those provisions creates an obligation on States parties to take the following measures with respect to offences established in accordance with the Protocol, the implementation of which is discussed in greater detail in the legislative guide for the implementation of the Organized Crime Convention:

(a) *Money-laundering*. States parties must criminalize the laundering of the proceeds of a comprehensive range of trafficking offences in

accordance with article 6 of the Convention (see also paras.77-162 of the legislative guide for the implementation of the Organized Crime Convention);

(b) *Liability of legal persons.* Liability for offences must be established both for “natural” or biological persons and for “legal” persons, such as corporations, in accordance with article 10 of the Convention (see also paras. 240-260 of the legislative guide for the implementation of the Organized Crime Convention);

(c) *Offences must be “criminal” offences (except for legal persons).* Each of the provisions on offences in the Convention and the 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 (arts. 5, 6, 8 and 23 of the Convention; see also paras. 48-209 of the legislative guide for the implementation of the Organized Crime Convention);

(d) *Sanctions.* Sanctions adopted within domestic law must take into account and should be proportionate to the gravity of the offences (art. 11, para. 1, of the Convention; see also paras. 261-286 of the legislative guide for the implementation of the Organized Crime Convention);

(e) *Presence of defendants.* States parties are to take appropriate measures, in accordance with domestic law and with due regard to the rights of the defence, to ensure that conditions of release do not jeopardize the ability to bring about the defendant’s presence at subsequent criminal proceedings (art. 11, para. 3, of the Convention; see also paras. 261-286 of the legislative guide for the implementation of the Organized Crime Convention);

(f) *Parole or early release.* The gravity of offences established in accordance with the Protocol must be taken into account when considering the possibility of early release or parole of convicted persons (art. 11, para. 4, of the Convention; see also paras. 261-286 of the legislative guide for the implementation of the Organized Crime Convention);

(g) *Statute of limitations.* A long domestic statute of limitations period for commencement of proceedings for the Convention offences should be established, where appropriate, especially when “the alleged offender has evaded the administration of justice” (art. 11, para. 5, of the Convention; see also paras. 261-286 of the legislative guide for the implementation of the Organized Crime Convention);

(h) *Asset confiscation.* To the greatest extent possible, tracing, freezing and confiscation of the proceeds and instrumentalities of these offences should be provided for in domestic cases and in aid of other States

parties (arts. 12-14 of the Convention; see also paras. 287-340 of the legislative guide for the implementation of the Organized Crime Convention);

(i) *Jurisdiction.* The Convention requires States parties to establish jurisdiction to investigate, prosecute and punish all offences established by the Convention and any of the Protocols to which the State in question is a party. Jurisdiction must be established over all offences committed within the territorial jurisdiction of the State, including its marine vessels and aircraft. 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 to permit the State to meet its obligation under the Convention to prosecute offenders who cannot be extradited on request owing to nationality. The Convention also encourages the establishment of jurisdiction in other circumstances, such as all cases where the nationals of a State are either victims or offenders, but does not require this (art. 15, para. 1 (mandatory jurisdiction) and para. 2 (optional jurisdiction); and art. 16, para. 10 (obligation to prosecute where no extradition due to nationality of offender); see also the discussion of jurisdictional issues in paras. 210-239 of the legislative guide for the implementation of the Organized Crime Convention);

(j) *Extradition.* The obligations of the Convention require States parties to, inter alia, treat offences established in accordance with the Protocol as extraditable offences under their treaties and laws and to submit to competent authorities such offences for domestic prosecution where extradition has been refused on grounds of nationality (art. 16 of the Convention; see also paras. 394-449 of the legislative guide for the implementation of the Organized Crime Convention);

(k) *Mutual legal assistance.* Mutual legal assistance shall be afforded to other States parties in investigations, prosecutions and judicial proceedings for such offences; numerous specific provisions of article 18 of the Convention apply (see also paras. 450-499 of the legislative guide for the implementation of the Organized Crime Convention);

(l) *Special investigative techniques.* Special investigative techniques shall be provided for the purpose of combating such offences, if permitted by basic principles of the domestic legal system of the State party concerned and, where deemed appropriate, other techniques such as electronic surveillance and undercover operations (art. 20 of the Convention; see also paras. 384-393 of the legislative guide for the implementation of the Organized Crime Convention);

(m) *Obstruction of justice.* Obstruction of justice must be criminalized in accordance with article 23 of the Convention when carried out with

respect to offences established in accordance with the Protocol (see also paras. 195-209 of the legislative guide for the implementation of the Organized Crime Convention);

(n) *Protection of victims and witnesses.* Victims and witnesses are to be protected from potential retaliation or intimidation under the provisions of articles 24 and 25 of the Convention (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention);

(o) *Cooperation of offenders.* Article 26 of the Convention requires the taking of appropriate measures to encourage those involved in organized crime to cooperate with or assist competent authorities. The actual measures are not specified, but in many States they include the enactment of provisions whereby offenders who cooperate may be excused from liability or have otherwise applicable punishments mitigated. Some States possess sufficient discretion in prosecution and sentencing to allow this to be done without legislative authority, but where such discretion does not exist, legislation that creates specific offences, establishes mandatory minimum punishments or sets out procedures for prosecution may require adjustment if the legislature decides to use mitigation or immunity provisions to implement article 26. This could be done by establishing a general rule, or on an offence-by-offence basis, as desired (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention);

(p) *Law enforcement cooperation and training and technical assistance.* Channels of communication and police-to-police cooperation shall be provided for with respect to offences established in accordance with the Protocol under article 27 of the Convention (see also paras. 500-511 of the legislative guide for the implementation of the Organized Crime Convention); and training and technical assistance under articles 29-30 of the Convention.

4. Other general requirements for legislation criminalizing trafficking in persons

45. In addition to the above measures that must be provided for with respect to offences established in accordance with the Protocol, the Convention and Protocol contain specific requirements that are to be taken into account when drafting legislation establishing criminal offences in accordance with the Protocol, in particular:

(a) *Non-inclusion of transnationality in domestic offences.* The element of transnationality is one of the criteria for applying the Convention

and the Protocols (art. 3 of the Convention), but transnationality must not be required as a proof in a domestic prosecution. For this reason, transnationality is not required as an element of domestic offences;

(b) *Non-inclusion of an organized criminal group in domestic offences.* As with transnationality, the involvement of an organized criminal group must not be required as a proof in a domestic prosecution. Thus, offences established in accordance with the Protocol should apply equally, regardless of whether they were committed by individuals or by individuals associated with an organized criminal group and regardless of whether this can be proved or not (see art. 34, para. 2, of the Convention and the interpretative notes (A/55/383/Add.1, para. 59));

(c) *Criminalization may use legislative and other measures but must be founded in law.* Both the Convention and the Protocol refer to criminalization using “such legislative or other measures as may be necessary”, in recognition of the fact that a combination of measures may be needed in some States. The drafters of those instruments were concerned, however, that the rule of law would generally require that criminal offences be prescribed by law, and the reference to “other measures” was not intended to require or permit criminalization without legislation. The interpretative notes therefore provide that other measures are additional to and presuppose the existence of a law;¹⁸

(d) *Only intentional conduct need be criminalized.* All of the criminalization requirements of the Convention and Protocols require that the conduct of each offence must be criminalized only if committed intentionally. Thus, conduct that involves lower standards, such as negligence, need not be criminalized. Such conduct could, however, be made a crime under article 34, paragraph 3, of the Convention, which expressly allows for measures that are “more strict or severe” than those provided for in the Convention. Drafters should note that the element of intention refers only to the conduct or action that constitutes each criminal offence and should not be taken as a requirement to excuse cases, in particular where persons may have been ignorant or unaware of the law establishing the offence;

(e) *Description of offences.* While article 11, paragraph 6, of the Convention states that the description of the offences is in principle reserved to the domestic law of a State party, drafters should consider the

¹⁸The same principle is applied separately to the Convention and all of its Protocols (see the interpretative notes (A/55/383/Add.1, paras. 9, 69 and 91, and A/55/383/Add.3, para. 5); see also article 15 of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex).

meaning of the provisions of the Convention and the Protocol concerning offences and not simply incorporate the language of the Protocols verbatim. In drafting the domestic offences, the language used should be such that it will be interpreted by domestic courts and other competent authorities in a manner consistent with the meaning of the Protocol and the apparent intentions of its drafters. In some cases, the intended meaning may have been clarified in the interpretative notes, which were drafted and adopted by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, which drafted the Convention and its Protocols;¹⁹

*(f) Provisions of the Convention apply to the Protocol mutatis mutandis and should be interpreted together.*²⁰

5. *Optional elements*

46. The criminalization article contains no optional elements. At the same time, it should be emphasized that not only are, for example, the recruitment and transportation of persons for purposes of exploitation significant problems, but also maintaining those forms of exploitation is itself a serious problem. Therefore, in addition to criminalizing the mandatory and central offence of trafficking, national legislatures that have not already done so may wish to consider, pursuant to article 9, paragraph 5, of the Protocol, the criminalization of other forms of exploitations of persons, especially women and children.

6. *Information resources*

47. Drafters of national legislation may wish to refer to the sources of information listed below.

¹⁹The formal *travaux préparatoires* for the Convention and its Protocols have not yet been published. Recognizing that this would take some time, and seeking to ensure that legislative drafters would have access to the interpretative notes during the early years of the instruments, the Ad Hoc Committee drafted and agreed on language for interpretative notes on many of the more critical issues during its final sessions. The following documents were submitted to the General Assembly, along with the finalized texts of the draft instruments: interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Convention and the first two Protocols thereto (A/55/383/Add.1), and interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Firearms Protocol (A/55/383/Add.3).

²⁰See paras. 16 and 17 above.

(a) *Related provisions and instruments*

(i) *Organized Crime Convention*

Article 3 (Scope of application)

Article 5 (Criminalization of participation in an organized criminal group)

Article 10 (Liability of legal persons)

Article 11 (Prosecution, adjudication and sanctions)

Article 12 (Confiscation and seizure)

Article 13 (International cooperation for purposes of confiscation)

Article 14 (Disposal of confiscated proceeds of crime or property)

Article 15 (Jurisdiction)

Article 16 (Extradition)

Article 18 (Mutual legal assistance)

Article 20 (Special investigative techniques)

Article 23 (Criminalization of obstruction of justice)

Article 24 (Protection of witnesses)

Article 25 (Assistance to and protection of victims)

Article 26 (Measures to enhance cooperation with law enforcement authorities)

Article 27 (Law enforcement cooperation)

Article 29 (Training and technical assistance)

Article 30 (Other measures: implementation of the Convention through economic development and technical assistance)

Article 34 (Implementation of the Convention)

Article 37 (Relation with protocols)

(ii) *Trafficking in Persons Protocol*

Article 1 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 14 (Saving clause)

(iii) *Other instruments*

1994 Inter-American Convention on International Traffic in Minors
Organization of American States, *Treaty Series*, No. 79
<http://www.oas.org/juridico/english/Treaties/b-57.html>
Article 2, subparagraph (b)

1995 Europol Convention
<http://www.europol.eu.int/ANNEX>
Annex 2

2002 SAARC Convention on Preventing and Combating Trafficking in
Women and Children for Prostitution
<http://www.saarc-sec.org/publication/conv-traffiking.pdf>
Article 1, paragraph 3

(b) *Other sources of information*

Council of European Union framework decision of 19 July 2002 on
combating trafficking in human beings
Official Journal of the European Communities, L 203, 1 August 2002
[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!
CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett)
Articles 1-5

7. *Examples of legislation*

48. One legislative approach already taken in drafting legislation for implementing the Trafficking in Persons Protocol has been to criminalize the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation as defined in the Protocol, without incorporating an additional element of requiring a prohibited means. This approach may simplify the process of drafting legislation. Examples of legislation in which that approach has been followed include:

United States of America, Title 18, United States Code, Section 1590
<http://uscode.house.gov/download.htm>

United States of America, Office to Monitor and Combat Trafficking
in Persons
“Model Law to Combat Trafficking in Persons”

B. Providing assistance to and protecting victims of trafficking in persons

Trafficking in Persons Protocol

“Article 6

“Assistance to and protection of victims of trafficking in persons

“1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

“2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

“(a) Information on relevant court and administrative proceedings;

“(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

“3. 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, and, in particular, the provision of:

“(a) Appropriate housing;

“(b) Counselling 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.

“4. 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.

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

“6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”

“Article 7

“*Status of victims of trafficking in persons in receiving States*

“1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

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

“Article 8

“*Repatriation of victims of trafficking in persons*

“1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

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

“3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

“4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right

of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

“5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

“6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.”

1. Summary of main requirements

49. Each State party is obliged to fulfil the following mandatory requirements:

(a) Protect the privacy and identity of victims in appropriate cases and to the extent possible under domestic law (art. 6, para. 1);

(b) Ensure that victims receive information on relevant court proceedings in appropriate cases and have an opportunity to have their views presented and considered (art. 6, para. 2);

(c) Endeavour to provide for the physical safety of victims while they are in their territory (art. 6, para. 5);

(d) Ensure that measures exist to allow victims the opportunity to seek compensation for damages suffered (art. 6, para. 6);

(e) Facilitate and accept the return of victims who are nationals or have the right of permanent residence, with due regard for their safety (art. 8, para. 1);

(f) Verify without unreasonable delay whether a trafficking victim is a national or has the right of permanent residence and issue the necessary travel documents for re-entry (art. 8, paras. 3 and 4).

50. In addition, each State party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons (art. 6, para. 3).

2. Main elements of the articles

51. Articles 6, 7 and 8 of the Trafficking in Persons Protocol include measures that must be taken or considered in respect of trafficking victims.

Those articles should be read and implemented in conjunction with articles 24 and 25 of the Convention, which make provisions for victims and witnesses that apply to all cases covered by the Convention (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention). Essentially, the intention of the drafters of the Convention and the Protocol was to supplement the general rules for dealing with witnesses and victims with additional assistance and support specifically established for victims of trafficking. Thus, where the Trafficking in Persons Protocol applies, trafficking would be an offence covered by the Convention and victims would be covered by articles 6-8 of the Protocol and article 25 of the Convention. To the extent that the victims are also witnesses, they would also be covered by article 24 of the Convention.

52. Generally, the provisions of the Protocol setting out procedural requirements and basic safeguards are mandatory, while requirements to provide assistance and support for victims incorporate some element of discretion. The various obligations apply equally to any State party in which the victims are located, whether a country of origin, transit or destination (see the interpretative notes (A/55/383/Add.1, para. 71)). The nature of the social obligations reflects concerns about the costs and difficulties in delivering social assistance to all victims (or indeed, the general population) in many developing countries.

3. *Implementation of the articles*

(a) Protection of victims' identity and/or privacy (article 6, paragraph 1)

53. Article 6, paragraph 1, of the Trafficking in Persons Protocol requires that measures be taken to protect the privacy and identity of victims, including by making legal proceedings confidential, to the extent that that is possible under domestic law. Procedural laws may require amendments to ensure that courts have the authority to shield the identities or otherwise protect the privacy of victims in appropriate cases. That may include keeping the proceedings confidential, for example, by excluding members of the public or representatives of the media or by imposing limits on the publication of specific information, such as details that would permit identification of the victim.

54. These measures raise issues similar to those discussed under the obligation set out in article 24, paragraph 2 (b), of the Convention to permit

witnesses to give evidence in safety. Drafters should bear in mind that denying information to the defence must be reconciled with any applicable constitutional or other rights, including the right to confront witnesses or accusers and the right to disclose any information that might be exculpatory or assist the defence. Drafters should also consider that excluding the media or the public from legal proceedings limits the effectiveness of openness and transparency as a safeguard to ensure the propriety of the proceedings and may infringe the rights of the media to free expression. One option is to permit exclusion but to create a preference for open proceedings and require the courts to find some justification before ordering them closed.

*(b) Participation of victims in proceedings
(article 6, paragraph 2)*

55. The obligation to provide victims with information and an opportunity to present their views and concerns is mandatory but will not necessarily require legislative measures. The basic obligation to ensure that victims are permitted an opportunity to participate is set out in article 25, paragraph 3, of the Convention and will have been implemented by legislation under that article. Further legislation may not be needed; if it is needed, it may be based on that already adopted under the Organized Crime Convention. The requirement of the Convention applies to all offences covered by the Convention, which includes the offence of trafficking covered by the Protocol, once it applies to a particular State.

56. In many cases, the requirements of article 6, paragraph 2, of the Protocol can be implemented by administrative measures that require officials to provide victims with information and to furnish any practical assistance needed to support the presentation of “views or concerns”. However, legislators may consider provisions that ensure that judges cannot deny information or exclude participation on any basis other than prejudice to the rights of the defence. One means that has been employed to reconcile these interests in some States is the idea of a victim statement about the impact of the offence, which is made after a conviction but prior to the passing of sentence, when fundamental questions of guilt or innocence are no longer an issue. This is a process that is separate and distinct from calling a victim to provide evidence of guilt, which is subject to the otherwise applicable rules of evidence and safeguards against the disclosure of information that is not admissible. Drafters should also bear in mind that article 6, paragraph 4, of the Protocol requires factors such as age, gender and special needs to be taken into account (see also paras. 65-67 below). These have more

significant ramifications for the optional and non-legislative social support and assistance elements of article 6 but may also influence any legislation on access to judicial proceedings.

(c) *Physical safety of victims (article 6, paragraph 5)*

57. In considering the requirements of article 6, paragraph 5, of the Protocol, attention should be given to articles 24 and 25 of the Convention.²¹ The requirements of article 6, paragraph 5, of the Protocol are additional to the obligations contained in articles 24 and 25 of the Convention to provide assistance and protection to victims and witnesses but differ in two important aspects:

(a) The obligation to make provision for victims of trafficking is limited to measures needed to provide for their physical safety only, with most of the support measures being made discretionary by article 6, paragraph 3, of the Protocol while the measures for the protection of witnesses set forth in the Organized Crime Convention include domestic or foreign relocation and special arrangements for giving evidence as well;

(b) The obligation of the Protocol is only to “endeavour to provide” for safety, whereas the obligation of the Organized Crime Convention is to take any measures that are appropriate within the means of the State party concerned.

58. Articles 24 and 25 of the Convention both refer to the dangers represented by intimidation and retaliation for those who cooperate with authorities, whereas article 9, paragraph 1 (b), of the Protocol also refers to protection from the risk of revictimization, a significant problem in trafficking cases.

59. Generally, the legislative measures needed to implement this provision will be subsumed within those used to implement articles 24 and 25 of the Convention. Under the Protocol, each State party is obliged to actually take at least some steps that amount to an “endeavour” to protect safety.

(d) *Possibility of obtaining compensation (article 6, paragraph 6)*

60. The possibility of obtaining compensation (art. 6, para. 6, of the Trafficking in Persons Protocol) is similar but not identical to the

²¹See paras. 352-375 of the legislative guide for the implementation of the Organized Crime Convention.

corresponding obligation under the Convention (art. 25, para. 2).²² Legislation will generally be required if appropriate schemes offering at least the possibility of obtaining compensation are not already in place. The Protocol does not specify any potential source of compensation, which means that any or all of the following general options would suffice to meet the requirement of the Protocol:

(a) Provisions allowing victims to sue offenders or others under statutory or common-law torts for civil damages;

(b) Provisions allowing criminal courts to award criminal damages (that is, to order that compensation be paid by offenders to victims) or to impose orders for compensation or restitution against persons convicted of offences;

(c) Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages suffered as a result of a criminal offence.

(e) *Repatriation of victims (article 8)*

61. Legislators may find it advisable to adopt legislative guidance for officials responsible for repatriation in order to implement obligations under article 8. The following provisions could be considered:

(a) The Convention and its Protocols are primarily criminal justice instruments and, apart from criminal proceedings against offenders, there are no formal judicial or administrative proceedings in which the status of victims of trafficking as such can be determined. Legislation on immigration, criminal law statutes and other relevant legislation could be amended to incorporate the definition of “trafficking in persons” and allow those who claim to be victims an opportunity to do so in appropriate proceedings, including proceedings to deport them as illegal immigrants and proceedings in which they are prosecuted for criminal offences that they are alleged to have committed while being victims;

(b) Legislative provisions could be adopted requiring officials or tribunals responsible for matters relating to illegal immigration and deportation not to order or carry out orders of deportation of a victim while that person was (or may be) required in criminal proceedings against alleged traffickers or in relation to other offences covered by the Convention, or in civil proceedings against alleged offenders. Alternatively, legislation could

²²See paras. 368-371 of the legislative guide for the implementation of the Organized Crime Convention.

direct such officials or tribunals to verify whether any relevant proceedings were ongoing and, if so, to take the status of such proceedings into consideration before deporting a victim. Article 25, paragraph 3, of the Convention and article 6, paragraph 2 (b), of the Protocol both require States parties to ensure that victims are able to present their views and concerns at appropriate stages of proceedings against offenders, which may require the deferral of deportations until that stage has been reached (usually after conviction but prior to sentencing);

(c) Regarding the safety of the victim, legislative measures are not specified, but essentially the same provisions as may be needed to ensure the protection of witnesses in cases involving organized crime, such as powers to conceal identities, relocate the victim or issue new identity documents, could be considered here. This is similar to the requirements of article 24 of the Convention, and drafters may find it possible to rely on legislation implementing that provision as a precedent for trafficking cases. Alternatively, if such legislation is made applicable, further amendments may be unnecessary, provided that officials are given appropriate instructions. It may be necessary to specifically apply such legislation to victims of trafficking, since they may not have been witnesses at all or may have given evidence only in the State party to which they were trafficked and from which they have been repatriated. Article 8, paragraph 2, of the Protocol requires that any repatriation of victims must be with due regard for the safety of that person, and this requirement also applies to victims who have not been witnesses. It also applies to countries to whom the victim is repatriated as a national or permanent resident, even where the victim has not testified or has done so in another country;

(d) Article 8, paragraph 4, of the Protocol also requires a State party to whom one of its nationals or permanent residents is to be repatriated to issue any necessary travel or identity documents on request. This is primarily an administrative obligation, but it may require legislation to ensure that the appropriate officials or agencies are both able and obliged to issue the documents when the conditions set out in article 8 are met.

4. *Optional elements*

(a) Social assistance and protection of victims (article 6, paragraph 3)

62. Article 6, paragraph 3, of the Protocol contains an extensive list of support measures intended to reduce the suffering and harm caused to victims and to assist in their recovery and rehabilitation. As noted above,

the high costs of these benefits and the fact that they apply equally to all States parties in which victims are found, regardless of the level of socio-economic development or availability of resources, precluded these from being made obligatory. States seeking to ratify and implement the Protocol are, however, required to consider implementing these requirements and are urged to do so to the greatest extent possible within resource and other constraints. Apart from the humanitarian goal of reducing the effects on victims, there are several major practical reasons why this should be done. The first is that providing support, shelter and protection for victims increases the likelihood that they will be willing to cooperate with and assist investigators and prosecutors, a critical factor in a crime where the victims are almost always witnesses and intimidation by traffickers has repeatedly been cited as a major obstacle to prosecution. Such support and protection shall, however, not be made conditional upon the victim's capacity or willingness to cooperate in legal proceedings.²³ More generally, addressing the social, educational, psychological and other needs of victims as soon as they are discovered may ultimately prove less costly than dealing with them at a later stage. This is a particularly compelling justification where child victims are concerned, as children harmed by trafficking may later become re-victimized. Generally, legislative measures will not be needed to implement article 6, paragraph 3, of the Protocol except to the extent that legislation may be needed in some States to ensure that the necessary resources are allocated and that officials are assigned and instructed to deal with victims.

63. In some States, legislation has also been applied to regulate the activities of non-governmental organizations that deal with victims. This is neither required nor excluded by the Protocol itself, but it does raise some significant issues. A significant problem in trafficking cases is that offenders often control victims by convincing them that they will be arrested and prosecuted or deported if they approach authorities to complain or ask for help. Generally, the value of shelters, counselling and other services offered by non-governmental organizations in this area is that victims will approach them rather than State-based agencies in such cases, and the viability of such services in this role depends on their being as independent as possible from the State and in ensuring that this is known to potential victims. Thus, while some degree of regulation (for example, to establish basic security requirements and safety standards) may be needed,

²³This is also recommended in the report of the United Nations High Commissioner for Human Rights on the Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1).

legislators should consider the implications and may wish to use as much restraint as possible in developing and applying such regulations.

64. While the Protocol makes some provision for the assistance and support of victims, there is no specific requirement or process established whereby the status of victims as such can be established. In cases where steps are taken to provide assistance to victims, legislators may therefore wish to consider establishing some process or processes whereby victims or others acting on their behalf can seek such status. Generally, these might involve any or all of the following:

(a) Allowing courts or tribunals that convict traffickers or deal with trafficking in civil or other litigation to certify as such any victims who are identified during the proceedings, whether or not they actually participate in those proceedings;

(b) Allowing a judicial or administrative determination to be made based on the application of law enforcement, border control or other officials who encounter victims in the course of investigations or prosecutions; and/or²⁴

(c) Allowing a judicial or administrative determination to be made based on the application of the alleged victim personally or some representative, such as a representative of a non-governmental organization.²⁵

(b) *Special needs of children (article 6, paragraph 4)*

65. Article 6, paragraph 4, of the Protocol provides that each State party, in considering measures to assist and protect victims of trafficking, shall take into account the special needs of child victims. In a case where the age of a victim is uncertain and there are reasons to believe that the victim is a child, a State party may, to the extent possible under its domestic law, treat the victim as a child in accordance with the Convention on the Rights of the Child until his or her age is verified. In addition, a State party may also wish to consider:

(a) 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.

²⁴Such a process would be particularly important in obtaining the cooperation of victims, as it would enable assurances of safety to be given prior to any prosecution of the offenders.

²⁵This may require a legislative provision that is separate from the preceding one in order to require some extrinsic evidence of victimization in cases where the application is not brought or supported by law enforcement.

To the extent possible, the same person should be assigned to the child victim throughout the entire process;

(b) Ensuring that, during investigation, as well as prosecution and trial hearings where possible, direct contact between the child victim and the suspected offender be avoided. Unless it is against the best interest of the child, the child victim has the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings. During legal proceedings, the right to legal safeguards and effective protection of child witnesses needs to be strongly emphasized. Child victims who agree to testify should be accorded special protection measures to ensure their safety;

(c) Providing appropriate shelters for child victims in order to avoid the risk of re-victimization. Child victims should especially be hosted in safe and suitable accommodation, taking due account of their age and special needs;

(d) Establishing special recruitment practices and training programmes in order to ensure that individuals responsible for the care and protection of the child victims understand their needs, are gender-sensitive and possess the necessary skills both to assist children and to ensure that their rights are safeguarded.

66. In cases where child victims are involved, legislators may also wish to consider not returning those child victims unless doing so is in their best interest and, prior to the return, a suitable caregiver such as a parent, another relative, another adult caretaker, a government agency or a child-care agency in the country of origin has agreed and is able to take responsibility for the child and to provide him or her with appropriate care and protection. Relevant judicial authorities and government ministries, in cooperation with the relevant social service authorities and/or guardian, should be responsible for establishing whether or not the repatriation of a child victim is safe and should ensure that the process takes place in a dignified manner and is in the best interest of the child. Social service authorities, in cooperation with the Ministry of the Interior or other relevant authorities or agencies, where necessary, should take all necessary steps to trace, identify and locate family members and facilitate the reunion of the child victim with his or her family where that is in the best interest of the child. States should establish procedures to ensure that the child is received in the country of origin by an appointed member of the social services of the country of origin and/or the child's parents or legal guardian.

67. In those cases where return is voluntary or in the best interest of the child, each State party is encouraged to ensure that the child returns to

his or her home country in a speedy and safe manner. In situations where the safe return of the child to his or her family and/or country of origin is not possible or where such return would not be in the child's best interest, the social welfare authorities should make adequate long-term care arrangements to ensure the effective protection of the child and the safeguarding of his or her human rights. In this regard, relevant government authorities in countries of origin and of destination should develop effective agreements and procedures for collaborating with each other in order to ensure that a thorough inquiry into the individual and family circumstances of the child victim is conducted to determine the best course of action for the child.

(c) *Status of victims (article 7)*

68. There is no obligation to legislate measures relating to the status of victims. However, in several countries where measures have been adopted for the temporary or permanent residence of victims of trafficking, such as Belgium, Italy, the Netherlands and the United States of America, such measures have had a positive effect on victims coming forward to testify against traffickers and on non-governmental organizations encouraging victims to whom they provide services to report incidents to the Government.

5. Information resources

69. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) *Related provisions and instruments*

(i) *Organized Crime Convention*

Article 24 (Protection of witnesses)

Article 25 (Assistance to and protection of victims)

(ii) *Trafficking in Persons Protocol*

Article 9 (Prevention of trafficking in persons)

(iii) *Migrants Protocol*

Article 16 (Protection and assistance measures)

(iv) *Other instruments*

1989 Convention on the Rights of the Child
General Assembly resolution 44/25, annex
<http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm>
Article 7
Article 8
Article 12
Article 13
Article 40

1990 International Convention on the Protection of the Rights of All
Migrant Workers and Members of Their Families
General Assembly resolution 45/158, annex
Article 16, paragraph 2

2000 Optional 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
<http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>
Article 8, paragraph 1

(b) *Other sources of information*

Council of the European Union framework decision 2001/220/JHA of
15 March 2001 on the standing of victims in criminal proceedings
Official Journal of the European Communities, L 82, 22 March 2001
http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/1_082/1_08220010322en00010004.pdf
Article 9, paragraph 1

Council of the European Union framework decision 2002/629/JHA of
19 July 2002 on combating trafficking in human beings
Official Journal of the European Communities, L 203, 1 August 2002
[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!
CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett)
Article 7

Recommended Principles and Guidelines on Human Rights and
Human Trafficking

Document E/2002/68/Add.1

[http://www.unhcr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/caf3deb2b05d4f35c1256bf30051a003/\\$FILE/N0240168.pdf](http://www.unhcr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/caf3deb2b05d4f35c1256bf30051a003/$FILE/N0240168.pdf)

Proposal 2002/C 142/02 for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, adopted by the JHA Council of Ministers of the European Union (Justice and Home Affairs)

Official Journal of the European Communities, C142, 14 June 2002

http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_142/c_14220020614en00230036.pdf

Part II, section E

Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, adopted by the Committee of Ministers of the Council of Europe

<http://cm.coe.int/ta/rec/2000/2000r11.htm>

Measures 16-18 and 38-41

United Nations Children's Fund Guidelines for Protection of the Rights of Children Victims of Trafficking in South-Eastern Europe, May 2003

http://www.seerights.org/data/reports/Reports/UNICEF_Guidelines_Trafficking_Final_May03.doc

C. Prevention

Trafficking in Persons Protocol

"Article 9

"Prevention of trafficking in persons

"1. States Parties shall establish comprehensive policies, programmes and other measures:

"(a) To prevent and combat trafficking in persons; and

"(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

“2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

“3. 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.

“4. States 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. States 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.”

“Article 11

“Border measures

“1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

“2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

“3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

“4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

“5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

“6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”

“Article 12

“*Security and control of documents*

“Each State Party shall take such measures as may be necessary, within available means:

“(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

“(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.”

“Article 13

“*Legitimacy and validity of documents*

“At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.”

1. Summary of main requirements

70. Each State party to the Trafficking in Persons Protocol is obliged to carry out the following mandatory requirements:

(a) Establish comprehensive programmes to prevent and combat trafficking in persons and to protect victims from revictimization (art. 9, para. 1);

(b) Endeavour to undertake measures such as media campaigns and social and economic initiatives to prevent and combat trafficking in

persons, including through cooperation with non-governmental organizations (art. 9, paras. 2 and 3);

(c) Take or strengthen measures to make persons less vulnerable to trafficking and to discourage the demand that fosters all forms of trafficking in persons (art. 9, paras. 4 and 5);

(d) Strengthen border controls (art. 11, para. 1);

(e) Adopt measures to prevent commercial carriers from being used to commit trafficking offences and to require commercial transportation carriers to ascertain that all passengers have the required travel documents, including sanctions for failure to do so (art. 11, paras. 2 and 3);

(f) Ensure that travel and identity documents are of such quality that they cannot be altered or misused (art. 12, subpara. (a));

(g) Prevent the unlawful issuance of a State party's travel documents (art. 12, subpara. (b)).

2. Main elements of the articles

71. The Trafficking in Persons Protocol attempts, in conjunction with article 31 of the Organized Crime Convention, to require States parties to adopt what amount to comprehensive prevention strategies. Social prevention measures, including addressing the adverse social and economic conditions believed to contribute to the desire to migrate and hence to the vulnerability of victims to traffickers, are dealt with in article 31, paragraph 7, of the Convention and article 9, paragraph 4, of the Protocol. The more direct prevention afforded by education and awareness-raising is dealt with in article 31, paragraph 5, of the Convention and article 9, paragraph 2, of the Protocol. These are worded so as to encompass campaigns intended to raise awareness of the problem and mobilize support for measures against it among the general population, as well as more targeted efforts directed at warning specific groups or even individuals believed to be at high risk of victimization.

72. In these areas, preventive measures to be taken against trafficking in persons parallel those against organized crime in general, but the Protocol contains additional requirements relating specifically to such trafficking. Recognizing that trafficking in persons could be dealt with from both the demand side and the supply side, the drafters introduced article 9, paragraph 5, into the Protocol requiring measures intended to discourage the demand for services, which fosters the exploitive element of trafficking and

hence its major source of illicit revenue. The Protocol also takes into consideration that former victims are often even more vulnerable later on, especially if they are repatriated to places where trafficking is common. In addition to the basic requirements to protect victims from intimidation or retaliation by offenders, article 9, paragraph 1 (*b*), of the Protocol also calls for measures to protect victims from being trafficked again and from other forms of revictimization.

73. Finally, the Protocol seeks to prevent trafficking in persons by requiring measures intended to make it more difficult for traffickers to use conventional means of transport and enter into countries by requiring States parties to ensure that border controls are effective and by taking measures to prevent the misuse of passports and other travel or identification documents. Those provisions, found in articles 11-13 of the Trafficking in Persons Protocol, are identical to the corresponding provisions of the Migrants Protocol, which permit States seeking to ratify both Protocols to implement those measures jointly (see also paras. 80-90 of the legislative guide for the implementation of the Migrants Protocol). Implementation of the resulting legislation may vary depending on the means preferred by smugglers or traffickers, but the underlying legislation will generally be the same.

3. Implementation

(a) General prevention measures (article 9)

74. Most of the various measures called for in article 9 of the Trafficking in Persons Protocol involve non-legal initiatives and will not require legislative authority in most countries, apart from ensuring that the basic powers and resources are allocated to the appropriate officials. Efforts such as research into the nature and extent of the problem and the conducting of mass media campaigns or other public information campaigns and the alleviation of harsh social or economic conditions may be difficult to implement in some States but will not require legislation. In some areas, legislation may indirectly be used to address the problem. Another area is demand reduction, which could be achieved in part through legislative or other measures targeting those who knowingly use or take advantage of the services of victims of exploitation. All of these obligations are mandatory, requiring States parties to adopt or strengthen measures, but only in the sense that some action on each point must be taken. The Protocol does not specify in detail the exact actions required, leaving States parties some flexibility to apply the measures that they think are most likely to be effective.

(b) *Measures dealing with commercial carriers (article 11)*

75. The major legislative requirement set out in article 11 of the Trafficking in Persons Protocol is that States parties must adopt legislative or other measures to prevent, to the extent possible, commercial carriers from being used by traffickers (art. 11, para. 2). The exact nature of such measures is left to the discretion of the legislature; for example, cross-border carriers would be obliged to check the travel documents of passengers (art. 11, para. 3) and subjected to appropriate sanctions if that is not done (art. 11, para. 4). Drafters of legislation to implement these requirements should consider the following points:

(a) The basic obligation to be placed on carriers is to ascertain basic possession of whatever documents may be needed to enter the State of destination, but there is no obligation to assess the authenticity or validity of the documents or whether they have been validly issued to the person who possesses them (A/55/383/Add.1, paras. 80 and 103);

(b) The obligation is to attach liability to the carriers for not having checked the documents as required. States may establish liability for having transported undocumented migrants, but the Protocol does not require this;

(c) States are also reminded of their discretion not to hold carriers liable in cases where they have transported undocumented refugees (A/55/383/Add.1, paras. 80 and 103). This is not obligatory, however, and can be dealt with in the exercise of prosecutorial discretion where available and appropriate;

(d) The obligation in article 11, paragraph 4, is to provide for sanctions, the nature of which is not specified in either the Protocol or the interpretative notes. If criminal liability is to be provided for, drafters should consider article 10 of the Convention, regarding the obligation to provide for the liability of legal persons such as corporations;

(e) In the interpretative notes, there are several references to the meaning of the phrase “travel or identity document”, which includes any document that can be used for inter-State travel and any document commonly used to establish identity in a State under the laws of that State (A/55/383/Add.1, paras. 78 and 83).

(c) *Measures relating to travel or identity documents
(article 12)*

76. Article 12 of the Trafficking in Persons Protocol requires measures to ensure the adequacy of the quality and the integrity and security of

documents such as passports. The language makes it clear that this includes such measures as technical elements to make documents more difficult to falsify, forge or alter and administrative and security elements to protect the production and issuance process against corruption, theft or other means of diverting documents.²⁶ These do not entail direct legislative obligations, except possibly to the extent that the forms of documents such as passports are prescribed by legislation that would have to be amended to raise standards or legally designate the enhanced versions as formally valid documents. Indirectly, additional supplementary offences to deal with theft, falsification and other misconduct in relation to travel or identity documents could be considered if more general offences do not already apply.

77. Several kinds of technology that are new or in the process of being developed offer considerable potential for the creation of new types of document that identify individuals in a unique manner, can be rapidly and accurately read by machines and are difficult to falsify because they rely on information stored in a database out of the reach of offenders rather than information provided in the document itself. One example is the European Image Archiving System called False and Authentic Documents (FADO).²⁷ FADO makes possible the speedy verification of documents and fast, comprehensive notification of relevant law enforcement or immigration authorities in other participating States when misuse of a document or a fraudulent document is detected. One concern raised during the negotiation of article 12 of the Trafficking in Persons Protocol was the cost and technical problems likely to be encountered by developing countries seeking to implement such systems. The development of systems and technologies that minimize the amount of sophisticated maintenance and high-technology infrastructure needed to support and maintain such systems will be critical to the success of deployment in developing countries and, in some cases it may be necessary for technical assistance to be provided pursuant to article 30 of the Organized Crime Convention.

²⁶The interpretative notes establish a relatively broad range of abuses in relation to documents. Drafters intended to cover not only the creation of false documents, but also the alteration of genuine ones and the use of valid and genuine documents by persons not entitled to do so (A/55/383/Add.1, para. 105).

²⁷Council of the European Union Joint Action 98/700/JHA of 3 December 1998, adopted by the Council on the basis of article K.3 of the Treaty on European Union concerning the setting up of a European Image Archiving System (FADO) (*Official Journal of the European Communities*, L 333, 9 December 1998) (available at <http://europa.eu.int/scadplus/leg/en/lvb/l33075.htm>).

4. Related provisions of the Organized Crime Convention and the Protocol against the Smuggling of Migrants by Land, Sea and Air

78. Legislators and drafters should note that these provisions should be read and applied in conjunction with article 31 of the Convention, which deals with the prevention of all forms of organized crime. Given the nature of migration and the smuggling of migrants, in article 31, paragraph 5, of the Convention, on the promotion of public awareness of the problems associated with organized crime, and paragraph 7, on the alleviation of social conditions that render socially marginalized groups vulnerable to organized crime, may be of particular interest in implementing the Trafficking in Persons Protocol.

79. Legislators and drafters charged with implementing both the Migrants Protocol and the Trafficking in Persons Protocol may also wish to take into consideration the fact that many similarities exist between the origins of cases involving smuggling of migrants and those involving trafficking in persons. Therefore, prevention measures may in many cases be developed and implemented jointly. For example, awareness-raising programmes to caution potential victims, including migrants, about the dangers of smuggling, trafficking and general dealings with organized criminal groups and more general efforts to alleviate social or other conditions that create pressure to migrate may be efficiently and effectively implemented on a joint basis.

5. Information resources

80. Drafters of legislation may wish to refer to the sources of information listed below.

(a) Related provisions and instruments

(i) Organized Crime Convention

Article 10 (Liability of legal persons)

Article 30 (Other measures: implementation of the Convention through economic development and technical assistance)

Article 31 (Prevention)

(ii) *Smuggling of Migrants Protocol*

Chapter III (Prevention, cooperation and other measures)

(iii) *Other instruments*

2000 Optional 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

<http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>

Article 9, paragraphs 1 and 2

Article 10, paragraphs 1 and 3

(b) *Other sources of information*

Council of the European Union Joint Action 98/700/JHA of 3 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the setting up of a European Image Archiving System (FADO)

Official Journal of the European Communities, L 333, 9 December 1998

<http://europa.eu.int/scadplus/leg/en/lvb/l33075.htm>

Recommendation No. R (2000) 11, of 19 May 2000, on Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation, adopted by the Committee of Ministers of the Council of Europe

<http://cm.coe.int/ta/rec/2000/2000r11.htm>

Council of the European Union Directive 2001/51/EC of 28 June 2001, supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985

Official Journal of the European Communities, L 187, 10 July 2001

http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_187/l_18720010710en00450046.pdf

Article 4

Twelve Commitments in the Fight against Trafficking in Human Beings, agreed upon at the meeting of Justice and Home Affairs (JHA) Council of Ministers of the member States of the European Union and the candidate States, Brussels, 28 September 2001

Point 12

2002 Recommended Principles and Guidelines on Human Rights and
Human Trafficking

Document E/2002/68/Add.1

Guideline 7 (Preventing trafficking)

Proposal 2002/C 142/02 for a comprehensive plan to combat illegal
immigration and trafficking of human beings in the European
Union, adopted by the JHA Council of Ministers of the European
Union (Justice and Home Affairs) in Brussels on 28 February
2002

Official Journal of the European Communities, C 142, 14 June 2002
[http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_142/c_14220020614
en00230036.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_142/c_14220020614en00230036.pdf)

Paragraph 56

Brussels Declaration on Preventing and Combating Trafficking in
Human Beings, made at the European Conference on Preventing
and Combating Trafficking in Human Beings: Global Challenge
for the 21st Century, Brussels, 18-20 September 2002

[http://europa.eu.int/comm/justice_home/news/forum_crimen/2002/
workshop/brussels_decl_en.htm](http://europa.eu.int/comm/justice_home/news/forum_crimen/2002/workshop/brussels_decl_en.htm)

D. Cooperation

Trafficking in Persons Protocol

“Article 6

“Assistance to and protection of victims of trafficking in persons

“ . . .

“3. 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, and, in particular, the provision of:

“(a) Appropriate housing;

“(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

“(c) Medical, psychological and material assistance; and

“(d) Employment, educational and training opportunities.

“ . . . ”

“Article 8

“Repatriation of victims of trafficking in persons

“1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

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

“3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

“4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

“5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

“6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.”

“Article 9

“Prevention of trafficking in persons

“ . . .

“3. 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.

“4. States 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. States 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.”

“Article 10

“Information exchange and training

“1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them 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.

“2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the

prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

“3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.”

“Article 11

“Border measures

“1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

“2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

“3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

“4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

“5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

“6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”

“Article 13

“Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.”

1. Summary of main requirements

81. Pursuant to the Trafficking in Persons Protocol, each State party shall:

(a) Cooperate with each other by exchanging information concerning the means and methods of traffickers, including their use of travel documents (art. 10, para. 1);

(b) Provide or strengthen training for law enforcement, immigration and other relevant officials (art. 10, para. 2);

(c) Comply with use restrictions placed on information received from another State Party (art. 10, para. 3);

(d) Facilitate and accept the return of victims who are nationals or have the right of permanent residence, with due regard for their safety (art. 8, para. 1);

(e) Verify without unreasonable delay whether a trafficking victim is a national or has the right of permanent residence, and issue necessary travel documents for re-entry (art. 8, para. 3).

82. In addition, a State party shall:

(a) Consider implementing support measures in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society (art. 6, para. 3);

(b) Where appropriate, consider including cooperation with non-governmental organizations, other relevant organizations and other elements of civil society in establishing preventive measures in accordance with article 9 (art. 9, para. 3);

(c) Consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication, without prejudice to article 27 (Law enforcement cooperation) of the Organized Crime Convention (article 11, para. 6, of the Protocol).

2. *Main elements of the articles*

83. Various articles set out a series of specific obligations to cooperate with other States parties with respect to specific subject matter and, in two cases, obligations to cooperate with entities that are not States parties to the Trafficking in Persons Protocol. As with other requirements of the Protocol, it is essential that, both in developing and applying implementing legislation, the Protocol provisions must be read and applied together with the corresponding articles of the Convention. For example, apart from the specific obligation to assist in verifying travel or identity documents under article 13 of the Protocol, there are no articles on extradition or mutual legal assistance in the Protocol because these are already fully covered by articles 16 and 18 of the Convention.

(a) *Information-sharing (article 10)*

84. The most general obligation to cooperate with other States parties is found in article 10 of the Trafficking in Persons Protocol, which requires the sharing of information about a range of relevant matters, including the identification of possible victims and/or traffickers in transit and information about the various means used by offenders, including the misuse of travel or identity documents. As with similar elements of the Organized Crime Convention and the other Protocols, the sharing of information raises some concerns about confidentiality. The obligation to share is limited to such sharing as is in accordance with domestic law, and article 10, paragraph 3, obliges States that receive information to comply with any restrictions placed on the use of the information by the sending State party. Generally, this may include both restrictions on the cases or types of cases in which the information could be used as evidence as well as more general restrictions intended to prevent disclosure to the public or potential criminal suspects. One issue that may arise in States with constitutional or other obligations to disclose potentially exculpatory information to defence counsel in criminal cases is that absolute confidentiality cannot always be guaranteed. The negotiators of the Convention worked out a compromise formula for dealing with this scenario (see paragraphs 5 and 19 of article 18), and officials confronted with this issue may wish to review those provisions and paragraphs 500-511 of the legislative guide for the implementation of the Convention. (Similar language is also used in article 12, paragraph 5, of the Firearms Protocol.)

(b) *Repatriation of victims (article 8)*

85. Article 8, which deals with the repatriation of victims of trafficking in persons, imposes a basic obligation on States parties to facilitate and accept the repatriation of any victim who is one of their nationals or who had a right of permanent residence²⁸ in their country at the time the victim entered the country. In support of repatriation, other specific forms of cooperation are also required. States parties must assist in verifying nationality and residence status on request (art. 8, para. 3), and agree to issue any travel documents or other authorizations needed to permit the victim to travel for repatriation (art. 8, para. 4). These obligations are fully mandatory, but they are subject to any other applicable bilateral or other agreements (art. 8, para. 6) and any rights afforded to victims by applicable national laws (art. 8, para. 5) and must be undertaken by all concerned with due regard for the safety of the victims involved (art. 8, para. 2).²⁹

(c) *Border measures and travel documents
(articles 11-13)*

86. Articles 11-13 of the Trafficking in Persons Protocol are identical to the corresponding provisions of the Migrants Protocol; where a State intends to become a party to both Protocols, joint implementation is recommended, at least insofar as legislative measures are concerned (see paras. 91-112 of the legislative guide for the implementation of the Migrants Protocol). In developing and implementing such legislation, however, drafters and legislators should bear in mind that there are significant differences between smuggling and trafficking, particularly with respect to the people affected by those acts. Persons who have been trafficked are victims of crime and are generally far more vulnerable to harm, both as a result of the trafficking and the intended or subsequent exploitation and through intimidation or retaliation on the part of the traffickers. This has important implications for the implementation of national laws and particularly important implications for programmes established for the training of officials.

²⁸Regarding the meaning of “permanent residence”, see the interpretative notes (A/55/383/Add.1, para.72). Drafters should also note that the basic obligation to accept repatriation of nationals or residents under this Protocol differs from the scope of the similar obligation in the Smuggling of Migrants Protocol.

²⁹See also the general obligations to protect and assist victims in article 6, paragraph 5, of the Protocol and article 25 of the Convention, as well as chapter II, section B, of the present legislative guide and chapter IV.E of the legislative guide for the implementation of the Organized Crime Convention.

87. Under article 11, generally, States parties are required to strengthen border controls to the extent possible and, in addition to taking measures pursuant to article 27 of the Convention, to consider strengthening cooperation between border control agencies, including by the establishment of direct channels of communication (art. 11, paras. 1 and 6). Under article 12, they are required to ensure the integrity and security of their travel documents. Under article 13, they are also required to verify within a reasonable time the legitimacy and validity of documents purported to have been issued by them at the request of another State party.

(d) Obligations to cooperate with entities that are not States parties to the Trafficking in Persons Protocol (article 6, paragraph 3, and article 9, paragraph 3)

88. The Protocol obliges its States parties to cooperate with entities that are not States parties in some circumstances. In the case of providing assistance to victims (art. 6) and the establishment of prevention measures (art. 9), the importance of non-governmental organizations, other relevant organizations and other elements of civil society was recognized, and cooperation with those entities is required, where appropriate, under article 6, paragraph 3, and article 9, paragraph 3.

3. Implementation of the articles

(a) Information-sharing (article 10)

89. As with other areas of cooperation, the mere exchange of information is not likely to require legislative action. Given the nature of some of the information that may be exchanged, however, amendments may be needed to domestic confidentiality requirements to ensure that such information can be disclosed, and precautions may be needed to ensure that it does not become public as a result. The interpretative notes also raise the need for prior consultations in some cases, especially before sensitive information is shared spontaneously and not on request (A/55/383/Add.1, para. 37). Amendments may involve changes to media or public access-to-information laws, official secrecy laws and similar legislation to ensure an appropriate balance between secrecy and disclosure. As noted above, the requirements of the Trafficking in Persons Protocol regarding confidentiality are less elaborate than those of the Organized Crime Convention and the Firearms Protocol, but the issues and the possible legislative responses will generally be similar. Countries in receipt of information may face

restrictions on disclosure (for example, no disclosure except where essential as criminal evidence) or restrictions on use (for example, prohibition on use in any other cases, in cases that do not involve trafficking, or restrictions on use in non-criminal matters, such as immigration-related proceedings). Where national laws implementing article 18 of the Convention are of sufficient scope regarding the types of information covered, further amendments may not be needed to implement the Trafficking in Persons Protocol. Alternatively, amendments to expand that legislation or parallel provisions might be sufficient.

(b) *Repatriation of victims (article 8)*

90. The repatriation of victims of trafficking raises difficult policy issues for many Governments, but in most countries, conformity with the basic requirements involves primarily the issuance of administrative instructions to the appropriate officials and ensuring that the necessary resources are available to permit them to provide the necessary assistance. Legislative amendments might be required in some States, however, to ensure that officials are required to act (or in appropriate cases, to consider acting) in response to requests and that they have the necessary legal authority to issue visas or other travel documents when a national or resident is to be returned. In drafting such legislation, officials should bear in mind that any obligations in international law governing the rights or treatment of victims of trafficking, including those applicable to asylum-seekers, are not affected by the Trafficking in Persons Protocol or the fact that the State concerned has or will become a party to it (art. 14, para. 1, of the Protocol and the interpretative notes (A/55/383/Add.1, paras. 76, 77, 84 and 85)). Actual repatriations should preferably, but not necessarily, be voluntary, and should take into consideration the status of any ongoing legal proceedings involving the victim as such (art. 8, para. 2, of the Protocol).³⁰ The interpretative notes also indicate that repatriation should not be carried out until any relevant nationality or residency status has been ascertained (A/55/383/Add. 1, para. 113).

91. Any principal legislative measures needed to implement these requirements would involve changes to ensure that officials have adequate resources and authority to carry them out. For example, amendments might be needed to laws governing the issuance of passports or other travel or

³⁰The major concern about ongoing legal proceedings arose from cases cited by some delegations in which victims have been deported from some countries by immigration authorities before they could be called as witnesses or provide other assistance to prosecution authorities.

identification documents to ensure that they may lawfully be issued in repatriation cases and that the appropriate officials have sufficient powers to issue them based on appropriate criteria. To implement the requirements that safety, legal proceedings and other factors are taken into consideration, laws and administrative practices may require adjustment to ensure that the decision-making officials have the appropriate information and are legally obliged to consider it. An important element in some countries will be ensuring that there are adequate links between law enforcement and prosecution officials who may be developing a criminal case against traffickers and immigration authorities responsible for deporting and repatriating victims to ensure that victims are not removed before they can participate effectively in the criminal process. Where feasible, States should also consider training officials likely to be involved in the return of victims, bearing in mind the requirements to ensure that basic rights are respected (art. 8, para. 5, of the Protocol); the preservation of other rights, notably those associated with asylum-seekers, pursuant to article 14, paragraph 1; and the obligation of States parties to ensure that the provisions of the Protocol are not applied in a discriminatory manner (art 14, para. 2).³¹

92. Drafters and legislators may wish to bear in mind that the obligation to facilitate and accept the return or repatriation of victims of trafficking under article 8, paragraph 1, parallels the obligation to accept the return of persons who are smuggled migrants or whose illegal residence has been procured contrary to domestic laws adopted pursuant to the Migrants Protocol. There are similarities, but there are also some significant differences between article 8 of the Trafficking in Persons Protocol and article 18 of the Migrants Protocol (see paras. 91-112 of the legislative guide for the implementation of the Migrants Protocol), and caution is therefore advised if joint or parallel provisions are under consideration. The major differences are in the class or category of persons whose return must be facilitated and accepted. In the Trafficking in Persons Protocol (art. 8, para. 1), the category of victims of trafficking includes any person who is a national or had the right of permanent residence at the time of entry into the territory of the receiving State party whereas, in the Migrants Protocol (art. 18, para. 2), it includes only a person who is its national or who has the right of permanent residence in its territory at the time of return. Thus, a person who had residency status on entering the country of destination but who has subsequently lost it could be repatriated if he or she is also a victim of trafficking but not if he or she is a smuggled migrant or illegal resident.

³¹This obligation includes precautions against both discrimination based on the status of victims as such and generally-recognized principles of non-discrimination.

This difference arises from positions taken by delegations during the negotiations and the fact that the language of the provisions was developed at separate times, but it does not arise from any particular policy objective of the Ad Hoc Committee as a whole, which negotiated both instruments. Drafters of legislation should also note that while one obligation extends only to victims of trafficking, the other extends to all persons who have been the object of conduct proscribed by the Migrants Protocol, which includes both smuggled migrants and persons whose migration (or at least entry and exit) may have been legal but whose illegal residence was subsequently enabled by an organized criminal group.

(c) Border measures (article 11)

93. The requirement to strengthen basic border controls does not necessarily involve cooperation with other States, and such cooperation or coordination of border controls as may be needed will not generally require legislation. The strengthening of cooperation between agencies and the establishment of direct channels of communication may require some legislation to establish that the agencies concerned have the authority to cooperate and to allow the sharing of information that might otherwise be protected by confidentiality laws. Many of the issues raised by cooperation between border control agencies will be similar to those raised by cooperation between law enforcement agencies, and article 27 of the Organized Crime Convention, paragraphs 500-511 of the legislative guide for the implementation of the Convention and domestic legislation used to implement it might therefore be considered.

(d) Travel or identity documents (articles 12 and 13)

94. The establishment of specific forms or the setting or amendment of technical standards for the production of documents such as passports may be a legislative matter in some countries. In such cases, legislators will generally need to consult technical experts, either within their countries or in other States parties to determine what basic standards are feasible and how they should be formulated. Understanding technologies such as biometrics and the use of documents containing electronically stored information, for example, will be essential to the drafting of legal standards requiring the use of these technologies. Implementing the requirement to verify travel or identity documents will generally not require legislation, since virtually all States already do that on request, but it may require

resources or administrative changes to permit the process to be completed in the relatively short time frames envisaged by the Protocol.

(e) Cooperation with entities (article 6, paragraph 3, and article 9, paragraph 3)

95. States parties are required, where appropriate, to cooperate with non-governmental organizations, other relevant organizations and other elements of civil society in matters relating to the prevention of trafficking and the provision of assistance to its victims. This recognizes the knowledge possessed by such organizations and other bodies in this field, as well as the fact that many victims fear deportation or prosecution in their countries of destination and are reluctant to come forward and approach officials or agencies that are too closely associated with the State. The value and principal role of non-governmental organizations in such situations lies in their independence and ability to act on behalf of victims, often serving as a bridge between otherwise isolated victims and officials. Apart from consideration of the question of whether to regulate the organizations themselves,³² States may not require legislative amendments to implement these requirements. Officials can be instructed to cooperate using administrative means, reinforced by training if necessary. If needed, amendments might take the form of measures to ensure that organizations have the resources and security needed to perform their functions, directing officials to cooperate with and protect facilities such as victim shelters. As noted above, however, legislation that links victim organizations too closely with the State or that compromises their actual or perceived autonomy may prove counterproductive, since it may deter victims from coming forward at all.

4. Information resources

96. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) Related provisions and instruments

(i) Organized Crime Convention

Article 18 (Mutual legal assistance)

Article 27 (Law enforcement cooperation)

³²For discussion of the issues relating to the use of laws to regulate such organizations, see paragraph 63 above.

(ii) *Trafficking in Persons Protocol*

Article 14 (Saving clause)

(iii) *Migrants Protocol*

Article 11 (Border measures)

Article 12 (Security and control of documents)

Article 13 (Legitimacy and validity of documents)

Article 18 (Return of smuggled migrants)

(iv) *Firearms Protocol*

Article 12 (Information)

(v) *Other instruments*

2001 Convention on Cybercrime

Council of Europe, *European Treaty Series*, No. 185

<http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>

Article 28

(b) *Other sources of information*

Guidelines for the regulation of computerized personal data files

General Assembly resolution 45/95 of 14 December 1990

Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, adopted by the Committee of Ministers of the Council of Europe on 19 May 2000

<http://cm.coe.int/ta/rec/2000/2000r11.htm>

Twelve Commitments in the Fight against Trafficking in Human Beings, agreed upon at the meeting of Justice and Home Affairs (JHA) Council of Ministers of the member States of the European Union and the candidate States, Brussels, 28 September 2001

Point 5

Council of the European Union Decision 2002/187/JHA of 28 February 2002, on setting up Eurojust with a view to reinforcing the fight against serious crime

Official Journal of the European Communities, L 63, 6 March 2002
[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!
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Article 3, paragraph 1

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Article 2

European Commission, “Brussels Declaration on Preventing and Combating Trafficking in Human Beings”, European Conference on Preventing and Combating Trafficking in Human Beings: Global Challenge for the 21st Century, Brussels, 18-20 September 2002
[http://europa.eu.int/comm/justice_home/news/forum_crimen/2002/
workshop/brusels_decl_en.htm](http://europa.eu.int/comm/justice_home/news/forum_crimen/2002/workshop/brusels_decl_en.htm)

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Point 2.1

Annex. Reporting requirements under the Trafficking in Persons Protocol

The following is a list of the notifications that States parties are required to make to the Secretary-General of the United Nations:

Article 15. Settlement of disputes

“4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.”

Article 16. Signature, ratification, acceptance, approval and accession

“3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

“4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.”

Article 18. Amendment

“1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.”

“4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit

with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.”

Article 19. Denunciation

“1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.”

