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Preliminary Recommendations on the draft Law of the Republic of Moldova on Prevention and Combating of Trafficking in Persons

**based on an English translation
provided by the OSCE Mission to Moldova**

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These Preliminary Recommendations have been drafted by the Legislative Support Unit
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Preliminary Recommendations on the Draft Law on Prevention and Combating of Trafficking in Persons of the Republic of Moldova¹

Based on the request of the Moldovan Government made to the OSCE Mission to Moldova, for recommendations to the draft Law on Prevention and Combating of Trafficking in Persons of the Republic of Moldova, and further, in response to the OSCE Mission's request for assistance from the OSCE ODIHR in this regard, the OSCE ODIHR and OSCE Mission to Moldova, are pleased to provide their preliminary recommendations on the aforementioned draft law;

In this regard, the OSCE ODIHR and the OSCE Mission to Moldova would like to make mention that the recommendations provided herein are without prejudice to any recommendations that both aforementioned institutions may wish to make on the draft Law on Prevention and Combating of Trafficking in Persons of the Republic of Moldova in the future;

The OSCE ODIHR and the OSCE Mission to Moldova recognize the commitments undertaken by the Government of the Republic of Moldova to prevent and combat trafficking in human beings, especially women and children and to protect and assist the victims of trafficking with full respect of their fundamental rights, being a signatory since November 2000 of the UN Convention against Transnational Organized Crime and the Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children;

Further, the preliminary recommendations contained herein are made owing to the commitments to combat trafficking in human beings expressed by OSCE participating States in, amongst others, the OSCE Action Plan to Combat Trafficking in Human Beings (PC Dec.557/2003), OSCE Maastricht Ministerial Council Decision No. 2/03, December 2003 endorsing the OSCE Action Plan to Combat Trafficking in Human Beings, OSCE Vienna Ministerial Council Decision No. 1, November 2003, OSCE Bucharest Ministerial Council Decision No. 6, December 2001, and OSCE Porto Ministerial Council Declaration, December 2002;

The OSCE ODIHR and the OSCE Mission to Moldova recognize the undertaking of the Moldovan Government made in Article 31 of the draft Law on Combating and Trafficking in Persons in the Republic of Moldova, and are therefore confident that in order to facilitate the implementation of the Law on Combating and Trafficking in Persons in the Republic of Moldova, the appropriate legislative review and reform of normative acts in this field will be conducted and continued, such acts including the Moldovan Criminal Code, Moldovan Criminal Procedure Code and Law on the Protection of Witnesses, amongst others;

¹ Unofficial translation of the draft Law of the Republic of Moldova on Prevention and Combating Trafficking in Persons as provided by the OSCE Mission to Moldova on 25 March, 2004.

Therefore, the OSCE ODIHR and the OSCE Mission to Moldova wish to submit the following preliminary recommendations to the Government of Moldova;

1. Executive Summary of Recommendations

It is recommended that;

- 1.1 the **definition of the crime of trafficking** be consistent with that of Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000 as well as, the Moldovan Criminal Code;
- 1.2 the draft Law of the Republic of Moldova on Prevention and Combating Trafficking in Persons, include a **non-discrimination clause**, providing for equal treatment for all victims of trafficking be they nationals, foreigners or stateless persons;
- 1.3 the **rights of children** be addressed in each part of the draft Law of the Republic of Moldova on Prevention and Combating Trafficking in Persons, always in consideration of their best interests and rights.
- 1.4 **non-governmental organizations** are provided with unfettered access in contributing to the creation and implementation of the institutional framework developed for combating the crime of trafficking in human beings;
- 1.5 provisions serving the **prevention** of the crime of trafficking include the creation and implementation of key social and economic policies aiming at the prevention of trafficking in human beings;
- 1.6 the draft Law of the Republic of Moldova on Prevention and Combating Trafficking in Persons, be focused on the crime of trafficking, as a clear and distinct crime to that of migrant smuggling and terrorist activities, and for this reason requiring a different approach to that needed for migration management;
- 1.7 **protection** for victims of trafficking be based on creating mechanisms and implementation thereof, which would first allow for the proper identification of victims and subsequently, their referral to the services and assistance which they may require, these including a reflection period for victims and short-term residence permits where required, as well as, access to medical, social, legal and psychological assistance;
- 1.8 **prosecution** of the crime of trafficking is aimed at both the bringing to justice the actions of the perpetrator, and permitting for adequate compensation of the victims, as well as his or her protections from further harm, throughout the criminal proceedings;
- 1.9. the necessary resources for the implementation of this law be secured, as provided by Article 31(2) of the draft Law on Prevention and Combating of Trafficking in Persons of the Republic of Moldova.

2. Recommendations as to Structure of ATL:

General Recommendations

2.1 It is proposed for the draft Law on Combating and Trafficking in Persons in the Republic of Moldova (hereinafter referred to as “ATL”) to be re-structured, and divided into the following chapters:

- (I) General Provisions
- (II) Institutional Framework
- (III) Prevention
- (IV) Protection
- (V) Prosecution
- (VI) International Co-Operation
- (VII) Final and Transitory Provisions
- (VIII) Information Note

3. Recommendations as to Content²:

In line with Recommendation 2.1 above, it is proposed for the following to be considered;

RE: Chapter I: General Provisions.

General Recommendations

3.1 It is recommended that the ATL applies equally to all victims of trafficking, that is, foreign citizens and stateless persons, as it does to Moldovan citizens; in as far as it is possible. Therefore, it is recommended that the principle of non-discrimination provided in Article 4 (2) of the ATL, be extracted to constitute a separate article under Chapter I: General Provisions, which would state that *“The implementation of the provisions of the ATL, in particular the enjoyment of measures to protect and promote the rights of victims of trafficking finding themselves on the territory of Moldova, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, irrespective of amongst others, citizenship, nationality, statelessness, unless otherwise provided by the law herein”*. Such provision would ensure that victims of trafficking are identified as such, and that protection measures, apply in a non-discriminating manner to all. Such a provision would serve to facilitate the proper and adequate referral of victims of trafficking to the assistance and protection services and schemes that they may require.

² Recommendations shall be presented in accordance with the proposed structure of the ATL, as outlined by point. 2.1. herein.

- 3.2 It is strongly recommended that the ATL include a separate article in Chapter I: General Provisions, which would expressly state the rights of children who are victims of trafficking. It is proposed that these rights should be addressed in each part of the ATL, always in consideration of their best interests and rights and in each case addressing their special needs.

Specific Recommendations

- 3.3 It is recommended that the definition of the crime of trafficking provided in Article 2(a) of the ATL, be consistent with that of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000 as well as, the definition provided by Art.165 of the Moldovan Criminal Code (hereinafter “MCC”). In particular, it is recommended that the words “*for the purpose of exploitation*” should be added³.
- 3.4 It is suggested to change the following term in describing the activities listed in Article 2(c); namely, “*performing forced labour or services*” should be amended to read “*make use of forced labour or services*”.
- 3.5 The definitions of “risk groups” and “risk regions” defined by Article 2 (c) and (e) of the ATL, respectively, should be found within the National Action Plan (hereinafter “NAP”), rather than in the ATL. It is recommended for these subparagraphs to be deleted.

RE: Chapter II: Institutional Framework.

General Recommendations

- 3.6 It is recommended that Articles 5, 6, 7 and 8 of the ATL be transferred into Chapter II on the Institutional Framework.
- 3.7 Co-operation between the Moldovan Government and Non-Governmental Organisations (NGO’s) as referred to by Article 5 of the ATL is pivotal to laying the foundation for an institutional framework for the prevention and combat of trafficking in human beings. For this reason, it should be an overarching principle, in light of which the ATL is read and interpreted. Therefore, a new provision is proposed to be drafted in Chapter II on the Institutional Framework, which would reflect this principle and give access for NGO’s to co-operate with authorities to the maximum possible extent. The article may also provide for a non-exhaustive list of areas of NGO intervention.

³ Article 3, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000.

Specific Recommendations

- 3.8 It is recommended that Article 7, clarify more specifically whether the National Committee has a consultative role, or whether the ATL delegates specific decision-making powers to it.
- 3.9 It is recommended that Article 7(1) of the ATL, more precisely define the term “representatives of civil society” or that it reads as follows “*and other representatives of civil society.*”
- 3.10 Assuming that the National Committee is a decision making body, it is recommended that Article 7(3) include the supervision of improvement to and enforcement of, legislation dealing with the prevention and combating trafficking in persons, as one of the mandated tasks, in addition to the development of proposals to submitting proposals on the improvement of legislation.
- 3.11 Assuming that the National Committee is a decision making body, it is recommended that the word “may” be replaced with “shall” in Article 7(5) of the ATL. This amendment would be then allow for the provision to be consistent with recommendation 3.7 above. In the case that the National Committee has a purely consultative function, Article 7(5) is proposed to read as follows “... that conduct anti-trafficking activities and activities aimed at assisting victims of trafficking ***shall be included in the composition of the National Committee.***”
- 3.12 It is suggested that an additional task of the National Committee be the regular revision, evaluation and monitoring of the NAP.

RE: Chapter III: Prevention

General Recommendations

- 3.13 It is proposed that the ATL should focus the responsibilities of public authorities and law enforcement agencies in prevention of the crime of trafficking by including key considerations and tasks such as research, awareness raising and the creation and implementation of social and economic policy aiming at preventing trafficking in human beings.
- 3.14 Further, it is recommended that provisions include the clear purpose of various actions and tasks i.e. such as stating the purpose of the compiling a list of countries, included in Article 9(1)(a) of the ATL.
- 3.15 It is recommended that in the case that Article 9 of the ATL intends to name all authorities working towards prevention of the crime of trafficking, the Ministry of

Justice, Department for Youth and Sport, the Migration Department as well as any other relevant institutions, be included in the development of policies outlined in recommendation 3.13 above.

Specific Recommendations

- 3.16 Following from the recommendation made in point 3.7 herein, Article 11 of the ATL should be deleted.
- 3.17 Article 10 (2) of the ATL contains the wording “...shall combat trafficking in persons by means of identification of connections between the international terrorist organisations and the criminal organised groups with the traffickers...”, and it is recommended that the crime of terrorism be addressed by separate legislation. The afore cited wording contained in Article 10 (2) should therefore be deleted and resolved in legislation governing terrorism issues.
- 3.18 Further, it is noted that Article 10(2) of the ATL contradicts Art.267 of the Moldovan Criminal Procedure Code (hereinafter “MCPC”) and it should be deleted.
- 3.19 In connection with recommendations 3.17 and 3.18 above, it is noted that conducting data analysis of investigations by law enforcement authorities of connections between migrant smuggling, terrorism and the crime of trafficking, may already come within the ambit of Article 9 (h) of the ATL. Further, it is noteworthy that point 1.3 of Chapter IV of the OSCE Action Plan to Combat Trafficking in Human Beings⁴, encourages law enforcement authorities to conduct more far-reaching analysis of the root causes of trafficking in human beings, amongst others, its demand and supply networks, and link to illegal migration as key activities in prevention of the crime. Article 9 of the ATL may be developed to reflect these activities aiming at prevention of the crime of trafficking.⁵

RE: Chapter IV: Protection

General recommendations

- 3.20 It is strongly recommended that protection measures for victims of trafficking should be applicable to all victims of trafficking including, amongst others, foreign citizens and stateless persons to the maximum possible extent, in line with the non-discrimination clause recommended by point 3.1 above.
- 3.21 It is proposed that, in line with the purpose of adoption of the Law, protection provisions should aim at first enabling the proper identification of the victims of

⁴ PC.DEC/557 24 July 2003

⁵ Point 2.7, Chapter III – OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July 2003.

- trafficking by relevant State authorities and subsequently, providing adequate protection and referral of all identified victims of trafficking.
- 3.22 It is suggested that Chapter IV on Protection be structured based on the cycle of recommended assistance to trafficked persons; that is; identification, referral and assistance

Specific Recommendations

- 3.23 With reference to general recommendation 3.20 above, adequate referral and assistance measures should be provided to all victims of trafficking, Moldovan citizens, foreign and stateless persons alike. Subsequently, a clear delineation needs to be made in the law, where provisions of protection apply to the specific needs of one particular group of victims of trafficking
- 3.24 Therefore, it is strongly recommended that Article 20, includes the provision of a reflection period of a minimum of 30 days for all identified victims of trafficking. Alternatively, the reflection period may be outlined in a separate article. The reflection period would serve the purpose of identification and recovery of a trafficked victim and ensure his/her proper referral to appropriate support services.
- 3.25 It is strongly recommended that a separate provision be drafted, which would ensure the issuance of a residence permit to the victim of trafficking (who is a foreign citizen), for a minimum time period of 6 months, following the period of reflection. Further, in light of the stipulation in Article 31 ATL, the relevant laws referring to immigration should be amended.
- 3.26 In light of recommendation 3.1, 3.20 and 3.25 above, Article 20 (1) and Article 16(1) of the ATL should be deleted as inconsistent with the purpose of the Act.
- 3.27 Further to the recommendations of provision on a reflection period and residence scheme, the provision referring victims of trafficking (who are foreign or stateless persons) contained in Article 20(2) of the ATL should be replaced with wording that would permit referral to the Centres outlined and established by Article 14 of the ATL.
- 3.28 It is recommended that Article 14(c) be revised with the result of allowing NGO's to function and assist independently of the decision of the National Committee. It is further suggested that a specific subparagraph be included, which would permit the National Committee to undertake Memorandums of Understanding with NGO's in referring them to the centres and shelters run by them.

- 3.29 It is recommended that thus, Chapter IV on Protection, include a non-punishment clause that would broaden that contained in Article 165(4), Article 206(4) and Article 362 (4) of the Moldovan Criminal Code. The non-punishment clause in the ATL, should not make exemption from criminal liability applicable to only those victims of trafficking who accept to co-operate with authorities. Exemption from criminal, administrative and civil liability should be applicable to all victims regardless of their ability or willingness, or in fact, necessity to co-operate with authorities to an extended degree. Alternatively, the ATL should include a clear definition of the level of co-operation as minimal. Further, in line with Article 31 of the ATL, Article 165(4), Article 206 (4) and Article 362(4) of the Moldovan Criminal Code should be amended accordingly.
- 3.30 With regard to the recommendation contained in point 3.29 above, the following wording for the non-punishment clause is proposed “ *victims of trafficking shall be exempted from criminal, administrative or civil liability for the offences resulting from the trafficking process to which they are victim, including amongst others those connected with violation of immigration laws or for the illegal acts they were involved in as a direct consequence of their situation as victims, such as illegal border crossing, illegal stay in the territory, use of forged documents, destruction, falsification and alteration of documents, illegal employment, prostitution, amongst others.*”
- 3.31 It is recommended that Article 16(3) be replaced with a separate provision on protection of personal data of the victim of trafficking.
- 3.32 It is recommended that a provision be inserted which would serve as a confidentiality clause between social workers and the properly referred victim of trafficking (Victim-Social Worker confidentiality clause).
- 3.33 It is further recommended that an article be inserted on free legal assistance to victims of trafficking.
- 3.34 It is recommended that travel documents for Moldovan trafficked persons, who find themselves outside the territory of the Republic of Moldova, should be issued free of charge.

Chapter V Prosecution:

General Recommendation

- 3.35 The current chapter IV of the ATL should be subsumed by the newly proposed Chapter V on Prosecution.

Specific Recommendations:

- 3.36 It is recommended for a separate article to be drafted, which would state the responsibility of law enforcement authorities to explore alternative investigative strategies, in reliance on intelligence information. This provision would encourage the carrying out of investigations and prosecutions without solely and exclusively relying on witness testimony and would reduce the need for victims to be required to testify in court.⁶
- 3.37 It is proposed that Article 22 should be clarified and made consistent with the provisions of the MCC which govern the crime of “assisting” and/or being an “accessory” to a crime. As it has been noted that the distinction between Article 22 (1) and Article 22(2) is not clear, and may serve only to hamper the prosecution of accessories to the crime of trafficking.
- 3.38 It is recommended that Article 23 and 24 be consolidated into one provision (article) which would define the crime of trafficking in aggravated circumstances; this should be drafted in line with the MCC and provisions of the MCPC.
- 3.39 It is proposed that Article 23(2) which stipulates that the issue of consent bears no relevance should constitute a separate article.
- 3.40 It is proposed that the liability of a legal entity for the crime of trafficking be extended to include criminal, civil and administrative liability.⁷ Sanctions may include also fines, and compensation of victims in addition to liquidation, as proposed by Article 25 of the ATL. The relevant amendments reflecting this liability should be introduced into the MCC and the MCPC.
- 3.41 It is proposed that a separate provision on free legal assistance to victims of trafficking in the role of witnesses in the cases of prosecution of traffickers be included. Further, we recommend that it be considered for the ATL to include a catalogue of protection measures for victims of trafficking in the role of witnesses.
- 3.42 It is recommended that the proposal made in recommendation 3.41 above, be reflected in the Law on State Protection of the Victim, of Witnesses and Other Persons who provide Assistance in the Criminal Proceedings and to the MCPC.

RE: Chapter VII: Final and Transitory Provisions

General Recommendation:

⁶ Point 2.6 and 2.7, Chapter III – OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July 2003.

⁷ Point 1.3 Chapter III, Action Plan to Combat Trafficking in Human Beings PC.DEC/557 24 July 2003.

- 3.43 It is recommended that Article 31 (1) in stipulating the tasks before the Government ensure first the review (as well as add the wording) ... “*amendment or abrogation*” of normative acts (adding the words) “*..or provision thereof..*”

4. Additional Recommendations:

- 4.1 It is noted that the ATL presents a rare opportunity to establish a Victims Compensation Fund, wherein seized assets could be deposited in order to secure compensation of victims of the crime of trafficking⁸. Additionally, a “Trafficking Victims Fund” would ensure that financial means are available to support the referral of victims to the support structures that they require. Provisions establishing this are recommended to be contained in the Chapter of the ATL on the Institutional Framework. Reference to this fund should be made in the Chapter on Protection, whereby a separate article on victims compensation should be found, as well as Chapter VII on Transitory Provisions, whereby a the appropriate government organ ought to be specifically tasked with establishment of the Fund.
- 4.2 The recommendations provided herein lay down the key elements in establishing a National Referral Mechanism, therefore it is proposed that the ATL considers introducing the term National Referral Mechanism for the Republic of Moldova. For the purpose of this task it would be first imperative to begin with a definition of the term in the general provisions, and reference throughout.

⁸ Part III 1(15) OSCE Action Plan to Combat Trafficking in Human Beings PC.DEC/557 24 July 2003.