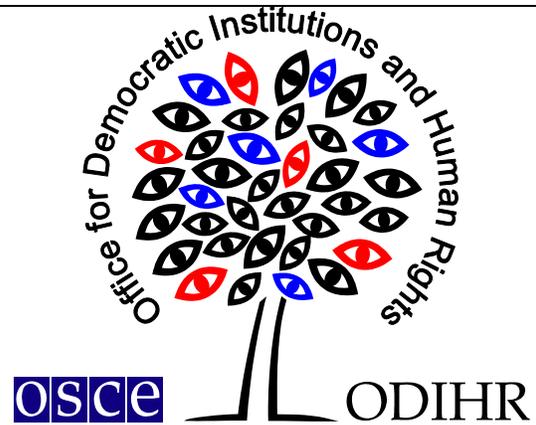


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Note
on the Draft Law of Georgia
on Prevention and Combating of Trafficking in Persons
and on the Protection, Assistance and Rehabilitation
of the Victims of Trafficking in Persons

**based on an English version of the draft
provided by the OSCE Mission to Georgia**

March 2005

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1. Scope and Purpose of the Note

This Note has been drafted in response to a request made by the OSCE Mission to Georgia on 22 March, 2002. This Note does not purport to constitute a comprehensive review of the draft Law of Georgia on Prevention and Combating of Trafficking in Persons and on the Protection, Assistance and Rehabilitation of the Victims of Trafficking in Persons (hereinafter, “draft Law”). This Note intends to demarcate and briefly discuss the most salient aspects of the draft Law.

2. Recommendation

It is generally recommended for the draft Law to be adopted, on the understanding that certain provisions may need to be further supplemented by executive ordinances, decrees and other forms of secondary legislation, thereby permitting the draft Law to be operational.

3. Comments

3.3 Purpose of the draft Law

It is noted that the purpose of the draft Law, as stipulated by Article 2 thereof, is comprehensive. The purpose covers the essential elements of the field of regulation, that being prevention and prosecution of trafficking, protection of the human rights of the victims, their assistance and rehabilitation, including also access to justice.¹ The purpose of the draft Law is also to establish principles, upon which a national framework ought to function. Such national framework is considered essential in achieving the aims of the draft Law² and it will serve to permit the Republic of Georgia to undertake the international legal obligations to which it is signatory.³

3.4 Definitions

It is imperative to adequately and accurately define the terms and expressions used throughout the draft Law. The draft Law furnishes many definitions related to both the terms used in the draft Law, but more importantly the definition of the crime of trafficking and the terms which comprise the constituent elements thereof.

The crucial definition to ensure success in prosecution of the crime and compatibility

¹ Generally, as required and recommended by Article 25 of the United Nations Convention Against Transnational Organised Crime, 2000, Article 6 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, OSCE Action Plan to Combat Trafficking in Human Beings PC.DEC/557, 24 July 2003, and Chapter I, II,III,IV,V of the draft Council of Europe Convention on Action Against Trafficking in Human Beings CAHTEH(2005) INFO 11.

² In particular as recommended by Point 3/Chapter V of the OSCE Action Plan to Combat Trafficking in Human Beings PC.DEC/557, 24 July 2003 on the establishment and functioning of National Referral Mechanisms.

³ On 13 December, 2000, the Republic of Georgia became signatory to both the United Nations Convention Against Transnational Organised Crime, 2000, and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000.

with international standards is that of the crime of trafficking itself.⁴ Article 3(a) of the draft Law refers to Article 143 of the Criminal Code of Georgia, which defines the crime of trafficking. Since Georgian law has opted to treat trafficking as a separate crime and has generally chosen to adopt the definition enunciated by Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (hereinafter “the Protocol”), unless placed elsewhere in the criminal code, the issue of consent (and the irrelevance thereof, where any of the means set forth have been used)⁵ should be dealt with and defined. In particular, irrelevance of consent in the case of trafficking in minors should be articulated.⁶

It is noted as advantageous to include a definition of ‘sexual exploitation’, particularly because this term was not defined in the Protocol.⁷ It is also believed to be of extreme importance to ensure that terms such as ‘forced labour’, ‘slavery’, and ‘conditions similar to slavery’ are précised in accordance with definitions contained in international law.⁸ It is duly noted that many of the definitions contained in the draft Law already comply with existing standards.

3.5 Institutional Framework and Mechanisms to Combat Trafficking.

The draft Law lays down an essential and comprehensive institutional framework for combating trafficking in persons. Chapter II installs the foundations for State authorities to undertake actions to prevent trafficking in persons. Importantly, Article 6(h) provides for the training of public officials who are responsible for carrying out the measures stipulated in the draft Law. The draft Law also rightly notes the crucial link between eliminating all forms of discrimination against women and the occurrence of trafficking.

⁴ The provisions criminalizing the act of trafficking were subject to a review entitled “*Analysis of the draft amendments to the Georgian Criminal Code establishing a criminal offence of trafficking in human beings*” of November 2002, by Angelika Kartusch, Legal Adviser, Boltzmann Institute for Human Rights in Vienna, for the OSCE ODIHR and the OSCE Mission to Georgia.

⁵ As established by Article 3(b) of the Protocol.

⁶ UNODC explains: “Victims often consent to the initial stage of trafficking because they are misled or deceived by traffickers. Trafficking prosecutions are sometimes lost, though, because the evidence needed to establish the true nature of the consent is not available. At the same time, constitutional and other human rights protections in many countries require that those accused of trafficking must be able to raise the possibility of consent as a defence. The Protocol, therefore, states that, if any of the improper means set out in the definition (i.e. coercion, fraud, deception) have been used, any alleged consent to the subsequent exploitation is irrelevant. Children under 18 cannot give valid consent, and any recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation is a form of trafficking regardless of the means used.” See: http://www.unodc.org/unodc/en/trafficking_victim_consent.html

⁷ Just as for the term “prostitution”, the term “other forms of sexual exploitation” was left, by the drafters of the Protocol, to be defined by the States parties.

⁸ That is, ‘forced labour’ as in ILO Forced Labour Convention No.29,1930, ‘slavery’ as in Article 1(1) of the UN Slavery Convention 1926 etc.

The draft Law includes non-governmental organisations as a partner with whom measures established by the draft Law shall be undertaken.⁹

The draft Law establishes two new bodies, firstly, a task force on combating trafficking mechanism (that is, prosecution of the crime) by way of Article 8(5) and secondly, in Chapter V, Articles 24 and 25 it establishes an Interagency Co-ordination Council, which is multidisciplinary and includes non-governmental organisations and other interested parties. Such multi-disciplinary composition of the Council is highly recommended by amongst others, the OSCE ODIHR.¹⁰ The provisions on the Council may also benefit from wording that would specify to whom the Council shall report and how often. Furthermore, while the Council has the role of *co-ordinating* the activities of the State, consideration should be given to establishing which body/authority will *monitor* the anti-trafficking activities of the State.

3.6 Data Protection

The draft Law lays some emphasis on the importance of data and information exchange, in provisions such as Article 8(5) and more specifically in the establishment of a joint information bank on traffickers, in Article 11. It is noteworthy that although data, information exchange and research constitute one of the fundamental tools in fighting organised crime, such as the crime of trafficking in persons, any such compilation, storage and transmission of personal data of victims, suspected victims, traffickers and suspected traffickers, must be carried out with due respect of the private life and identity of the persons concerned.¹¹ In this regard, Article 18 and Article 21(8) of the draft Law are welcomed.

3.6 Protection, Assistance and Rehabilitation of Victims.

The provisions on protection of, assistance to and rehabilitation of victims are considered well grounded in already existing standards, as well as those emerging on a European level.¹²

It is of particular importance for any law or provisions dealing with the issue of trafficking to be clear on the legal status of victims. Therefore, it is recognised that some States may wish to define the concept of ‘victim’ as has been done in Article 13 of the draft Law. However, it is imperative for any such definition to ensure that persons who are trafficked (where there are reasonable grounds to believe on the part of the authorities or non-governmental organisation or the person him or herself that they have been subjected to trafficking) receive access to all requisite assistance measures. Access to such assistance should not be restricted by defining victims solely as those involved in criminal proceedings and should be possible from the moment that the person is identified as having been trafficked.

⁹ As stated in Article 5(6) and Article 35 on Co-operation with Civil Society, of the draft Council of Europe Convention on Action Against Trafficking in Persons, CAHTEH (2005) INFO 11.

¹⁰ OSCE ODIHR Handbook on National Referral Mechanisms, 2004.

¹¹ Please see: the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No.108, which the Republic of Georgia has signed but not ratified as yet.

¹² For instance, the draft Council of Europe Convention on Action Against Trafficking in Persons, CAHTEH (2005) INFO 11.

Expertise and practice on a global, European¹³ and domestic level has proved time and again that the provision to victims of a reflection and recovery period as foreseen by Article 14 of the draft Law is indispensable. The provision of the 90 day reflection and recovery period is welcomed. The provision would benefit from clarification that this reflection period is essentially only required for victims who are foreigners, staying illegally on the territory of Georgia and therefore, connected with the residence permits offered under Article 20 of the draft Law. Evidently, citizens of Georgia, or persons who have legal residence in the territory, do not require such reflection period and should be entitled to access all assistance offered by the draft Law and any other relevant acts of the Republic of Georgia.

The draft Law goes on to address core standards, in an adequate and logical manner. That is, Article 15 of the Draft Law envisages access to justice for the victims of trafficking, in both civil and criminal jurisdictions, and it also ensures that legal aid is provided. More importantly, victim compensation and victims compensation fund is envisaged (Article 23), which would permit the *de facto*, receipt of compensation, as opposed to simply *de jure* eligibility to it.

Article 16 outlines the necessity for physical protection of the victims and their families, and may be considered to be expanded to include, protection to those reporting on the crime, as well as any other persons collaborating with the authorities.¹⁴ Article 17 speaks of repatriation, which should always be voluntary, and ensures that it is preceded with security and risk assessment.

Article 19 is particularly welcomed, as it ensures that victims of trafficking are not punished for illegal acts which result from their being victims. It should be considered for the draft to specify that victims would not be punished for *any* illegal acts, whether in the criminal, civil or administrative jurisdiction, if such acts directly result from their situation as victims of trafficking.¹⁵

The draft Law also provides for important select witness protection provisions. It should be ensured that such provisions are reflected in the Georgian Criminal Procedure Code and that the measures are adequately balanced with the rights of the defendant as enshrined in Article 6 of the European Convention on Human Rights, 1950.

Importantly, the draft Law provides for shelters for all victims of trafficking and the possibility for foreign citizens, trafficked into the Republic of Georgia to receive a residence permit, however, following criminal proceedings. It may be considered to offer

¹³ The European Commission's Expert Group on Trafficking in Human Beings, recommends a 90 day recovery and reflection period for all victims of trafficking in human beings. The recovery and reflection period is enshrined also in Article 13 of the draft Council of Europe Convention on Action Against Trafficking in Persons, CAHTEH (2005) INFO 11.

¹⁴ See Article 28, of the draft Council of Europe Convention on Action Against Trafficking in Persons, CAHTEH (2005) INFO 11.

¹⁵ See for example; Article 26 on Non-punishment of the draft Council of Europe Convention on Action Against Trafficking in Persons, CAHTEH (2005) INFO 11.

residence to victims of trafficking on humanitarian grounds, notwithstanding their ability or willingness to participate in criminal proceedings.¹⁶

5. Conclusion

The draft Law is comprehensive. It has been shaped not only on existing international standards, but also in light of emerging European standards. The draft Law, if adopted and when supplemented with secondary regulations, will go a long way to achieving the set objectives of prevention and prosecution of trafficking and the provision of the protection and assistance to victims, by the Republic of Georgia.

¹⁶ As suggested by; Article 7 of the UN Protocol and Article 14 (a) of the draft Council of Europe Convention on Action Against Trafficking in Persons, CAHTEH (2005) INFO 11.