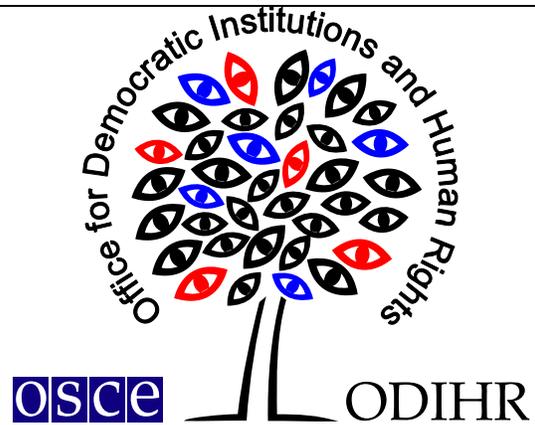


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**Preliminary Comments
on the Amendments to
Article 8 on Extraterritorial Jurisdiction,
Article 149 on Trafficking in Human Beings and,
Article 303 on Compelling into Prostitution
of the Criminal Code of the Republic of Ukraine**

**based on an unofficial English translation of the draft
provided by the OSCE Project Co-ordinator in the Ukraine**

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1. INTRODUCTION

1. *The Parliamentary Committee on the Fight Against Corruption and Organised Crime of the Republic of Ukraine made a request to the OSCE Project Co-ordinator in the Ukraine, for comments on the Amendments to Articles 8, 149 and 303 of the Criminal Code of the Republic of Ukraine (hereinafter also referred to as “draft Provisions” or “draft Articles”).*

2. *Further, the OSCE Project Co-ordinator in Ukraine requested assistance from the OSCE ODIHR in this regard and this preliminary comment was drafted in response thereto.*

2. SCOPE OF REVIEW

3. These preliminary comments do not equate to a full and comprehensive review, rather they have been drafted to serve as considerations which should be taken into account in light of international standards in the field of trafficking to which the Republic of Ukraine has committed or may seek to commit.

4. In this regard, the OSCE ODIHR and the OSCE Project Co-ordinator in Ukraine would like to make mention that the preliminary comments contained herein are without prejudice to any recommendations and comments to the Amendments to Articles 8, 149 and 303 of the Criminal Code of the Republic of Ukraine that both aforementioned institutions may wish to make on the draft Provisions in the future.

3. EXECUTIVE SUMMARY

5. The draft Articles and amendments are drafted in the spirit of compliance with international standards which obligate criminalization of trafficking in human beings. The OSCE ODIHR encourages further efforts to be made to clarify the proposed draft Articles and consider analysis and relevant revision of the legislative framework for combating trafficking in human beings, preventing it and ensuring protection and assistance is delivered to victims of the crime.

6. It is recommended that:

A Article 8 of the Ukrainian Criminal Code remains in place (subject to the considerations below), thus permitting the assertion and **exercise of extraterritorial jurisdiction** by the Ukrainian authorities in relation to the crime stated in Article 149-2;

B Article 149 on **the crime of trafficking in human beings** be consistent with 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;

- C Article 149, does not confuse the **intent and the motive of the crime**, and for this reason, it is proposed to delete the phrase “for lucrative gain or other personal reasons”;
- D Article 149 should be revised in order to ensure that the **minimum activities** to facilitate trafficking in human beings set out by 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, be reflected in the draft Provision;
- E Article 149 should be revised in order to ensure that the **minimum means adopted to achieve trafficking in human beings** as set out by 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, be adopted in the draft Provision;
- F the **definition of “exploitation”** should be précised, amongst others, to include “debt bondage”¹ and “illegal adoption”, rather than enumerating these forms of exploitation separately, which may serve to confuse the understanding ascribed to these terms in the context of trafficking in human beings, by international instruments;²
- G the draft Provisions criminalize the act of **trafficking in children** in line with Article 3(c) 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;
- H the **penalties and sanctions** contained in Article 149-1 are reconsidered especially whether they indeed reflect the gravity of the crime of trafficking in human beings and in light of the penalties imposed by neighboring States of the Republic of Ukraine;
- I not only the crime of trafficking in human beings and all of its components should be clearly defined, but also that **additional crimes which may come within the trafficking in human beings context**, for which additional criminal charges may be brought in addition to the act of trafficking in human beings are regulated and established;
- J analyses be undertaken to ensure that the Ukraine complies with all provisions set out by the Transnational Organized Crime Convention, 2000 and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000, in particular the criminalization of attempting to commit the crime of trafficking in human beings (subject to ordinary principles of domestic law), participating as an accomplice to trafficking in human beings and

¹ Please Note: “debt bondage” has been translated as “peonage” in the English translation provided to the OSCE ODIHR. The term “debt bondage” shall be used throughout this preliminary comment.

² That being, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000

- organizing or directing other persons to commit the crime of trafficking in human beings;
- K in connection with liability for the crime of trafficking in human beings, the Ukrainian Criminal Code should establish liability of both natural and legal persons (corporate liability), in accordance with Article 10 of the Transnational Organized Crime Convention, 2000;
- L further efforts are made in order to ensure that appropriate provisions to establish a **national legislative framework** within which not only **prosecutions** are ensured, but also **prevention** of trafficking in human beings is made possible and most importantly, the **protection of and assistance to victims** of trafficking in human beings in human beings, is ensured in the Republic of Ukraine;

4. ANALYSIS AND RECOMMENDATIONS

4.1 Article 8 - The operation of the law on criminal liability in regard to offences committed by foreign nationals or stateless persons outside Ukraine.

7. This article of the Ukrainian Criminal Code³ (hereinafter, “Criminal Code” or “UCC”) asserts extraterritorial jurisdiction. Assertion of jurisdiction outside the territory is stipulated in Article 15 of the Transnational Organized Crime Convention, 2000 (hereinafter, “TOC” or “the Convention”) for the offences covered in the Convention itself and in the Protocols thereto. Article 15 (2) of the TOC, although not binding, states that extraterritorial jurisdiction may be based on the passive personality principle⁴ or on the active personality principle⁵, amongst other bases. Article 8 of the UCC establishes extraterritorial jurisdiction based on the passive personality principle.⁶

8. The amendment proposed expands the categories of crime over which such jurisdiction may be established, from solely “special grave offences”⁷ punishable by more than ten years imprisonment, to both “special grave offences” and “grave offences”⁸ with the latter carrying a penalty of imprisonment of a maximum of ten years. This inevitably entails the expansion of the number of crimes which would fall under the extraterritorial jurisdiction of Ukraine. In this case the crimes stipulated in Article 149-2, 149-3 would be subject to extraterritorial jurisdiction in addition to Article 149-4. The

³ In force, 1 September, 2001.

⁴ Article 15 (2)(a) of the Transnational Organised Crime Convention, 2000, that is, “if the offence is committed against a national of the State party”

⁵ Article 15 (2)(b) of the Transnational Organised Crime Convention, 2000, that is, “if the offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory.”

⁶ Extraterritorial jurisdiction based on the active personality principle may be found in Article 7 of the Criminal Code, 2001.

⁷ Article 3(5) of the Ukrainian Criminal Code

⁸ Article 3(4) of the Ukrainian Criminal Code

extent of jurisdiction over crimes varies from State to State⁹ and States may establish additional bases for jurisdiction for as long as it is in compliance with international norms.¹⁰ This is recommended if it is clear that the intent of expanding assertion of jurisdiction is not to jeopardize or violate the general rules of jurisdiction but rather to ensure that serious transnational crimes of organized criminal groups do not escape prosecution as a result of jurisdictional gaps.

9. The important consideration to be borne in mind, is that unless already stipulated in provisions not coming within the scope of this commentary the UCC is recommended to stipulate that liability for any act committed abroad is subject to the principle that such act is also recognized as an offence abroad.¹¹

10. It is noted that the draft Provision would ensure the assertion of extraterritorial jurisdiction over “grave crimes”, which would therefore include the crime stated in Article 149-2 of the UCC on trafficking in human beings perpetrated by a “group of persons with conspiracy”. If the intention is therefore, to assert jurisdiction over organised criminal activity, is recommended to ensure that the definition of and “organized criminal group” is clear in Ukrainian law and in accordance with Article 2 (a) of the TOC.

11. The amendment is recommended to be adopted, subject to the clarifications and proposals set out in paragraphs 8, 9 and 10 above.

4.2 Article 149- Trafficking in Human Beings

12. Article 5 of the Protocol obliges States to make criminal the conduct outlined in Article 3 of the Protocol, when committed intentionally. 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 (hereinafter “the Protocol” or “the Palermo Protocol”), provides a comprehensive definition of trafficking in persons, which outlines the most essential elements that ought to be included when criminalizing such conduct. It is recommended for this definition to be strictly followed in amending the UCC.¹²

13. It is duly noted that draft Article 149 of the UCC has been drafted in the spirit of Article 3 of the Palermo Protocol. It should be borne in mind that the Palermo Protocol, *de facto*, establishes the minimum standards, and not the maximum. Therefore, in their efforts to combat trafficking in human beings, by amending legislation in order to comply with the Palermo Protocol, the Republic of Ukraine is encouraged to raise the benchmark.

14. It is noted that the draft Article includes the element of intent, as stipulated in Article 5 (1) of the TOC. However, the wording of Article 149-1 “for lucrative gain or

⁹ For instance, please see Article 110 of the Polish Penal Code, 1997, which extends jurisdiction to crimes carrying a penalty of over 2 years imprisonment, committed against Polish nationals by foreign nationals outside the territory of Poland.

¹⁰ Article 5 (c) of the Transnational Organised Crime Convention, 2000

¹¹ For example, please see Article 111 par.1 of the Polish Penal Code, 1997.

¹² Point 1.1, Chapter III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003.

other personal interests” may unnecessarily serve to confuse in the procedure of proving the elements of the crime, as it describes a possible motive and not the intention. That is, the intent and motive should not be confused. Motive is what prompts a person to act, while intent refers to the state of mind with which the act is done. It is however, required to prove that the intention was to exploit the victim, as is articulated further in the draft Article. It is therefore recommended to consider deleting the phrase “for lucrative gain or other personal interests”.

15. Draft Article 149-1 also enumerates the activities which could amount to trafficking in human beings, commencing with recruitment in sub-paragraph (1), that is, Article 149-1(1), through receipt of persons in sub-paragraph (7). Owing to the fact that Article 3 of the Palermo Protocol establishes the minimum requirements which States must adopt in order to be in compliance therewith, the activity of “harbouring” a person, is recommended to be included.¹³

16. The Palermo Protocol¹⁴ also provides a minimum, but non-exhaustive list of means which may be used in order to lure and traffic a person. These means are, threat or use of force, other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, or giving or receiving of payments or benefits to achieve the consent of a person having control of another person. It is recommended that Article 149-1 of the UCC be revised in this regard, as the current draft Article appears not to address all such means. Furthermore, as already introduced by other OSCE participating States, the UCC may list additional means, which may be used in order to effect the crime of trafficking in human beings.¹⁵ It is important also to ensure that the list of means is not exhaustive.

17. As stated above, the definition of trafficking in human beings according to the Palermo Protocol, stipulates that the minimum purpose for which the intended acts are committed, is that of exploitation. Article 149-1 provides this purpose, and additionally, includes the purpose of “debt bondage” and “illegal adoption”. The reason for such separate enumeration of these forms of exploitation is not clear, and ought to be made so. Additionally, it is highly recommended that all such acts be separately criminalized, however, in the context of trafficking in human beings, they come within the ambit of the term “exploitation.”

18. In line with the above, it is important to note at this junction, that “debt bondage” comes within the notion of “practices similar to slavery”¹⁶ expressed in Article 3 (a) of the Palermo Protocol. Debt bondage is also a form of “servitude”, as prohibited by Article 8 of the Covenant on Civil and Political Rights (“ICCPR”). Therefore, it may be concluded that it would be sufficient to ensure that both “practices similar to slavery” and “servitude” are included in the definition of “exploitation” (in for instance, Note 1 to the draft Article). In this case “debt bondage” would come within the definition of “practices

¹³ As established in Article 3(a) of the Palermo Protocol.

¹⁴ Please see: Article 3(a)

¹⁵ See for instance, Article 379(1)bis of the Criminal Code of Luxembourg at: <http://www.legislationline.org/view.php?document=55274>

¹⁶ As enumerated in Article 1 of the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and practices Similar to Slavery, 1956.

similar to slavery”. Thereafter, “debt bondage” may be defined in a separate Note to the draft Provision, as a separate and specific practice similar to slavery, and in accordance with Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1926.

19. Further to the above analysis and recommendation, the separate enumeration in Article 149-1 of the term “illegal adoption” should also be subjected to further consideration. The *travaux préparatoires* to the Palermo Protocol state that illegal adoption is a form of exploitation, in the case that it amounts to a “practice similar to slavery” as defined by Article 1(d) of the Supplementary Convention on Slavery.¹⁷ It must be clear that, adopting a child, even illegally, is not on its own a form of trafficking in human beings. However, if the child is adopted for the purpose of exploiting him or her, then this will amount to trafficking in human beings. It is recommended to consider, including an explanatory Note to Article 149-1 in this regard, as has been done for the notion of “debt bondage”, in Note 2 to Article 149-1 of the UCC. Furthermore, illegal adoptions may also be regulated by separate criminal provisions.

20. The Palermo Protocol also lays down a minimum list of the types of exploitation which may amount to trafficking in human beings.¹⁸ This list has been reflected, to a large extent in Note 1 to Article 149-1 of the UCC. It is understood that Note 1 therefore, forms an integral part of Article 149-1 of the UCC, by serving to define the term “exploitation” contained therein. Note 1 provides additional forms of exploitation, such as “use in armed conflict” and “engaging in criminal activities”, which is a welcomed step. For the purposes of compliance with the minimum provided for in Article 3(a) of the Palermo Protocol, it should be considered to include “servitude”, and “removal of organs” within this definition, and further, as recommended above, to include both “debt bondage” and “illegal adoption” as forms of exploitation.

21. It should be borne in mind that the terms “prostitution of others” and “other forms of sexual exploitation” have not been defined in the Palermo Protocol. These terms have intentionally been left by the drafters of the Protocol, to the discretion of the domestic jurisdiction of each State. The OSCE ODIHR while not endorsing any stance on how the Republic of Ukraine, or any other OSCE participating State regulates the issue of prostitution, does recommend that this issue is addressed at this early stage of drafting, by the provision of clear definitions of the terms chosen for inclusion in Article 149 and the Notes thereto. Such clear definition of all terminology is imperative to the subsequent de facto implementation of the provision.

22. It is recommended to consider specifically criminalising the act of trafficking in human beings in children, and not solely include trafficking in children as an aggravating circumstance, carrying a higher penalty, as currently reflected in Article 149-3. In order

¹⁷ “Any institution of practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another persons, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”, United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and practices Similar to Slavery, 1956.

¹⁸ Article 3(a) “(...) 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 of the removal of organs;”

to truly reflect the gravity of the crime of trafficking in children, it may alternatively constitute a separate article following Article 149-1.¹⁹ A separate article on trafficking in children would need to contain a definition consistent with that of Article 149-1, could reflect higher punishment, would define children as any person under 18 years of age and would stipulate that consent of the child to being trafficked may never be achieved, regardless of the means used.²⁰

23. Regarding article 149-4 and the issue of removal of organs, It should be noted that the Protocol does not cover the trafficking of organs alone.²¹ However, in the case that a person is transported for the purpose of removing his or her organs, this may amount to trafficking in human beings. Therefore, the draft Article 149-4 does not need to stipulate the additional purpose of “transplantation or forced donation”, as it is sufficient to establish that a person has been transported for the purpose of “removing organs or tissues”. Therefore “for the purpose of transplantation or forced donation” is recommended to be deleted, as it would mean in practice that other purposes of organ removal such as genetic experimentations may not be captured by this provision.

24. Neither the Palermo Protocol nor the TOC indicate clearly the amount of penalties and sanctions to be imposed on persons found guilty of trafficking in human beings. The TOC does however indicate that the sanctions ought to take into account the gravity and seriousness of the crime, and point out that a crime such as trafficking in human beings is considered a “serious” crime and therefore should be punishable by at least four years or more of deprivation of liberty.²² What is recommended to be considered is whether the sanctions and penalties currently contained in Article 149 suffice. Furthermore, the sanctions and penalties are recommended to be harmonised with surrounding States of the Republic of Ukraine, given the transitional nature of the crime and the necessity for co-operation with neighbouring States in the combating thereof.

4.3 Article 303. Compelling a Person to Engage in Prostitution

25. The OSCE ODIHR notes that draft Provision 303, by repealing the current Article 303 of the UCC, in fact de-criminalizes prostitution. Whereas, the proposed draft Article 303, allegedly criminalizes forcing someone to engage in prostitution. In this regard, the OSCE ODIHR must state that it does not seek to encourage, promote or endorse any decision which OSCE participating State make on the issue of criminalization, or de-criminalization of prostitution. Such policy decisions are left to the discretion of the States, and any comment made herein may not be construed as any such endorsement or rejection of policy in this regard.

26. Further to the above, it is important to note that forcing into prostitution, whether the act of prostitution is legal or illegal may fall within the definition of “sexual exploitation”. Some commentators to the Palermo Protocol have suggested, that in the absence of any guidance by the framers of the Protocol, on the definition of “sexual exploitation” a possible definition may be: *“the participation by a person in prostitution,*

¹⁹ For example see: Article 206 on Trafficking in Children, Chapter VII Crimes Against Family and Juveniles, Criminal Code of the Republic of Moldova, in force, June 12, 2003.

²⁰ Article 3(c) Palermo Protocol.

²¹ A. Jordan, “The Annotated Guide to the Complete UN Trafficking Protocol”, Washington DC, 2002

²² Article 11(1) of the Transnational Organised Crime Convention, 2000

*sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, coercion, abduction, force, abuse of authority, debt bondage or fraud.”*²³ In any case, as stated in paragraph 21 above, such clarity in terminology is essential.

27. Additionally, the draft Provision also highlights the necessity of the State to not only define clearly the crime of trafficking in human beings and all of its components, but also regulate and establish additional crimes which may come within the trafficking in human beings context, for which additional criminal charges may be brought in addition to the charge of trafficking in human beings.

4.4 Additional Comments and Recommendations

28. It is highly recommended to consider introducing a provision within the UCC that would secure non-punishment of victims for the illegal acts committed as a result of being victims of trafficking in human beings. Optimally, such a provision should include the possibility of not punishing victims for acts which are criminal, administrative offences or create civil liability, where it is proven that they resulted directly from their situation as victims of trafficking in human beings.²⁴

29. It is recommended that extended analysis be undertaken to ensure that the Ukraine complies with all provisions set out by the TOC and the Palermo Protocol. In particular, at the junction of criminalization, and in order to comply with Article 2(a) (b) and (c) of the TOC, attempting to commit the crime of trafficking in human beings (subject to ordinary principles of domestic law), participating as an accomplice to trafficking in human beings and organizing or directing other persons to commit the crime of trafficking in human beings should be regulated by the UCC.

30. It is recommended also that in connection with liability for the crime of trafficking in human beings, the UCC should establish liability of both natural and legal persons (corporate liability), in accordance with Article 10 of the TOC. The TOC indicates that it is possible to impose administrative, civil and criminal sanctions on legal persons. This is especially important in the context of seizure of criminal assets, often held by traffickers under the penumbra of a legal entity.²⁵ Furthermore, this recommendation is made in the understanding that in the case that legal persons cannot be held criminally liable under Ukrainian law, it should be ensured that civil and administrative liability is effective, proportionate and dissuasive (to compensate for the inability to hold legal persons criminally liable).

31. Additionally, further efforts are proposed to be made in order to ensure that appropriate provisions to establish a national legislative framework within which not only prosecutions are ensured, but also prevention of trafficking in human beings is made

²³ A. Jordan, “The Annotated Guide to the Complete UN Trafficking Protocol”, Washington DC, 2002.

²⁴ As recommended by: Point 1.8 Ch III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003. and Guideline 4.5 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Economic and Social Council, New York, 2002 Document Reference No: E/2202/68/Add.1. See also: Article 165(4) of the Criminal Code of the Republic of Moldova, entry into force, June 12, 2003.

²⁵ Point 1.3/Chapter III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 24 July 2003.

possible and most importantly, the protection of and assistance to victims of trafficking in human beings, are introduced in the Republic of Ukraine.

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