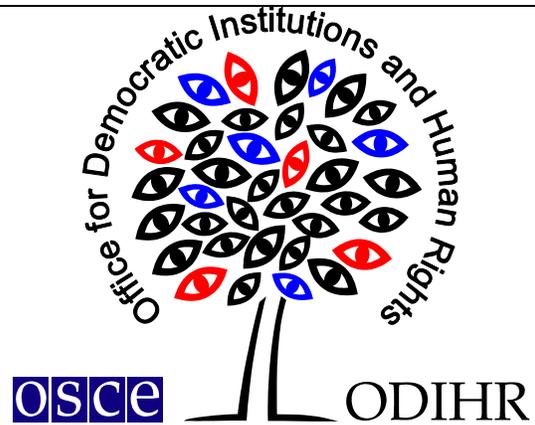


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Preliminary Opinion
on the Amendments to
Article 149 on Trafficking in Human Beings and,
Article 303 on Compelling into Prostitution
of the Criminal Code of the Republic of Ukraine,
as Drafted by the Ministry of Justice of the
Republic of Ukraine

**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 Ministry of Justice of the Republic of Ukraine made a request to the OSCE Project Co-ordinator in the Ukraine, for comments on the Amendments to Articles 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 opinion was drafted in response thereto.*

2. SCOPE OF REVIEW

3. This preliminary opinion does not equate to a full and comprehensive review, rather it has been drafted to serve as a set of 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 opinions contained herein are without prejudice to any recommendations and comments to the Amendments to Articles 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 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 [par.7, par. 8];
 - B. the understanding and interpretation of Article 149 ensures 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, are reflected[par. 10];
- C. the understanding and interpretation of Article 149 ensures that the **minimum means used to commit 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 [par. 11];
 - D. the draft Article should clearly state that the **purpose** of the acts and means used by traffickers, is to exploit the victims, and reconsider including other purposes in addition to exploitation [pars. 12, 13];
 - E. the **definition of “exploitation”** and thereby, the *types of exploitation* should be further defined and brought in line with international standards and law [pars. 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23]
 - F. the issue of **consent of the victims**, and its invalidity in the event that any of the means listed in Article 3(a) 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, are used be clearly applicable [pars. 24, 25];
 - 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 [par 26, 27];
 - H. the **penalties and sanctions** contained in Article 149 are retained as they reflect the gravity of the crime of trafficking in human beings and may only be reconsidered in light of the penalties imposed by neighboring States of the Republic of Ukraine, in order to facilitate better cooperation [par.29];
 - 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 [par.32];
 - J. **non-punishment** of victims of trafficking in human beings be considered [par. 33];
 - K. analyses be undertaken to ensure that 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

- organizing or directing other persons to commit the crime of trafficking in human beings [par. 34];
- L. 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 [par.35];
- M. 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 [par. 36];

4. ANALYSIS AND RECOMMENDATIONS

4.1 Article 149- Trafficking in Human Beings

7. 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 necessary to criminalize such conduct. It is recommended for this definition to be followed in amending the Ukrainian Criminal Code (hereinafter “UCC”)¹.

8. Further to the above, it is important to note at the outset, that the recommendation to comply with Article 3 of the Palermo Protocol does not mean to suggest that the definition of trafficking should be transplanted verbatim from the Palermo Protocol to the UCC. The form that a section criminalizing the act of trafficking takes in the UCC is dependent on the structure of the UCC, already existing legislation and the relevant provisions and prerequisites for effective implementation of the crime by the prosecuting authorities.

9. Nevertheless, it is noted and welcomed 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 however that Article 3 of the Palermo Protocol, *de facto*, establishes the minimum elements of the crime of trafficking OSCE/ODIHR would encourage Ukraine to go further in its understanding of this definition, where appropriate, in its effort to combat trafficking in human beings in accordance with this opinion.

10. Draft Article 149(1) enumerates the acts which amount to trafficking in human beings, commencing with recruitment. Article 3 of the Palermo Protocol also refers to

¹ Point 1.1, Chapter III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003.

receipt which is currently not included under Article 149(1). Since article 3 of the Palermo Protocol establishes the minimum elements which States must include in their definition of trafficking in order to comply, it is recommended to include reference to ‘receipt of persons’ under this section.²

11. The Palermo Protocol³ 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. As stated above, given that the Palermo Protocol outlines the minimum requirements, it is recommended that Article 149 be revised to ensure it addresses all such means.

12. Furthermore, as already introduced by other OSCE participating States, the UCC may include additional means, which may be used in order to effect the crime of trafficking in human beings⁴. Whatever the case, the precise definition of means used to carry out the crime must be clear as they not only have to be proved by the prosecution, but also they are closely related to the issue of consent of the victim. This issue and relationship are discussed below.

13. Further to the above, and depending on the structure of the UCC, it is also suggested that a provision criminalizing trafficking, may simply state that the act of trafficking may be achieved by use of “any means”⁵. If such model for the draft were to be adopted, it must be made certain that possible “means” are defined elsewhere in the UCC, since it will be up to the prosecution to prove them.

14. As already mentioned, the definition of trafficking in human beings according to the Palermo Protocol, stipulates that the purpose for which the intended acts are committed, is that of exploitation. The Palermo Protocol continues by indicating a minimum list of the *types of exploitation* that should be covered in national laws. The draft Article 149 (1) seemingly provides four purposes, that is, “sale of a person”, “carrying out any other agreement”, “purchase of a person” and finally, “exploitation.” While reference to “exploitation” as the purpose of the act complies with the requirement under Article 3(a) of the Palermo Protocol, the inclusion of “sale” of a person or the “carrying out any other agreement” may lead to confusion⁶. In practice proving the sale or purchase of a person may be extremely difficult for the prosecuting authorities and detract from the central issue or proving exploitation. Although as recommended above, States may exceed the requirements of the Palermo Protocol, it is recommended under this section that reference to sale or other agreements as a purpose of trafficking be deleted.

² As established in Article 3(a) of the Palermo Protocol.

³ Please see: Article 3(a) of the Palermo Protocol

⁴ See for instance, Article 379(1)bis of the Criminal Code of Luxembourg at: <http://www.legislationline.org/view.php?document=55274>

⁵ A.Jordan, *The Annotated Guide to the Complete UN Trafficking Protocol*, May 2002 Washington DC, p7

⁶ It is noted that the reason behind the third stated purpose is due to the retention of language from the current Article 149 of the UCC.

15. Further to the above, it is contended that the sale and purchase of persons, would come within the definition of slavery⁷, outlined by the Slavery Convention⁸, which states the definition of slavery to be “the status or condition of a person over whom any or all powers attaching to the right of ownership are exercised”⁹. This constitutes another reason why it may be considered to remove the additional purposes and instead ensure that the types of exploitation, including “slavery”, are clearly and well defined in the UCC, if it is not already the case.

16. Importantly, in relation to the note provided in Article 149 on the definition of “exploitation” it is important to point out that the types of exploitation listed, should be defined in accordance with international legal standards.

17. In relation to point 14 above, 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 through the provision of clear definitions of the terms included under Article 149 and the Notes thereto. Clear definitions of all terminology are important for the implementation of all provisions in practice.

18. Furthermore, the term “forced labour or services”, unless already stipulated in the UCC, is also recommended to be defined in accordance with Article 2(1) of the International Labour Organisation Forced Labour Convention No.29, which states that forced labour is “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him[her]self voluntarily”¹⁰. Forced labour may also be regulated by a separate criminal provision.

19. It is also important to note that “debt bondage” is defined as a “practice similar to slavery”¹¹ 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, a Note to the draft Article, or in any other manner appropriate to the structure of the UCC). It is also recommended that in the case that debt

⁷ Article 1(1) of the Slavery Convention, of September 25, 1956, 212, U.N.T.S 17 see:

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

⁸ Slavery Convention, of September 25, 1956, 212, U.N.T.S 17

⁹ The Slavery Convention further indicates that the slave trade includes: “All acts involved in capture, acquisition or disposal or a person with the intention to reduce him [or her] to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him [or her]; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and in general, every act of trade or transport in slaves”, Slavery Convention, of September 25, 1956, 212, U.N.T.S 17

¹⁰ ILO Convention Concerning Forced or Compulsory Labour, June 28, 1930.

¹¹ 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.

bondage is retained, it should be clearly defined. Furthermore, slavery may also be regulated by a separate criminal provision.

20. As regards “adoption for commercial purposes”, the *travaux préparatoires* to the Palermo Protocol speak rather of illegal adoption as a form of exploitation, which amounts to a “practice similar to slavery” as defined by Article 1(d) of the Supplementary Convention on Slavery.¹² 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 a definition of “practices similar to slavery” and that “adoption for commercial purposes” or rather, “illegal adoption”, comes within such definition. Furthermore, illegal adoptions may also be regulated by separate criminal provisions.

21. As stated above, the Palermo Protocol also lays down a minimum list of the types of exploitation which may amount to trafficking in human beings.¹³ This list has been reflected, to a large extent in the Note to draft Article 149 of the UCC. It is understood that the Note therefore, forms an integral part of draft Article 149 of the UCC, by serving to define the term “exploitation”. The Note includes additional forms of exploitation, than those discussed above, such as “use in armed conflict” and “engaging in criminal activities”, which is a welcomed step, and therefore, recommended to be retained.

22. For the purposes of compliance with the minimum elements provided under Article 3(a) of the Palermo Protocol, it should be considered to include the “removal of organs” in the definition of exploitation. This would be in addition to Article 143(4) of the UCC on trading in organs, as that article refers to ‘trading in organs’ themselves and not trafficking in persons for the purpose of removing their organs.

23. Regarding the issue of removal of organs, mentioned above, it should be noted that the Protocol does not cover the trafficking of organs alone.¹⁴ However, in the case that a person is transported for the purpose of removing his or her organs, this may amount to exploitation and therefore, trafficking in human beings.

24. It is important to consider whether Article 3(b) of the Palermo Protocol¹⁵, relating to the consent of the victim of trafficking in human beings is already implemented and regulated under the UCC. The UCC should foresee the invalidity of consent of the victim

¹² “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.

¹³ 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;”

¹⁴ A. Jordan, “The Annotated Guide to the Complete UN Trafficking Protocol”, Washington DC, 2002

¹⁵ Article 3(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”.

where coercion, threat, force, threat of force and other means have been used, if this is not already the case then it is recommended to include an appropriate provision to do so.

25. In relation to the issue of consent, it is important to take note that trafficking victims either do not consent to the prohibited conduct to which they are subject or, if they initially consent, that consent is rendered meaningless by the coercive, deceptive or abusive actions of the traffickers. For this reason it is imperative to ensure that the means which render consent ineffective, such as ‘deception’, ‘coercion’ etc. are clearly defined in the UCC. For instance, ‘deception’ of the victim occurs not only when the victim is deceived about the fact that he or she will be required to provide sexual services, but also if he or she is deceived about other matters, such as the extent to which he or she will be free to leave the place where he or she provides the services, control his or her working hours, be free to cease providing such services or able to leave the place of residence. National legislation should ensure that the victims consent is irrelevant where any of the means listed in Article 3 of the Palermo Protocol (at the very least), are used.

26. It is recommended to consider specifically criminalising the act of trafficking in children, and not solely include trafficking in children as an aggravating circumstance, carrying a higher penalty, as currently reflected in Article 149 (2). In order to truly reflect the gravity of the crime of trafficking in children, it may alternatively constitute a separate article following Article 149¹⁶. The sentencing instructions stipulated in Article 149(2) for trafficking in ‘minors’ would benefit from separation from sentencing on account of ‘abuse of power’. This is because in the case of ‘minors’ the sanctions concentrate on the victim, whereas in the case of ‘abuse of power’, the sanctions concentrate on the criminal. The basis for sanctioning therefore is different for each of these circumstances.

27. Further to the above, and in order to ensure compliance with Article 3(c)¹⁷ of the Palermo Protocol, the separate article on trafficking in children is recommended to stipulate that consent of the child to being trafficked may never be achieved, regardless of the means used¹⁸.

28. Draft Article 149(2) refers to the “abuse of power” as an aggravating circumstance. Unless, this constitutes a phrase of common understanding in the UCC, it would be beneficial to bring this in line with international standards to ensure that the offence of trafficking in human beings when committed (by act or omission) by a public official in the performance of his/her duty shall constitute an aggravating circumstance¹⁹.

29. Neither the Palermo Protocol nor the United Nations Convention Against Transnational Organized Crime, 2000 (hereinafter “TOC”) indicate clearly the penalties

¹⁶ 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.

¹⁷ Article 3(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”

¹⁸ Article 3(c) Palermo Protocol.

¹⁹ Article 24 (c) of the Council of Europe Convention on Action Against Trafficking in Human Beings, CETS No.197.

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.²⁰ It is therefore recommended to retain the current sanctions and punishment, subject to the recommendation on sanctions for trafficking of ‘minors’ recommended above. Furthermore, it may be considered to take into account before final adoption of the draft, the sanctions and penalties in other European jurisdictions and surrounding States of the Republic of Ukraine, as given the transnational nature of the crime, there exists necessity for co-operation with neighbouring States in the combating thereof.

4.2 Article 303. Involving into Prostitution

30. 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 involving into prostitution.

31. Further to the above, it is important to note that involving into prostitution, whether the act of prostitution is legal or illegal may fall within the definition of “sexual exploitation”²¹. 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, 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.*”²² In any case, as stated in paragraph 30 above, such clarity in terminology is essential.

32. 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.

4.3 Additional Comments and Recommendations

33. It is highly recommended to consider introducing a provision within the appropriate legislative acts, 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

²⁰ Article 11(1) of the Transnational Organised Crime Convention, 2000

²¹ Please see also paragraph 40.7 of the Document of the Moscow Meeting of the Convergence on the Human Dimension of the CSCE, 3 October, 1991 which states: “The participating States will seek to eliminate all forms of violence against women, and all forms of traffic in women and *exploitation of prostitution* of women including by ensuring adequate legal prohibitions against such acts and other appropriate measures”.

²² A. Jordan, “The Annotated Guide to the Complete UN Trafficking Protocol”, Washington DC, 2002.

criminal, administrative offences or create civil liability, where they result from their situation as victims of trafficking in human beings.²³

34. 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.

35. 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.²⁴ 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).

36. 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 possible and most importantly, the protection of and assistance to victims of trafficking in human beings, are introduced in the Republic of Ukraine. Such protection and assistance measures have recently been developed on the European scale by the Council of Europe Convention on Action Against Trafficking in Human Beings²⁵.

[END OF TEXT]

²³ 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.

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

²⁵ CETS No.197, opened for signature in Warsaw, May, 2005.