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**UNITED NATIONS PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN  
PERSONS, ESPECIALLY WOMEN AND CHILDREN**  
**2237 UNTS 319**

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The United Nations' *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children*<sup>1</sup> is one of three supplementary instruments to the *Convention against Transnational Organized Crime*.<sup>2</sup> The Convention entered into force on September 29, 2003. The Protocol entered into force on May 31, 2004.

## 1. Background and history

During the early 1990s, the UN General Assembly became increasingly aware of the need for international cooperation to combat the growing threat posed by transnational organised crime. In December 1998, the General Assembly established an Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (AC.154), which was also charged with the task of elaborating a new treaty dealing with the trafficking of women and children.<sup>3</sup> The Ad Hoc Committee held eleven meetings in Vienna, Austria between January 1999 and October 2000, culminating in the opening of the Convention and Protocol for signature at the High Level Signing Convention in Palermo, Italy on December 12–15, 2000.<sup>4</sup>

The two major textual influences on the Protocol were draft documents submitted by the governments of the United States and Argentina. The United States proposal did not limit trafficking to women and children, but was narrower in scope than the Argentinean proposal, which also covered pornography, sex tourism, acts in connection with marriages and the extraction of body organs.<sup>5</sup> A preference for the United States proposal became evident at the second meeting of the Ad Hoc Committee and the definition of 'trafficking in persons' adopted in the Protocol bears a strong resemblance to that submitted by the United States.<sup>6</sup>

## 2. Terminology

The express purposes of the Protocol are to prevent and combat trafficking in persons, to protect and assist the victims of that trafficking, and to promote cooperation among state parties in order to achieve these objectives.<sup>7</sup>

The key provisions of the Protocol are articles 3, 4 and 5, which define 'trafficking in persons' and criminalise its actors.

### 2.1 Use of terms and definitions

The definition of 'trafficking in persons' is set out in article 3 of the Protocol. It requires that three elements be fulfilled, which can be broadly classified as the acts involved, the means used, and the purpose of the actor.<sup>8</sup>

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<sup>1</sup> Opened for signature 15 December 2000, 2237 UNTS 319, Annex II, (the '*Protocol*').

<sup>2</sup> Opened for signature 15 December 2000, 2225 UNTS 209, (the '*Convention*').

<sup>3</sup> *Resolution on Transnational Organized Crime*, GA Res 111, UN GAOR, 53<sup>rd</sup> sess, UN DOC A/RES/53/111 (1998).

<sup>4</sup> Silvia Scarpa, *Trafficking in human beings: Modern Slavery* (2008) 56.

<sup>5</sup> David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 323.

<sup>6</sup> See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress, and Punish Trafficking in Women and Children, Supplementing the Convention against Transnational Organized Crime, Combined drafts of Argentina and the United States of America*, UN Doc A/AC.254/4Add.3/Rev.1

<sup>7</sup> See art 2 of the Protocol.

<sup>8</sup> McClean, above n 5, 323.

<b>Article 3, Trafficking in Persons Protocol</b>	
<b>Definition of 'trafficking in persons'</b>	
<b>1. Act</b>	<ul style="list-style-type: none"> <li>• '[T]he recruitment, transportation, transfer, harbouring or receipt of persons'</li> </ul>
<b>2. Means</b>	<p>'The threat or use of':</p> <ul style="list-style-type: none"> <li>• force or other forms of coercion;</li> <li>• abduction;</li> <li>• fraud or deception;</li> <li>• the abuse of a position of vulnerability; or</li> <li>• the giving or receiving of payments / benefits to achieve the consent of a person having control over another person.</li> </ul>
<b>3. Purpose</b>	<p>Exploitation</p> <p>This includes at a minimum:</p> <ul style="list-style-type: none"> <li>• the exploitation of the prostitution of others or other forms of sexual exploitation;</li> <li>• forced labour or services;</li> <li>• slavery or practices similar to slavery;</li> <li>• servitude; or</li> <li>• the removal of organs.</li> </ul>

Note that 'exploitation' is only given a partial definition in article 3(a) and other purposes which are not listed may constitute exploitation in satisfaction of the definition of 'trafficking in persons'.<sup>9</sup>

Additionally, article 3(b) provides that the consent of the victim to exploitation is irrelevant where any of the means listed are used. As proof of one of the means is a necessary element for establishing that a person has been trafficked, the practical effect of article 3(b) is that the consent of the victim is wholly irrelevant.<sup>10</sup>

## 2.2 Children

In cases involving child victims, proof of a means listed is not an essential element for establishing that the child has been trafficked.<sup>11</sup> That is, where a child has been recruited, transported, transferred, harboured or received for the purpose of exploitation, he or she will have been trafficked. The consent of a child to exploitation is obviously irrelevant.<sup>12</sup> Finally, to ensure consistency and uniformity among State Parties, article 3(d) of the Protocol defines a child as any person less than eighteen years of age.

## 3 Trafficking offences

Article 5 of the Protocol requires State Parties to adopt legislative or other measures which establish that trafficking in persons (as defined in article 3) amounts to a criminal offence.

In addition, state parties are required to establish the following inchoate offences:

- Subject to the basic concepts of their legal system, attempting to commit an offence involving trafficking in persons;
- Participating as an accomplice in an offence involving trafficking in persons; and

<sup>9</sup> McClean, above n 5, 326-327.

<sup>10</sup> Ibid 328. This interpretation is acknowledged in UNODC *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto* (2004) 270 [37].

<sup>11</sup> Art 3(c) of the Protocol.

<sup>12</sup> McClean, above n 5, 329.

- Organising or directing other persons to commit an offence involving trafficking in persons.

Article 4 provides for the Protocol to apply to the prevention, investigation, and prosecution of the offences established under article 5, where those offences are transnational in nature and involve an organised criminal group.<sup>13</sup> However, the *Legislative Guide* explains that ‘the Protocol offences of trafficking in persons [...] must apply equally regardless of whether the case involves transnational elements or is purely domestic.’<sup>14</sup> Thus, the Protocol does not require State Parties to include a transnational component or the involvement of an organised criminal group as essential elements of any offences criminalising trafficking in persons. In the context of trafficking in persons this is quite important, as it ensures that persons trafficked internally within a country or without the involvement of an organised criminal group are entitled to protection under the Protocol, and their traffickers remain criminally liable.<sup>15</sup>

Clauses similar to article 4 of the Protocol can be found in the *Convention against Transnational Organised Crime*.<sup>16</sup> These were included in the Convention and Protocol to ensure compliance with the cooperation articles on which the Convention negotiations proceeded.

#### 4 Other provisions

Part II, articles 6 to 8 of the Protocol mandates the adoption of measures and procedures for the protection of victims of trafficking in persons, though in rather vague terms which do not place strong obligations on State Parties.<sup>17</sup> These include:

- protecting the identity and safety (both physical and psychological) of victims;
- providing general welfare and support;
- ensuring access to compensation for damage suffered<sup>18</sup>; and
- facilitating the residence of victims in the receiving country or safe return to their country of origin, at the victim’s election.<sup>19</sup> (This is subject to the principle of non-refoulement).

Part III, articles 9 to 13 of the Protocol further requires State Parties to:

- establish comprehensive policies, programs and measures for the prevention of trafficking in persons and protection of victims<sup>20</sup>;
- exchange information between government authorities to assist in identifying the victims and perpetrators of trafficking in persons<sup>21</sup>;
- strengthen border controls to prevent and detect trafficking in persons<sup>22</sup>;

<sup>13</sup> As defined in article 2(a) of the Convention.

<sup>14</sup> UNODC *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocol thereto* (2004) 10-11 [18].

<sup>15</sup> See Scarpa, *Trafficking in human beings: Modern Slavery* (2008) 62.

<sup>16</sup> See art 3(4) and 34(2) of the Convention.

<sup>17</sup> Scarpa, above n 4, 64.

<sup>18</sup> Art 6 of the Protocol.

<sup>19</sup> Art 8 of the Protocol.

<sup>20</sup> Art 9 of the Protocol.

<sup>21</sup> Art 10 of the Protocol.

<sup>22</sup> Art 11 of the Protocol.

- ensure that travel or identity documents are not easily replicated or falsified; and
- verify the legitimacy of travel or identity documents within a reasonable time at the request of another state party.<sup>23</sup>

Part IV, articles 14 to 20 of the Protocol contain generic final provisions including a saving clause protecting any other rights conferred on individuals/states by international law and procedures for signature etc., entry into force and the settling of disputes.

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<sup>23</sup> Arts 12, 13 of the Protocol.