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## **Preliminary Comments on draft Law of the Republic of Azerbaijan on Fighting Against Human Trafficking**

**based on an English translation  
provided by the OSCE Office in Baku**

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## **Preliminary Comments to the draft Law of the Republic of Azerbaijan on Fighting Against Human Trafficking.<sup>1</sup>**

Based on the request of the Government of the Republic of Azerbaijan made to the OSCE Office in Baku, for comments to the draft Law of the Republic of Azerbaijan on Fighting Against Human Trafficking, and further, in response to the OSCE Office in Baku request for assistance from the OSCE ODIHR in this regard, the OSCE ODIHR and the OSCE Office in Baku provide their preliminary comments on the aforementioned draft law;

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 Azerbaijan has committed;

Furthermore, it ought to be taken into consideration that the preliminary comments have been based on a working translation of the draft Law on Fighting Against Human Trafficking, as provided by the OSCE Office in Baku, from which fact inconsistencies may result. Additionally, the preliminary comments have been written simultaneously with the preliminary comments to the Law of the Republic of Azerbaijan to Several Legislative Acts of the Azerbaijan Republic related to Fighting Against Human Trafficking;

The OSCE ODIHR and the OSCE Office in Baku would also like to make mention that the preliminary comments contained herein are without prejudice to any recommendations and comments that both aforementioned institutions may wish to make on the draft Law on Fighting Against Human Trafficking, in the future;

Further, the preliminary comments 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;

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<sup>1</sup> Based on the Translation provided by the OSCE Office in Baku.

## 1. Executive Summary of the Preliminary Comments

It is recommended that;

- 1.1 the **definition of the crime of trafficking** should 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, simultaneously with the Criminal Code of the Republic of Azerbaijan;
- 1.2 the draft Law of the Republic of Azerbaijan on Fighting Against Human Trafficking should **define children** as any person under the age of 18 years;
- 1.3 the **rights, needs and best interest of children** should be draft Law of the Republic of Azerbaijan on Fighting Against Human Trafficking;
- 1.4 the draft Law of the Republic of Azerbaijan on Fighting Against Human Trafficking include a **non-discrimination clause**, which would ensure the equal treatment of all victims of trafficking be they nationals, foreigners or stateless persons;
- 1.5 the role of **non-governmental organizations** be clearly defined within the draft Law of the Republic of Azerbaijan on Fighting Against Human Trafficking;
- 1.6 provisions serving the **prevention** of the crime of trafficking include the creation and implementation of key social and economic policies, including addressing root causes and the inequality between men and women in society;
- 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, including short-term residence permits, as well as, access to medical, social, legal and psychological assistance;
- 1.8 the draft Law of the Republic of Azerbaijan on Fighting Against Human Trafficking includes provisions **protecting the private life** and identity of the victims of trafficking;
- 1.9 **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 of her protection from further harm, throughout the criminal proceedings;
- 1.10 the **necessary resources for the implementation of the draft Law** of the Republic of Azerbaijan on Fighting Against Human Trafficking ought to be secured.

## **2. Purpose and Structure of the draft Law.**

- 2.1 It is recommended that the purpose of the draft Law on Fighting Against Human Trafficking (hereinafter also referred to as “LFAT” or “Draft Law”) include, “the prevention of trafficking in human beings, the protection and provision of assistance to victims of trafficking in human beings, and the legal and organizational basis for combating trafficking in human beings”.
- 2.2 It is proposed that the Draft Law be re-structured in the following manner and divided into the following Chapters<sup>2</sup>:
  - (I) General Provisions
  - (II) Institutional Framework
  - (III) Prevention
  - (IV) Protection
  - (V) Prosecution
  - (VI) International Co-Operation
  - (VII) Final Provisions.

## **3. Chapter I: General Provisions**

- 3.1 It is recommended that the definition of “human trafficking” be consistent<sup>3</sup> with the definition provided in Article 3 of the UN Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (hereinafter “Palermo Protocol”). The essence of this definition, that is all of the necessary elements of the crime of trafficking, should be contained in this Law and well as the Criminal Code of the Republic of Azerbaijan (hereinafter, “ACC”)<sup>4</sup> Such consistency is aimed at ensuring the effectiveness of prosecution of the crime of trafficking in human beings.
- 3.2 Further to the above the additional elements of “recruitment”, “harbouring or receipt”, should be added to the definition of “human trafficking”. It should be noted that one of the key undertakings in combating trafficking is action at the phase of “recruitment”. The Government of Azerbaijan may in the future, commence reviewing current laws and administrative controls over the legal conditions relating to the licensing and operations of businesses that may serve as a cover for trafficking such as, marriage bureaux, employment agencies, travel agencies, hotels and escort services. Such review is recommended by; Guideline

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<sup>2</sup> Notwithstanding this recommendation, for the purposes of clarity, the preliminary comments are provided in accordance with the structure in the present draft law.

<sup>3</sup> As regards the elements which constitute trafficking in human beings, and not necessarily structure of drafting.

<sup>4</sup> currently found in: Article 145-1 of the (draft) Law of the Republic of Azerbaijan On Amendments to Several Legislative Acts of the Republic of Azerbaijan Related to Fighting Against Human Trafficking.

- 4.2 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking.<sup>5</sup>
- 3.3 As recommended by point 3.6 below, and in accordance with Article 3(b) of the Palermo Protocol, a paragraph should be included directly after paragraph 1.0.1 expressly stating that the consent of the victim of trafficking in persons to the intended exploitation set forth in paragraph 1.0.1, shall be irrelevant where any of the means set forth in paragraph 1.0.1 have been used. Further to this recommendation Article 18.2 of the Draft law may be deleted.
- 3.4 As regards the definition of exploitation, it is recommended for the terms “exploitation of the prostitution of others” and “sexual exploitation” in the context of the crime of trafficking, to be defined in the LFAT. The Palermo Protocol does not endeavour to define these terms, and it was left to the domestic law of each state to do so, by the framers of the Palermo Protocol.<sup>6</sup> Additionally, it is recommended that the catalogue of forms of exploitation be included in the definitions section as opposed to inclusion in Article 19 of the LFAT. In view of this recommendation, Article 19 of the LFAT is proposed to be deleted, with the various forms of exploitation contained therein transferred to the definition of exploitation contained in this Article 1 of the LFAT. Furthermore, the list of possible forms of exploitation is recommended to remain non-exhaustive. The Palermo Protocol list of exploitative purposes is a minimum standard only, and states are free to add further purposes. It should be ensured, however, that any new terms introduced are precisely defined in law.
- 3.5 It is considered that the definition of “human trafficker” has been included in order to cover the scope of liability of legal entities as well as liability of public officials. The scope of such liability should therefore instead be defined in Chapter V on Prosecution (currently called: Liability for Human Trafficking). Further to this proposal the definition of “human trafficker” may be deleted from this article, to be replaced by one provision on corporate liability in Chapter V of the draft Law and a provision on aggravating circumstances including the liability of public officials for involvement in trafficking. Recommendations as to the content of these provisions are provided in the preliminary comment to Chapter V of the Draft Law, as set out below.
- 3.6 It is recommended that the definition of victim “as any person subject to human trafficking” be separated from the issue of consent. The issue of consent is relevant to establishing the elements of the crime. That is, in accordance with Article 3(b) of the Palermo Protocol, consent of the victim is irrelevant to proving

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<sup>5</sup> United Nations Economic and Social Council, New York, 2002 Document Reference No: E/2202/68/Add.1

<sup>6</sup> UN Interpretive Note: “...The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol, which is therefore, *without prejudice* to how State Parties address prostitution in their respective domestic laws” [Italics added] See also: Jordan, A., *The Annotated Guide to the Complete UN Trafficking Protocol*, International Human Rights Law Group, Washington, 2002. p 8

- the crime where any of the means to achieve the crime have been used. Therefore, it is recommended to include this within the definition of “trafficking” and not within the definition of “victim”. Further to this proposal, and point 3.3 above, Article 18.12 of the Draft Law may be deleted. It is also proposed to reconsider the necessity for defining the term “victim” at all.
- 3.7 It is recommended that the definition of “children” as any person under the age of 18 years be included in Article 1.0 of the LFAT.<sup>7</sup>
- 3.8 It may be considered to criminalize trafficking in children in a separate provision<sup>8</sup> of the ACC<sup>9</sup>, in which case it would be recommended to consider drafting a separate article defining trafficking in children in the Draft Law.
- 3.9 In the case that a separate article on trafficking in children is not adopted by the ACC and defined herein, at minimum, Article 1 is recommended to include a separate paragraph defining trafficking in children in compliance with Article 3 (c) of the Palermo Protocol.
- 3.10 It is also recommended to consider adding a separate principle on children in Chapter I, General Provisions, or alternatively under Article 4 of the LFAT. The proposed article should expressly state that the best interest of the child shall be paramount at all times and that child victims of trafficking shall be provided with appropriate assistance and protection, with full account being taken of their special vulnerabilities, rights and needs.<sup>10</sup> These rights and needs should be considered at every article of the LFAT, with specific provisions drafted, where appropriate.
- 3.11 It is recommended for the general provisions of the LFAT to include a principle on non-discrimination.<sup>11</sup> The non-discrimination principle proposed to be included would ensure that the LFAT applies equally to all victims of trafficking, whether they are foreign citizens or citizens of the Azerbaijan Republic, in as far as this is possible.<sup>12</sup> The insertion of this principle into the LFAT would ensure

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<sup>7</sup> Article 1, United Nations Convention on the Rights of the Child, 1990, as ratified by the Republic of Azerbaijan.

<sup>8</sup> See: Article 206 on Trafficking in Children, Criminal Code of the Republic of Moldova, 2003.

<sup>9</sup> For example, it may be included in the ACC directly after the article on trafficking in human beings of in Chapter 22 of the ACC, on Crimes Against Minors and Family Relations.<sup>9</sup> In accordance with Article 3(c) of the Palermo Protocol, this article should state that the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation, shall amount to trafficking, even in this does not involve any means set forth in Article 3(a) of the Palermo Protocol (that is, deception, fraud, abduction etc.)

<sup>10</sup> Guideline 8, 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/2002/68/Add.1.

<sup>11</sup> This is not to be confused with the prevention of discrimination of victims of trafficking provided by Article 4.0.1.

<sup>12</sup> The following wording for such provision may be adopted: *“The implementation of the provisions of the LFAT, in particular the enjoyment of measures to protect and promote the rights of victims of trafficking finding themselves on the territory of the Azerbaijan Republic, shall be secured without discrimination on*

- that victims of trafficking are identified as such, and afforded all protection necessary by being properly referred to the assistance services they may require.
- 3.12 It is recommended that Article 4 of the LFAT, on basic principles of fighting against human trafficking, include the principle of respect for the human rights of victims of trafficking in human beings, as a key principle.
- 3.13 It is also recommended that Article 4.0.3 be clarified.

#### **4. Chapter II: The Basis of the Organization of Fighting against Trafficking in Human Beings [Institutional Framework]**

- 4.1 In accordance with the recommendation made in point 2.2 above, the chapter may be renamed as “Institutional Framework”.
- 4.2 The LFAT presents a unique opportunity to create a functional and effective institutional framework for the fight against trafficking in human beings. It is therefore recommended that this chapter be specific in establishing the appropriate bodies which will partake in the combating of trafficking. In particular in light of the National Action Plan to Combat Trafficking in Human Beings in the Republic of Azerbaijan, as approved by Decree No. 208 of the President of the Republic of Azerbaijan dated 6 May 2004 (hereinafter, “NAP”). Therefore, it is suggested that some general references such as “relevant executive bodies” are replaced, to the extent possible, with a clearer indication of which institution(s) will be dealing with, and have responsibility for, certain aspects of the fight against trafficking. These types of clarifications are recommended to be weighed against the possibility of introducing also, secondary implementing legislation.
- 4.3 Further the above recommendation, this chapter of the LFAT should contain provisions on the establishment of the National Co-Ordinator and his or her role of coordination of anti-trafficking activities between the various institutions. Additionally, it is proposed to consider the institution of a National Rapporteur, who would be responsible for monitoring the anti-trafficking activities of the State Institutions and the implementation of the requirements set out by national legislation.
- 4.4 It is also recommended that a provision on the tasks and powers of the Special Police Anti-Trafficking Squad (hereinafter, “SPAT”) be included in this chapter of the LFAT. This recommendation is made especially in light of the fact that a part of the activities of the SPAT as proposed by the NAP are planned to include the carrying out of in particular, identification of victims of trafficking in human beings, as well as operational, investigation and criminal prosecution activities.

- 4.5 Further to point 4.4 above, once the SPAT is established by a separate provision in this chapter, it is recommended that any investigational or criminal prosecution powers that are assigned to the SPAT, should be clearly enshrined in Chapter V of the LFAT, especially if new powers are intended to change the current criminal procedure. Furthermore, such changes are proposed to also lead to the amendment of the Criminal Procedure Code of the Republic of Azerbaijan, which at the very least should contain an appropriate cross-reference to the LFAT, with regard to such new procedure. It is further suggested that in view of the changes, laws such as that on police, are reviewed and amended, as appropriate.
- 4.6 The LFAT may also outline the basic premises of the operation of the NAP and the entities responsible for its implementation and update.
- 4.7 The NAP refers to the role of specially trained non-governmental organizations (hereinafter, “NGOs”) as playing a pivotal role in the provision of secure accommodation for victims of trafficking. Therefore, it is recommended that the role of NGOs in the institutional framework to combat trafficking also be defined in this chapter of the LFAT.
- 4.8 Article 6 of the LFAT, and more specifically, paragraph 6.2 and 6.3 appear to be addressing the obligations by citizens of reporting crimes as well as carriers liability which has been proposed by the draft Law on Amendments to Several Legislative Acts of the Azerbaijan Republic related to Fighting Against Human Trafficking, amending Article 150-1 of the Code of Administrative Offences. It is proposed that these articles more appropriately belong in Chapter V, and although they are termed as “assistance to the State” constitute rather obligations (liability) under both criminal and administrative law.
- 4.9 It is recommended that Article 7, generally be revised to ensure that preventative measures, as such, are placed in the Chapter III on Prevention. In particular, border measures, outlined in Article 7.5, are proposed to be included in Chapter III on Prevention. Furthermore, the Article should be clarified to ensure that it does not impose any restrictions on the freedom of movement of individuals.

### **5. Chapter III: Prevention of Trafficking in Human Beings**

- 5.1 It is proposed for Article 8 to state that implementation and assessment of all policies and programs developed to prevent trafficking in human beings shall be in consideration of ensuring and furthering the equal status of men and women, and shall be in consideration of the special rights and needs of children. The provision may also stipulate that all policies and programs shall be aimed at reducing inequality, poverty and all forms of discrimination, which factors may lead to trafficking in persons.<sup>13</sup> The provision would therefore be setting one of the standards according to which preventative measures should be developed as

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<sup>13</sup> Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Economic and Social Council, New York, 2002 Document Reference No: E/2002/68/Add.1.pg.3



- opposed to specifying concrete actions in the LFAT itself. Based on this rationale there would be no need to delve into such detail as expressed in paragraph 8.2.4, which consequently may be deleted.
- 5.2 It is proposed for paragraph 8.2.3 to also include the provision of vocational training for potential victims of trafficking (or rather, groups in society vulnerable to becoming victims of trafficking) as well as, expressly include wording recognizing the particular need to introduce and/or maintain policies on eliminating discrimination of women in the field of employment ensuring the right to equal employment opportunities and equal pay.<sup>14</sup>
- 5.3 It is noted that paragraph 8.2.7 stipulates the requirement of establishing educational courses for personnel of institutions fighting against human trafficking. In fact, it is proposed that the training of personnel is of such importance that a separate article on “training” (of personnel of the institutions fighting trafficking in human beings) should be drafted. Such article is recommended to establish that training for such personnel, shall include general human rights training, as well as, more specifically, training on the prevention of trafficking in human beings, identification and protection of victims trafficking in human beings, and where appropriate, prosecution of traffickers.
- 5.4 It is proposed that Article 13 of the LFAT be transferred into this Chapter III on prevention. Whereas, provisions on the assistance provided by NGOs to victims of trafficking in human beings should remain under Chapter IV and further to point 3.5 above, the place of NGOs in the “institutional framework” should be established in Chapter II.
- 5.5 It is strongly recommended that any information sharing amongst authorities, as foreseen by Article 9 of the LFAT, and as regards the personal data and identity of victims of trafficking in human beings be conducted in respect of the private life and identity of victims. The article should clearly stipulate that personal data regarding victims shall be stored and used on consent of the victims and in conformity with the principles provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe (ETS 108), which although the Republic of Azerbaijan has not yet ratified, contains standards adopted by states with which the Republic of Azerbaijan may wish to share information, or receive information from, for example, also in the context of international co-operation. Therefore, the proposed provision would expressly state that any storing, compilation or transmission of personal data of the victim of trafficking may only be done upon his or her consent and that the data shall only be used for the purpose for which it was compiled.

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<sup>14</sup> Point 3.3, Chapter IV, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003.

## **6. Chapter IV: Social Rehabilitation and Protection of Victims**

- 6.1 It is proposed that Article 10 on the establishment of special units be transferred to Chapter on the Institutional Framework, so that those responsible for implementing the LFAT when reading its provisions are clear on the organization of the institutional framework for combating trafficking in human beings. However, the *type* of assistance that the victims of trafficking are required to receive from these special units should remain under this Chapter.
- 6.2 It is recommended that Article 13 on co-operation with non-governmental organizations on preventing trafficking, be amended and transferred as suggested by point 5.4 above.
- 6.3 It is proposed that, in line with the purpose of the adoption of the Law, protection provisions should enable the proper identification of victims of trafficking in human beings, by relevant and competent State authorities as well as by way of self-identification as already stipulated by paragraph 12.2 of the Draft Law, and subsequently, referral and provision of all available assistance measures.
- 6.4 Further to the recommendation made in point 3.11 above, it is proposed that the law clearly stipulates that the protection and assistance measures offered are applicable to all victims of trafficking in human beings, that is, citizens of Azerbaijan, foreign and stateless persons alike. Such wording would ensure that all victims are able to be referred to the interim shelters proposed by Article 11 of the draft Law.
- 6.5 It is recommended that this chapter on Protection of victims include a general provision on the protection of private and family life of the victim of trafficking. This constitutes a fundamental human right, which the state is obliged to protect<sup>15</sup>, but in addition to this victims of trafficking are witnesses to organized crime, and in order to ensure their co-operation with authorities in order to combat this crime, they and their families must receive the maximum amount of safety and protection from retribution and retaliation of traffickers. Such provision is pivotal to ensuring the safety of the victim from the very moment of identification and should apply throughout the entire recovery process, any potential trial in which the victim may serve as a witness and if necessary, involve measures to maintain the identity of the victim as anonymous.
- 6.6 It is proposed that a provision be drafted clearly listing the assistance measures that ought to be provided to all persons who are presumed to be victims of trafficking. In addition to the assistance already stipulated in Articles 14 and 15 of the LFAT, provision of translation and interpretation services should be provided, as well as the possibility of access to extended (and not solely emergency) medical treatment, and to the labour market , vocational training and

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<sup>15</sup> Article 8, European Convention on Human Rights, as amended by Protocol No.11, 1998, ETS No.5

- education for victims lawfully resident in the Republic of Azerbaijan. The article on assistance measures is also proposed to expressly include the provision of free legal assistance to victims of trafficking.
- 6.7 It is proposed that identified victims of trafficking be granted a ‘reflection and recovery period’ at minimum lasting for a period of 30 days. This provision is recommended to be expressly included in the LFAT. During such recovery and reflection period victims would be permitted to remain in the country (if foreign nationals or stateless), could escape the influence of traffickers while being provided with all of the assistance measures provided above, and would have the opportunity to take an informed decision on co-operating with the competent authorities in prosecuting the trafficker (if such co-operation is at all required).<sup>16</sup> Further to this recommendation, paragraphs 15.6, 15.7 and 15.8 are proposed to be deleted. Additionally, paragraph 11.2 on provision of shelter is recommended to extend the initial time period for which the shelter is available to 30 days for all victims.
- 6.8 It is recommended that Chapter IV on protection of victims also includes the possibility of obtaining a renewable residence permit for victims of trafficking<sup>17</sup>, who are not citizens of the Republic of Azerbaijan, to the extent that it is considered necessary owing to their personal situation or for the purposes of investigation or criminal procedure. Such article should also stipulate that any decision on issuance of a residence permit to child victims shall always be taken in the best interests of the child. Furthermore, it is also proposed for the Draft Law to permit the change of the place of residence for victims of trafficking, who are citizens of the Republic of Azerbaijan. It is recommended that the issuance of a residence permit not be conditioned upon the co-operation with authorities, as stated in paragraphs 15.6 and 15.7 of the LFAT, and therefore, as recommended in point 6.7 above, these articles are recommended to be deleted. It is also noted that paragraphs 15.6 and 15.7 may contravene one of the main principles of the Draft Law, as articulated in paragraph 4.0.1
- 6.9 It is considered that affording all victims of trafficking adequate compensation and legal redress is fundamental to their social recovery. Provisions on the access to legal redress and compensation available to the victim, whether in administrative, civil or criminal proceedings are recommended to be drafted. Further, the LFAT should contain the necessary guarantee of compensation for victims in accordance with the conditions of national law.
- 6.10 The establishment of a victim compensation fund, consisting in part of the assets seized from the traffickers should be carefully considered, as a measure that

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<sup>16</sup> Point 4.1, Point 8 of Chapter V, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003.

<sup>17</sup> Article 7, Palermo Protocol.

- would secure compensation to victims.<sup>18</sup> A provision on the establishment of a victims compensation fund is therefore, recommended. Accordingly, it is proposed that paragraph 23.2 on seizing the property of legal entities proven by court order as liable for the crime of trafficking, should expressly state that the assets and property seized shall be deposited into such victim compensation fund.
- 6.11 Further to the recommendations made above it is proposed that victim and victim-witness protection measures foreseen by paragraphs 15.2, 15.3, 15.4 and 15.5, be drafted as separate and express provisions. Article 24(2)(a) of the United Nations Convention Against Transnational Organized Crime, 2000 (hereinafter “Crime Convention”) specifically provides that the state should establish procedures for the physical protection of victims, and the possibility of relocation and identity change when feasible. Further, the Council of Europe Recommendations R(85)11 and R(2000) 11, provide for measures to protect trafficked persons and their family members, with the latter standards calling upon the extension of protection provisions also to members of NGOs assisting the victims during penal and civil proceedings. Such protection of trafficked persons should not be made conditional upon their capacity or willingness to cooperate in legal proceedings.<sup>19</sup>
- 6.12 Although paragraph 15.4 refers to the protection of victims in accordance with the Law on “State Protection of Persons Participating in Criminal Procedure” (hereinafter, “SPCP”), it is noted that this legal act, fails to provide for protection measures during the actual trial. Additionally, physical protection, psychological protection and protection from unfair treatment of the victim during the trial must be secured. Therefore, in the case that a victim of trafficking in human beings does act as a witness in criminal proceedings the protection measures which are recommended to be made available may include i.e., teleconferencing, allowing a witness to be heard in the court room, but physically in and adjacent or nearby room,<sup>20</sup> use of video-taped statements,<sup>21</sup> or where considered necessary exclusion of the public from the trial as stated in Article 22.
- 6.13 Furthermore, if indeed the SPCP should remain applicable to victims of trafficking it is recommended to also be reviewed, so as to ensure that; clear criteria for admission to the protection program are set out; the law stipulates who may apply for inclusion in the program; the law provides for protection measures during the trial and, that inclusion in the program, and decision for classification of an individual as a “protected person” is done upon the consent of the individual concerned – especially, in light of the fact that measures such as identity and appearance change and relocation are foreseen by the SPCP. Therefore, it is proposed to be expressly stated that the witness protection program, is available to victims of trafficking which would permit for the relocation, physical protection,

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<sup>18</sup> Article 6 of the Palermo Protocol on Assistance and Protection of Victims of Trafficking in Human Beings.

<sup>19</sup> Recommended Guideline 6 .6, UNHCHR.

<sup>20</sup> See for example: Article 110, Moldovan Code of Criminal Procedure.

<sup>21</sup> See for example: Article 109, Moldovan Criminal Procedure Code.

and identity change of victims of trafficking, in appropriate cases and upon the consent of the victim.<sup>22</sup> Also, in accordance with best practices in the OSCE region<sup>23</sup>, it may be considered to expressly provide that such extensive protection to persons reporting corruption in the context of trafficking in human beings<sup>24</sup>.

- 6.14 It is proposed to be ensured that the adoption such new victim, and victim-witness protection measures, as required also by Article 24 of the Crime Convention”, should be reflected with relevant amendments both to the Criminal Procedure Code of the Republic of Azerbaijan and the Law on the State Protection of Persons Taking Part in Criminal Procedure. This may be achieved through cross-referencing, that means, either the special procedures for victims of trafficking are included in this Draft Law and referenced as such in other laws mentioned above, or the special procedure is explained by the other laws, and reference to these provisions is made in the Draft Law.
- 6.15 It is recommended that the non-punishment provision encompassed by paragraph 15.9 be transferred to Chapter V on Prosecution (currently “Liability for Trafficking in Human Beings”)
- 6.16 The compliance with international standards of the protection measures offered to child victims of trafficking, and in particular, that stated in paragraph 17.5, may be assessed only following the review of the Law on Social Protection of Orphans and Children Deprived of Parental Care.

## **7. Chapter V: Liability for Trafficking in Human Beings [Prosecution]**

- 7.1 Further to the proposal made in point 2.2 above, this chapter may be renamed “Prosecution”
- 7.2 It is recommended that this chapter provide a clear non-punishment provision for victims of trafficking. Such provision should state that victims of trafficking should not be detained, charged or prosecuted under criminal, civil<sup>25</sup> or administrative law provisions for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as victims.<sup>26</sup> Furthermore, as proposed in point 6.16 above, paragraph 15.9 of the

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<sup>22</sup> Article 28 on Protection of Victims, Witnesses and Collaborators with the Judicial Authorities, of the Revised Draft Convention of the Council of Europe on Action Against Trafficking in Human Beings, CAHTEH(2004) INFO 4.

<sup>23</sup> Best Practices in Combating Corruption Manual, Office of the Co-ordinator for Economic and Environmental Activities, Vienna 2004.

<sup>24</sup> For instance, by specific inclusion in the Draft Law or in Article 3(1) of the SPCP.

<sup>25</sup> Guideline 4.9, 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.

<sup>26</sup> Point 1.8, Chapter 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.

- Draft Law may be subsumed by this non-punishment provision. The inclusion of a clear non-punishment provision would ensure that provisions such as paragraph 6.5, 7.5 and 21.4, amongst others, do not apply to victims of trafficking.
- 7.3 Articles 18, 19, 20 and 21 of the Draft Law appear to have been drafted to assist in the prosecution of the crime of trafficking. However, it is submitted that the articles, in the current form, serve to rather confuse the elements of this crime. It is therefore, highly recommended to revise these provisions.
- 7.4 Paragraph 18.1 is proposed to reflect the precise definition of the crime of trafficking as found in the Draft Law and the ACC.
- 7.5 Paragraph 18.2 dealing with the issue of consent is proposed to be drafted precisely as in the definition of the crime of trafficking.
- 7.6 The means and forms of exploitation addressed by Article 19 are recommended to be identical to that expressed in the definition of “exploitation” in the draft Law.
- 7.7 Aggravating circumstances in which the crime of trafficking occurs, which Article 20 appears to be addressing, are recommended to be stipulated as such, instead of being labeled “socially dangerous features of human trafficking”. Aggravating circumstances are considered to occur, amongst others, when the offence of trafficking; has deliberately or by gross negligence endangered the life of the victim; has been committed against a child; has been committed by a public official in the exercise of his/her duties (whether by act or omission, as stated in point 3.5 above); and, has been committed within the framework of an organized criminal group.<sup>27</sup> Of course, the catalogue of aggravating circumstances may be broader. In light of the recommendation made in point 3.5 above, liability of public officials is recommended to be dealt with in this provision (on aggravating circumstances) and not within the definitions. Further, it is recommended that liability of public officials is expressly stated as including any acts or omissions, or failure to act, by an official which action or inaction leads to trafficking.<sup>28</sup>
- 7.8 Additionally, it is proposed to review the ACC, in order to ensure that separate offences such as, threats, mental abuse, unlawful detention, debt bondage, forced marriage, forced abortion, torture, cruel, inhumane and degrading treatment<sup>29</sup>, liability for not paying wages, confiscation and destruction of travel documents, etc are established. The ensuring that such separate offences are established would

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<sup>27</sup> Article 24 of the Draft Council of Europe Convention on Action Against Trafficking in Human Beings, 5 July 2004, CAHTEH(2004) INFO 4. Definition of “organized criminal group” in accordance with Article 2(a) of the UN Transnational Organized Crime Convention, 2000.

<sup>28</sup> Point 1.4, Chapter III, OSCE Action Plan to Combat Trafficking in Human Beings PC.DEC/557 24 July, 2003, and Article 24 of the Draft Council of Europe Convention on Action Against Trafficking in Human Beings, 5 July 2004, CAHTEH(2004) INFO 4.

<sup>29</sup> Article 3, European Convention on Human Rights, as amended by Protocol No.11, 1998, ETS No.5; also; Article 2 and 4, United Nations Convention Against Torture, 1984; and; Article 23, International Covenant on Civil and Political Rights, 1966.

permit bringing charges against perpetrators for violations in addition to the charge of trafficking in persons. Such provisions, depending on the style of drafting and methods of cross-referencing adopted, should be reflected also in this Draft Law.

- 7.9 It is also proposed that provisions be included which describe liability for aiding and abetting the crime of trafficking, and organizing and directing other persons to commit acts of trafficking, in compliance with Article 5(2) of the Palermo Protocol.
- 7.10 Article 12 of the Crime Convention also obliges states to adopt provisions which would facilitate the confiscation and seizure of the proceeds of the crime derived from the trafficking offence, or property, equipment or other instrumentalities used or destined for use in the offence of trafficking. It is recommended that such provisions be drafted. However, in order to ensure that the seizure of criminal gains is not used for corrupt purposes, provisions should clearly stipulate the procedure for seizure as well as the proposed deposit into a victim compensation fund, as recommended in 6.9 above.
- 7.11 As recommended by point 3.5 above, liability of legal entities should be dealt with in this Chapter IV on Prosecution. It is recommended for the liability of legal entities to be defined as including criminal, civil and administrative liability, in accordance with Article 10 of the Crime Convention. Further, it is imperative to ensure precise compatibility between the provision herein and the ACC.
- 7.12 Further to point 7.11 above, the liability of legal entities contained in Article 23 of the Draft Law is recommended to be reviewed to ensure clarity, in particular, of the necessary “link” to trafficking that such entities must have in order to be held liable, especially, in consideration of the sanctions imposed, which may serve to restrict the freedom of association<sup>30</sup>. Furthermore, for the purposes of consistency, wherein, sanctions and penalties for liability have not been included in this Chapter IV at all, it should be reconsidered whether the sanctions of “abolishing” such entities is appropriate to be included in this provision.
- 7.13 It is highly recommended that the introduction of new provisions which have effect of the current status of the ACC and the Criminal Procedure Code of the Republic of Azerbaijan, or any other codes, be reflected in such codes, as appropriate (for instance, by precise cross-referencing of acts).

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<sup>30</sup> Article 22, International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49 and Article 11 of the European Convention on Human Rights, as amended by Protocol No.11, 1998, ETS No.5

## **8. Article 24: International Co-Operation**

- 8.1 It is proposed, in line with point 2.2 above, that there be a chapter on International Co-operation which may include provisions such as mutual co-operation in preventative activities, as well as, exchange of information and expertise.
- 8.2 It is suggested that matters such as extradition, regulated by the current paragraph 21.5 of the LFAT, may also be included under this Chapter on International Co-operation.
- 8.3 Additionally, provisions on co-operation on the implementation of witness protection programmes are also may also be included in this chapter.
- 8.4 It is proposed that the Draft Law makes clear that any exchange of information on victims of trafficking, in the context of international co-operation, be conducted in respect of the general provision of protection of private life and data protection principles recommended in point 5.5 above.

## **9. Additional Comments**

- 9.1 It is recommended for a precise cost assessment to be conducted in light of the assistance and protection measures which are foreseen in this Draft Law.
- 9.2 It is recommended that consultations on the content of the Draft Law to be undertaken with the members of civil society who will partake in implementation of the law
- 9.3 It is also recommended that a wider group of law enforcement authorities, in particular, those foreseen to be in close contact with victims of trafficking, be consulted on the Draft Law.