



**United Nations and Council of Europe Anti-trafficking Instruments:
Comparative Analysis and
Assessment of Implementation in Ukraine**

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EXECUTIVE SUMMARY

The thesis is dedicated to a comparative analysis of the international standards in the areas of criminalization, investigation, prosecution and adjudication of human trafficking crime that were established by the two international anti-trafficking instruments: the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Protocol), and the Council of Europe Convention on Action against Trafficking in Human Beings (the CoE Convention), and their implementation in Ukraine. The author made a thorough evaluation of the international standards and their interpretations, analyzed Ukrainian legislation and practice, interviewed practitioners, and as a result, identified gaps in legislation and flaws in practical enforcement in Ukraine. It is concluded that despite Ukraine has taken some steps towards implementation of the Palermo Protocol and the CoE Convention, more action should be taken to improve the national anti-trafficking regime. In addition there are recommendations giving a road map to the government and civil society on measures to be introduced in the field to comply with international standards.

INTRODUCTION

Human trafficking is one of the serious challenges that the international community faces. It is a criminal offence committed by international organized criminality, it violates human rights and therefore requires all states to address it accordingly.¹

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Trafficking in persons is a latent phenomenon, because many victims do not step forward and report the crime to authorities², therefore collecting data in the field is a challenging task.

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However, there are some estimates as regards the nature and scope of the problem globally. The US Department of State estimated 600 to 800 thousand men, women, and children are trafficked through international borders annually.³ In 2005, the ILO estimated 980 thousand to 1.225 million children trafficked with the purpose of forced labor.⁴ UNODC estimated that “more than 2.4 million people are exploited by criminals at any given time.”⁵ Another ILO study concluded that trafficking in persons, the criminal profits of which may reach USD 31.6 billion, occupies the second place among the most lucrative criminal businesses after drugs trafficking.⁶

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Ukraine has been among the countries which have been suffering from this problem since it announced its independence in 1991. Since then, according to the research initiated by the International Organization for Migration (IOM) and conducted by two research groups: GFK Ukraine and Nebraska University, about 100,000 Ukrainians respectively became victims of

¹ Stephan Parmentier. Epilogue: Human Trafficking Seen from the Future, *European Journal of Criminology*, 7 (1), 2010, <http://euc.sagepub.com/content/7/1/95> as of Dec.30, 2010

² Frank Laczko. Data and Research on Human Trafficking, *International Migration*, 2005, Vol. 43 Issue 1/2, p.12

³ Trafficking in Persons Report 2006, <http://www.state.gov/g/tip/rls/tiprpt/2006/65983.htm> as of November 16, 2011

⁴ ILO, <http://www.ilo.org/ipec/areas/Traffickingofchildren/lang-en/index.htm> as of November 16, 2011

⁵ UNODC, <http://www.unodc.org/unodc/en/frontpage/2011/October/unodc-launches-first-global-database-of-human-trafficking-cases.html> as of November 16, 2011

⁶ Patrick Belser. Forced Labour and Human Trafficking: Estimating the Profits, 2005, p. 17, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1016&context=forcedlabor&sei-redir=1&referer=http%3A%2F%2Fwww.google.com.ua%2Fsearch%3Fq%3DForced%2BLabour%2Band%2Bhuman%2Btrafficking%253A%2BEstimating%2Bthe%2Bprofits%26hl%3Duk%26source%3Dhp%26gs_sm%3De%26gs_upl%3D121814000101418712211410161014071104712-1.1.11310%26oq%3DForced%2BLabour%2Band%2Bhuman%2Btrafficking%253A%2BEstimating%2Bthe%2Bprofits%26aq%3Df%26aqi%3Dg-L1%26aqi%3D#search=%22Forced%20labour%20human%20trafficking%3A%20Estimating%20profits%22 as of November 16, 2011

trafficking.⁷ Moreover, IOM provided concrete reintegration and rehabilitation assistance to 7,954 victims of trafficking (from January 2000 to September 2011).⁸ Official statistics are much more modest since, as mentioned above, the latent character of the crime and the unwillingness of victims to disclose their experience greatly reduce the number of victims of trafficking in criminal proceeding. From 1998, when human trafficking was first penalized, to June 30, 2011 at least 3,133 persons were recognized victims of human trafficking in the criminal proceedings,⁹ though the figures show that human trafficking is a widespread problem in Ukraine.

Currently, Ukraine is a country of origin, transit and destination for men, women and children trafficked for the purposes of exploitation. Ukrainians are mainly trafficked to the Russian Federation, Poland, Turkey, the Czech Republic, Italy, Cyprus, Lebanon and Germany.¹⁰ Nationals of Belarus, Georgia, Kyrgyzstan, Moldova, the Russian Federation, and Uzbekistan are typically trafficked through Ukraine.¹¹ Cases when nationals of Congo, the Czech Republic, Lithuania, Moldova, Pakistan, Philippines and Uzbekistan were trafficked to Ukraine have been identified by IOM since 2000.¹²

The anti-trafficking regime in Ukraine remains far from being perfect, the Government needs to improve its efforts. In 2010, Ukraine was criticized by the US Department of State for convicting traffickers to non-custodial sentences, reluctance to investigate and prosecute government officials complicit in trafficking, and inadequate attitude to and treatment of witnesses in court proceedings.¹³ In 2011, since Ukrainian Government has not demonstrated much progress, the US Department of State reiterated the recommendation as regards appropriate

⁷ <http://www.khpg.org/index.php?id=1172519218> as of November 16, 2011

⁸ Combating Trafficking in Human Beings: Ukraine. Statistics last updated on 30 September 2011. IOM Mission in Ukraine, p.1

⁹ Data is provided by the Department for Combating Cyber Crime and Human Trafficking, Ministry of Interior of Ukraine.

¹⁰ Combating Trafficking in Human Beings: Ukraine. Statistics last updated on 30 September 2011. IOM Mission in Ukraine, p.2

¹¹ Supra Note, p.2

¹² Supra Note, p.2

¹³ Trafficking in Persons Report 2010, <http://www.state.gov/g/tip/rls/tiprpt/2010/142761.htm> as of November 16, 2011

investigation, prosecution and conviction of government officials complicit in human trafficking, and added one more: development and implementation of a national victim referral mechanism.¹⁴

Ukraine is party to two main international conventions against human trafficking. In 2000, in the frameworks of the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children was adopted to address the spread of the problem all over the world in the context of fighting transnational organized crime. In 2005, the Council of Europe Convention on Action against Trafficking in Human Beings was adopted. Both documents reflect the current trends in combating modern slavery and oblige signatories to criminalize human trafficking, and undertake measures aimed at prevention, protection of victims and prosecution of traffickers. The Palermo Protocol was ratified by Ukraine on February 4, 2004, and there were some successful legislative measures aimed at its implementation into national legislation. The CoE Convention was ratified on September 21, 2010 and entered into force for Ukraine on March 1, 2011.

I will do a comparative analysis of the two instruments with the purpose to identify what legal standards these two instruments established in the areas of criminalization, investigation, prosecution and adjudication of human trafficking crime and how far these standards are implemented in Ukraine's law and practice.¹⁵ I believe it will help identify gaps in legislation and flaws in practical enforcement, and give a road map to the government and civil society on measures to be taken in the field. I will conclude with recommendations on what legislative changes or amendments as well as better enforcement is needed to fully implement the standards.

¹⁴ Trafficking in Persons Report 2011, <http://www.state.gov/g/tip/rls/tiprpt/2011/164233.htm> as of November 16, 2011

¹⁵ Note. I will not analyze EU legislation and initiatives since Ukraine is not a member of the EU and is unlikely to join it in the near future.

I will argue that although Ukraine has taken some steps towards implementation of the Palermo Protocol and the CoE Convention, more action is required to improve the national anti-trafficking regime as regards criminalization of this crime, investigation, prosecution and adjudication of traffickers.

My thesis includes two chapters. The first addresses a comparative analysis of the international standards in the field, and the second demonstrates how these standards are implemented in laws and practice in my country.

In my research I use international and national resources, including articles and researches, collection of data made by international organizations and Government of Ukraine. I analyze Ukraine's legislation, in particular, Criminal and Criminal Procedures Codes, Laws on Operative Investigation Activity, State Border Guards Service, Militia and Procuracy. I also conducted interviews with Ukrainian practitioners, in particular, with law enforcement officers, judges, academics, and international organizations' workers.

This topic is interesting and important to me because since 1998 I have been involved in different anti-trafficking activities in Ukraine and have made a considerable contribution to improving both legislation and practice. Therefore, being an expert in the field, I can conduct this analysis and provide anti-trafficking players in Ukraine with guidelines for further development.

Trafficking in persons has been researched in different aspects with different focuses. Although there are some articles dedicated to the analysis and criticism of each of the two instruments by Gallagher¹⁶, Warren¹⁷, de Heredia¹⁸, Fredette¹⁹, and Sembacher²⁰, few

¹⁶ Anne Gallagher, Trafficking, Smuggling and Human Rights: Tricks and Treaties, <http://www.mafhoum.com/press3/104S25.htm> as of nov.6, 2010

¹⁷ Kay Warren. The 2000 UN Human Trafficking Protocol: Rights, Enforcement, Vulnerabilities. The Practice of Human Rights. Tracking Law between the Global and the Local, Cambridge, 2007, p.242-269

¹⁸ Marta Iñiguez de Heredia, People Trafficking: Conceptual issues with the United Nations Trafficking Protocol 2000, Springer Science + Business Media B.V. 2007

¹⁹ Kalen Fredette, Revisiting the UN Protocol on Human Trafficking: Striking Balances For More Effective Legislation, Cardozo J. OF INT'L & COMP. LAW [Vol. 17:101]

comparative researches have been done as regards these two international instruments except Gallagher²¹ and Matar,²² who did comparative analysis of both documents²³. In Ukraine, some scholars have analyzed the criminal law provisions which established criminal liability for human trafficking and outlined problematic issues related to investigation and prosecution of this category of crimes²⁴. At the same time, few scholars have analyzed the implementation of the international instruments in the field into the national legislation. There seems to be a gap in research since no one has compared international standards established by the two international instruments and its implementation in Ukraine, and I am going to fill it in.

²⁰ Anke Sembacher, The Council of Europe Convention on Action against Trafficking in Human Beings, *Tulane Journal of International and Comparative Law*, L. 435, 2006

²¹ Anne T. Gallagher. The International Law of Human Trafficking, Cambridge University Press, 2010, p.126; Anne Gallagher, Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments, *European Journal of Migration and Law* 8, 2006, p.163–189

²² Mohamed Y. Matar. Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention, *Tulane Journal of International and Comparative Law*, Spring, 2006, pp.357-419

²³ Anne T. Gallagher. The International Law of Human Trafficking, Cambridge University Press, 2010, p.126; Anne Gallagher, Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments, *European Journal of Migration and Law* 8, 2006, p.163–189; Mohamed Y. Matar. Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention, *Tulane Journal of International and Comparative Law*, Spring, 2006, pp.357-419

²⁴ Oleksandr Bandurka. Protivodeystviye Torgovle Lyud'mi (Counteracting Human Trafficking), Kharkiv, Konsyum, 2003; Vitaliy Kozak. Cryminal'na Vidoividal'nist za Torgivlyu Lyud'my: chy Rukhayemosya u Virnomu Napryamku? (Criminal Liability for Human Trafficking: Are We Moving in the Right Direction? *Cryminal'ne Pravo Ukrainy (Criminal Law of Ukraine)*, 2006 (1), pp. 56-61; Vita Ivaschenko. Torgivlya Zhinkamy ta Dit'my: Cryminologichni ta Cryminal'no-Pravovi Aspekty Borot'by (Trafficking in Women: Criminological and Criminal Law Aspects of Combating), Kyiv, Atika, 2004; Andriy Orlean. Cryminal'no-Pravova Kharakterystyka Torgivli Lyud'my (Criminal Law Characteristics of Human Trafficking). Kharkiv, SIM, 2005, Vadym Pyaskov's'kyy. Ponyattya ta Cryminalistychna Kharakterystyka Torgivli Lyud'my (Definition and Criminalistic Characteristics of Human Trafficking), *Prosecutors Bulletin*, 2003 (5), pp. 69-75; Victor Vesel's'kyy. Vadym Pyaskov's'kyy. Torgivlya Lyud'my v Ukraini: Problemy Rozsliduvannya (Human Trafficking in Ukraine: investigation challenges), Kyiv, 2007

CHAPTER 1. COMPARATIVE ANALYSIS OF THE UN PROTOCOL AND THE COE CONVENTION

In this chapter I will analyze international standards established by the two documents: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (the Protocol) and the Council of Europe Convention on Action against Trafficking in Human Beings (the CoE Convention), and compare their content, scope of application and possible limitations in relation to the definition of human trafficking, criminalization, investigation, prosecution and adjudication of this crime. The purpose of this analysis is to get a clear vision of commitments that Ukraine took by ratification of the two documents. However, I will not touch on extradition, international cooperation and jurisdiction issues since they have a general character and are not specific to human trafficking crimes.

Although there are some articles dedicated to the analysis and critique of each of the two instruments by Gallagher²⁵, Warren²⁶, de Heredia²⁷, Fredette²⁸, Matar²⁹ and Sembacher³⁰, only Gallagher paid much attention to the comparative analysis of both documents and concluded that the CoE Convention is a more comprehensive document that establishes higher standards from the point of victims' rights protection and criminal justice response³¹. In Ukraine, some scholars

²⁵ Anne Gallagher, Trafficking, Smuggling and Human Rights: Tricks and Treaties, <http://www.mafhoum.com/press3/104S25.htm> as of nov.6, 2010

²⁶ Kay Warren. The 2000 UN Human Trafficking Protocol: Rights, Enforcement, Vulnerabilities. The Practice of Human Rights. Tracking Law between the Global and the Local, Cambridge, 2007, p.242-269

²⁷ Marta Iníguez de Heredia, People Trafficking: Conceptual issues with the United Nations Trafficking Protocol 2000, Springer Science + Business Media B.V. 2007

²⁸ Kalen Fredette, Revisiting the UN Protocol on Human Trafficking: Striking Balances For More Effective Legislation, *Cardozo J. OF INT'L & COMP. LAW* [Vol. 17:101]

²⁹ Mohamed Y. Mattar. Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention, *Tulane Journal of International and Comparative Law*, Spring, 2006, pp.357-419

³⁰ Anke Sembacher, The Council of Europe Convention on Action against Trafficking in Human Beings, *Tulane Journal of International and Comparative Law*, L. 435, 2006

³¹ Anne T. Gallagher. The International Law of Human Trafficking, Cambridge University Press, 2010, p.126; Anne Gallagher, Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments, *European Journal of Migration and Law* 8, 2006, p.163-189

like Bandurka³², Kozak³³, Ivaschenko³⁴, Orlean³⁵, Pyaskovs'kyi³⁶ and Vesel's'kyi³⁷ made analysis of the criminal law provisions which established criminal liability for human trafficking, and outlined problematic issues related to investigation and prosecution of this category of crimes. At the same time, quite few scholars like Levchenko³⁸, Yevsyukova³⁹, and Bortnytska⁴⁰ focused on implementation of the international instruments including the CoE Convention into the national legislation. In fact, no one in Ukraine conducted a comparative research on the Protocol and the CoE Convention, and no one analyzed implementation of the both documents into the national legislation.

SECTION 1.1. GENERAL OVERVIEW OF THE TWO INTERNATIONAL INSTRUMENTS: THEIR PURPOSE, SCOPE OF APPLICATION AND INTERRELATION

In this section I will briefly outline the status and features of the two documents with the purpose of a clear understanding of their role and place in international law.

³² Oleksandr Bandurka. *Protivodeystviye Torgovle Lyud'mi* (Counteracting Human Trafficking), Kharkiv, Konsyum, 2003

³³ Vitaliy Kozak. *Cryminal'na Vidoividal'nist za Torgivlyu Lyud'my: chy Rukhayemosya u Virnomu Napryamku?* (Criminal Liability for Human Trafficking: Are We Moving in the Right Direction? *Cryminal'ne Pravo Ukrainy* (Criminal Law of Ukraine), 2006 (1), pp. 56-61.

³⁴ Vita Ivaschenko. *Torgivlya Zhinkamy ta Dit'my: Cryminologichni ta Cryminal'no-Pravovi Aspekty Borot'by* (Trafficking in Women: Criminological and Criminal Law Aspects of Combating), Kyiv, Atika, 2004.

³⁵ Andriy Orlean. *Cryminal'no-Pravova Kharakterystyka Torgivli Lyud'my* (Criminal Law Characteristics of Human Trafficking). Kharkiv, SIM, 2005.

³⁶ Vadym Pyaskovs'kyi. *Ponyattya ta Cryminalistychna Kharakterystyka Torgivli Lyud'my* (Definition and Criminalistic Characteristics of Human Trafficking), *Prosecutors Bulletin*, 2003 (5), pp. 69-75.

³⁷ Victor Vesel's'kyi. *Vadym Pyaskovs'kyi. Torgivlya Lyud'my v Ukraini: Problemy Rozsliduvannya* (Human Trafficking in Ukraine: investigation challenges), Kyiv, 2007

³⁸ Kateryna Levchenko, Mar'yana Evsjukova. *Perspektyvy ta Problemni Pytannya Rozvytku Notmatyvno-Pravovoyi Bazy u Sferi Protydiyi Torgivli Lyud'my v Ukraini* (Perspectives and Challenges in Development of Legal Base in the Sphere of Counteraction of Human Trafficking in Ukraine), *Forum Prava (Forum of Law)*, 2007 (1), pp.113-118, <http://www.nbu.gov.ua/e-journals/FP/2007-1/071kblvu.pdf> as of November 11, 2011

³⁹ Kateryna Levchenko, Mar'yana Evsjukova. *Perspektyvy ta Problemni Pytannya Rozvytku Notmatyvno-Pravovoyi Bazy u Sferi Protydiyi Torgivli Lyud'my v Ukraini* (Perspectives and Challenges in Development of Legal Base in the Sphere of Counteraction of Human Trafficking in Ukraine), *Forum Prava (Forum of Law)*, 2007 (1), pp.113-118, <http://www.nbu.gov.ua/e-journals/FP/2007-1/071kblvu.pdf> as of November 11, 2011

⁴⁰ Lesya Bortnytska. *Organizatsiyno-Pravovi Zakhody schodo Realizatsiyi Ukrainoyu Mizhnarodno-Pravovykh Zbov'yazan' u Sferi Protydiyi Torgivli Dit'my, Dytyachiy Prostytutsiyi ta Dyutyachiy Pornografiyi* (Organizational and Legal Measures As Regards Implementation of Ukraine's International Commitments In the Field of Combating Child Trafficking, Child Prostitution and Child Pornography), *Scientific Bulletin of Dnipropetrovsk University of Internal Affairs*, 2010 (1), pp. 185-194

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime is an international treaty that was drafted and adopted under the auspices of the United Nations, with 147 signatories as of Nov. 26, 2011⁴¹. This globally recognized instrument that entered into force on Dec. 25, 2003⁴² forms a part of the “package of legal instruments”⁴³ together with the Convention against Transnational Organized Crime (the TOC Convention) itself and two other protocols related to smuggling of migrants and illicit manufacturing and trafficking of firearms. The Protocol was not supposed to become a separate document⁴⁴: it is interpreted together with the UN Convention; general provisions of the latter apply to it, and offences criminalized by the Protocol are considered as established by the TOC Convention.⁴⁵ Therefore, on one hand, this may be considered as its weakness because it does not fully take account of human trafficking as a very specific crime that requires special approach, but on the other hand, the Protocol can benefit from many general articles of the TOC Convention keeping its articles fully focused on human trafficking crimes.

Unlike the Protocol, the Council of Europe Convention on Action against Trafficking in Human Beings is an independent international treaty of regional character. It has been drafted and adopted under the Council of Europe, an international organization that covers “the entire European continent”⁴⁶, in particular 47 member states, 34 of them are signatories to the CoE

⁴¹ <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> as of November 26, 2011

⁴² Supra Note.

⁴³ Anne Gallagher, Trafficking, Smuggling and Human Rights: Tricks and Treaties, <http://www.mafhoum.com/press3/104S25.htm> as of nov.6, 2010, p.1

⁴⁴ Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html#trafficking> as of Nov.23, 2010, paragraph 16

⁴⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 1, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

⁴⁶ <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en> as of Jan.31, 2011

Convention as of Aug. 25, 2011.⁴⁷ It entered into force on Feb.1, 2008.⁴⁸ The CoE Convention is a step beyond recommendations that were adopted by the Parliamentary Assembly⁴⁹ before, towards legally binding requirements as regards adequate protection of human rights and “a proper balance between matters concerning human rights and prosecution.”⁵⁰

The two documents in question are different in their nature: the first is a global one that covers many countries around the world; the second is regional with a relatively small number of signatories. Moreover, the first is a part of the package and therefore “shares” some provisions with other documents in the package, the second is an independent international document. These differences make them complementary in relation to each other.

The Protocol is aimed at prevention of trafficking in persons, especially women and children, protection of and assistance to victims, and promotion of the international cooperation to achieve the above objectives.⁵¹ The CoE Convention has the same goals, however, it adds ensuring effective investigation and prosecution, and guaranteeing gender equality while implementing these goals.⁵² So, it seems both documents have quite a comprehensive focus. At the same time, some researchers believe that from the point of content the Protocol is focused “on law enforcement rather than victim support”⁵³ while the CoE Convention is the first document in international law that considers human trafficking “from a human rights

⁴⁷ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG> as of November 26, 2011

⁴⁸ Supra Note.

⁴⁹ CoE Parliamentary Recommendation 1545 (2002), Recommendation 1610 (2003), Recommendation 1611 (2003), Recommendation 1663 (2004) http://assembly.coe.int/ASP/Doc/ATListingnum_E.asp as of August 25, 2011

⁵⁰ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 29

⁵¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 2, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

⁵² Council of Europe Convention on Action against Trafficking in Human Beings, Article 1, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

⁵³ Suzanne Egan. Protecting the victims of trafficking: problems and prospects, European Human Rights Law Review, 2008(1), 109-110

perspective”⁵⁴ and puts greater emphasis on victims’ rights. It established “a comprehensive legal framework for the protection of victims and witnesses with specific and binding measures to be adopted.”⁵⁵ These statements are justified since the Protocol’s mandatory provisions are related to criminalization and prosecution while the language of provisions aimed at protection of victims puts no legal obligation on its signatories.⁵⁶

The Protocol includes the first universally recognized definition of trafficking in persons. The CoE Convention purposively contains a similar definition of trafficking in human beings because according to its preamble, the TOC Convention and the Protocol were used as a starting point “with a view to improving the protection which they afford and developing the standards established by them”⁵⁷. Such sustainability significantly contributes to the unification of standards between countries in general, and international organizations like the UN and CoE in particular.

The scope of the Protocol’s application in comparison with the CoE Convention has some limitations. First, since it supplements the UN Convention against Transnational Organized Crime (TOC Convention), its focus is trafficking in persons’ offences which are “transnational in nature and involve an organized criminal group”.⁵⁸ However, the UNODC Legislative Guide puts it wider by saying that “the Protocol offences of trafficking in persons [...] must apply

⁵⁴ Tenia Kyriazi. The Council of Europe Convention an action against trafficking in human beings, *Revue hellénique de droit international*. #59(2006), 2, p. 668

⁵⁵ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 51.

⁵⁶ Anne Gallagher, Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments, *European Journal of Migration and Law*, 8, 2006, p.165

⁵⁷ Council of Europe Convention on Action against Trafficking in Human Beings, Preamble, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

⁵⁸ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 4, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

equally, regardless of whether the case involves transnational elements or is purely domestic.”⁵⁹

The CoE Convention language is clear: it applies to “all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime.”⁶⁰ Second, the Protocol’s implementation by Member States is not backed up by any sanctions, therefore some scholars, like Fredette, suggest motivating states “which have become havens for trafficking crimes”⁶¹ to combat human trafficking appropriately by introducing economic sanctions against them.⁶² The CoE Convention does not provide for any sanctions either. However, it introduces monitoring mechanism that drafters believe to be efficient and credible.⁶³

Some of the Protocol’s limitations were addressed in the Convention. Thus, the CoE convention complements the Protocol in certain areas and goes beyond its minimum standards.⁶⁴ Due to its regional status it can benefit from the larger extent of closeness and similarity between Council of Europe countries in contrast with a global instrument like the Protocol.⁶⁵

Overall, there are five important issues that distinguish the Convention from the Protocol:

1. Human rights approach and linking with the European Convention for Human Rights and Fundamental Freedoms (ECHR). “Recognition of trafficking in human beings as a violation of human rights and a special focus on assistance to victims and on protection of their human rights”⁶⁶

⁵⁹ Legislative Guide for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, Part 1, UNODC, 2004, paragraph 18,

http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf as of March, 2, 2011

⁶⁰ Council of Europe Convention on Action against Trafficking in Human Beings, Article 2,

<http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

⁶¹ Kalen Fredette. Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation, CARDOZO J. OF INT’L & COMP. LAW [Vol. 17:101], 2009, p.133

⁶² Supra Note, p.133

⁶³ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 51

⁶⁴ Council of Europe Convention on Action against Trafficking in Human Beings, Preamble,

<http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

⁶⁵ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, paragraph 30, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010

⁶⁶ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, paragraph 51, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010

2. Broader scope of application. The Protocol which is limited to the scope of regulation of the TOC Convention, i.e. transnational organized crime.
3. Gender mainstreaming: all the purposes of the Convention include the component of “guaranteeing gender equality”⁶⁷.
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4. Establishment of “a comprehensive legal framework for the protection of victims and witnesses with specific and binding measures to be adopted.”⁶⁸
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5. More efficient monitoring mechanism. The CoE Convention provides for a stronger monitoring mechanism in comparison with the Protocol.

Each of these two documents plays its own specific role being closely interlinked with the other. The Protocol provides for a unified definition to establish the common ground and understanding of what kind of actions should be criminalized, which is very important for international cooperation in the area of combating human trafficking. The CoE Convention “complements global efforts”⁶⁹, uses the Protocol as a basis ensuring further development and improvement of the latter’s standards regionally. Combination of the standards established by the both documents creates unique, comprehensive anti-trafficking regime.

SECTION 1.2. DEFINITION OF THE CRIME OF HUMAN TRAFFICKING ACCORDING TO THE INTERNATIONAL DOCUMENTS UNDER ANALYSIS

In this Section, I will analyze the definition of trafficking in persons set forth by the Protocol and subsequently included into the CoE Convention. Since the definitions are identical, I will use explanatory documents of both instruments.

⁶⁷ Council of Europe Convention on Action against Trafficking in Human Beings, Article 1, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

⁶⁸ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, paragraph 51, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010

⁶⁹ Supra Note, paragraph 30

The Protocol is widely recognized as the first international instrument to introduce the definition of trafficking in persons.⁷⁰ Article 3 of the Protocol reads:

For the purposes of this Protocol:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. 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 or the removal of organs;
- (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;
- (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;
- (d) “Child” shall mean any person under eighteen years of age.⁷¹

The CoE Convention includes the same definition of trafficking in human beings, which was done on purpose to “use a definition of trafficking in human beings on which there is international consensus.”⁷² The only difference is that the Protocol calls the problem “trafficking in persons”, while the CoE Convention – “trafficking in human beings”. In principle, the words “person” and “human being” have the same meaning. For instance, “person” is “a human being, whether man, woman, or child.”⁷³ However, “person” in legal terminology can also mean legal person, e.g. legal entity⁷⁴, therefore drafters might be concerned about this and may have changed persons to human beings, and added paragraph e to Article 4 that reads “Victim” shall

⁷⁰ Marta Iníguez de Heredia, *People Trafficking: Conceptual issues with the United Nations Trafficking Protocol 2000*, Springer Science + Business Media B.V. 2007, p.300; Andreas Schloenhardt, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children – commentary*, 2009,

<http://www.law.uq.edu.au/documents/humantrafficking/legislation/UN-TiP-Protocol-2000-Commentary-Analysis.pdf> as of Feb. 11, 2011, p. 3; Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, <http://www.mafhoum.com/press3/104S25.htm> as of Nov.6, 2010

⁷¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 3,

http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

⁷² Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 72

⁷³ <http://dictionary.reference.com/browse/person> as of March 2, 2011

⁷⁴ Supra Note.

mean any natural person who is subject to trafficking in human beings as defined in this article.”⁷⁵ Nevertheless, in my thesis I will use both terms as synonyms.

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It is generally understood that the definition of trafficking in persons includes three components⁷⁶:

- 1. Action: “recruitment, transportation, transfer, harboring or receipt of persons.”⁷⁷

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These five steps cover almost all actions that precede exploitation.⁷⁸ These terms are not legal, therefore can be interpreted through their general meaning. Thus, recruitment means “drawing a person into process”⁷⁹, transportation covers acts of technical carriers and persons who arranged the movement of a victim, transfer is related to passing control of a victim to another person and correlates to receipt, and harboring means providing accommodation and hiding a victim.⁸⁰ Inclusion of receipt plays an important role since it leaves the definition quite wide and allows reaching “owners and managers, supervisors, and controllers of any place of exploitation such as a brothel, farm, boat, factory, medical facility or household.”⁸¹

- 2. Means: “threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the

⁷⁵ Council of Europe Convention on Action against Trafficking in Human Beings, Article 4, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

⁷⁶ Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html#trafficking> as of Nov.23, 2010, paragraph 32; Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 74; Anne T. Gallagher. The International Law of Human Trafficking, Cambridge University Press, 2010, p.29

⁷⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 3, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

⁷⁸ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 78

⁷⁹ McClean, David. TRANSNATIONAL ORGANIZED CRIME. A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS, Oxford University Press, 2007, p.323

⁸⁰ Supra Note, p.323

⁸¹ Anne T. Gallagher. The International Law of Human Trafficking, Cambridge University Press, 2010, p. 30

giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”⁸²

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Means are related to methods or ways of committing the crime. The list of means provided by the Protocol is comprehensive enough to cover all possible variations. I would divide the means into two groups: related to use of force and not related to it. The first group would include threat or use of force or other forms of coercion or abduction. The rest of the means form the second group. The cases where no violence was used are quite widespread since victims have been brainwashed by recruiters and believed in their promises.⁸³

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As regards particular means, it is worth mentioning that threat or use of force or other forms of coercion may focus either on a trafficked person or third party.⁸⁴ Abduction is usually used in relation to a victim⁸⁵, however, it is also possible to imagine a situation when a family member of a victim is abducted. McClean considers fraud and deception together since in different legal systems, the distinction between these two terms is disputable.⁸⁶ According to Black’s Law Dictionary fraud is defined as a “knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”⁸⁷ Explanatory report to the CoE Convention explains fraud and deception as leading victims “to belief that an attractive job awaits them rather than the intended exploitation.”⁸⁸ The abuse of power or of a position of vulnerability refers to “any situation in which the person involved has no real and

⁸² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 3, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

⁸³ Interview with Oksana Horbunova, International Organization for Migration, Mission in Ukraine, Sept. 1, 2011, Kyiv, Ukraine

⁸⁴ McClean, David. TRANSNATIONAL ORGANIZED CRIME. A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS, Oxford University Press, 2007, p.324

⁸⁵ Supra Note, p.324

⁸⁶ Supra Note, p.324

⁸⁷ BLACK’S LAW DICTIONARY, p. 1950

⁸⁸ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 82

acceptable alternative but to submit to the abuse involved.”⁸⁹ It means that in fact, the crime of trafficking may be committed without use of force: if people due to cultural or other considerations could not refuse the proposal.⁹⁰ Explanatory report to the CoE Convention suggests that the vulnerability can be of different types such as “physical, psychological, emotional, family-related, social or economic”⁹¹. This means that any personal circumstance or individual feature can be considered as vulnerability. The giving or receiving of payments or benefits to achieve the consent of a person having control over another person covers relations of control which often happen in cases of trafficking in persons. The means may overlap, for instance “control” means may overlap with the abuse of vulnerability, and abduction is often related to use of force.⁹²

3. Purpose: “exploitation that shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁹³

The Protocol does not define “exploitation of the prostitution” and “sexual exploitation” since it can influence domestic legal provisions as regards prostitution. Therefore Member States have quite a wide margin of appreciation in regulating these issues domestically.

⁸⁹ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, A/55/383/Add.1, paragraph 63, http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf as of March 2, 2011

⁹⁰ Ann Jordan. Annotated Guide to the Complete UN Trafficking Protocol, 2002, p. 4

⁹¹ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 83

⁹² McClean, David. TRANSNATIONAL ORGANIZED CRIME. A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS, Oxford University Press, 2007, p.325

⁹³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 3, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

Forced labor or services, slavery or practices similar to slavery, servitude are defined in other international instruments. In particular, ILO Convention No.29 says that “the term forced or compulsory labor shall mean 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 himself voluntarily.”⁹⁴

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According to the 1926 Slavery Convention "Slavery means the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁹⁵ The

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Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices includes the following practices similar to slavery:

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labor on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

*(d) Any institution or 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 person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.*⁹⁶

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As to the removal of organs, Interpretative Notes to the Protocol only indicates that the removal of organs from children with the consent of a parent or guardian for legitimate medical

⁹⁴ ILO Convention No. 29 of 1930, Article 2, http://www.ilocarib.org.tt/projects/cariblex/conventions_21.shtml as of March 3, 2011

⁹⁵ The Slavery Convention, 1926, <http://www2.ohchr.org/english/law/slavery.htm> as of March 3, 2011

⁹⁶ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices, Article 1, <http://www2.ohchr.org/english/law/slavetrade.htm> as of March 3, 2011

or therapeutic reasons should not be considered exploitation.⁹⁷ In the CoE, issues related to organ removal have been elaborated quite extensively in the same direction as the Protocol: removal of organs with the purpose of financial gain has been prohibited⁹⁸.

The definition of trafficking in persons requires combination of the three components, for instance, recruitment committed by means of fraud with the purpose of sexual exploitation constitutes trafficking in persons. McClean considers the part of the definition where actions and means are set forth as a matrix. There are various combinations possible, some of them are situations typical for trafficking, some of them are difficult to imagine.⁹⁹ However, person should not be necessarily subjected to exploitation to become a victim of human trafficking. Being subjected to one of actions and one of means “for the purpose of exploitation”¹⁰⁰ is enough for classification as trafficking in persons. Trafficking of children is an exception since use of means is not a mandatory element.

Paragraph b of Article 3 of the Protocol provides for irrelevancy of a victim’s consent in case any of the means are used. I can logically infer that it is not possible to give consent when means based on force were used. When a victim is in a state of vulnerability, s/he is not able to give a real consent either, since s/he acts under the pressure of various factors like culture, family relations, poverty, etc. In other situations, when fraud or deception is used, consent is given on fake promises, not on the real conditions. For instance, a man may consent to construction work

⁹⁷ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, A/55/383/Add.1, paragraph 65, http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf as of March 2, 2011

⁹⁸ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Article 21, <http://conventions.coe.int/Treaty/en/Treaties/html/164.htm> as of November, 16, 2011

⁹⁹ McClean, David. TRANSNATIONAL ORGANIZED CRIME. A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS, Oxford University Press, 2007, p.323

¹⁰⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 3, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

abroad with a particular salary and work conditions, but the trafficker is not going to give him what was promised, instead he will force him to work without any money and keep him in slavery conditions. A man is a victim of trafficking even if he initially agrees to work abroad. There is the same situation with women who agree to work as prostitutes: they do not consent “to be subjected to abuse of all kinds.”¹⁰¹ Moreover, it is not possible to consent to slavery, forced labor of servitude according to definitions of these crimes.¹⁰² Mattar supports this argument by saying that every victim of trafficking is in a vulnerable position and has no choice but to agree on the trafficker’s proposal and recruitment that makes that consent “either nonexistent or defective during the exploitation phases of trafficking.”¹⁰³

The definition provided by the Protocol is not ideal, and has been criticized for excluding trade and sale of persons as itself¹⁰⁴, being too complicated for domestic use¹⁰⁵, leaving the terms “sexual exploitation” and “exploitation of prostitution”¹⁰⁶ for the consideration of States – signatories to the Protocol¹⁰⁷, and using controversial formulation of consent provision¹⁰⁸ (Article 3b of the Protocol).

According to de Heredia, the definition excludes actions related to economic activities in which people appear as objects rather than subjects: trade and sale of persons¹⁰⁹ that is not

¹⁰¹ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 97.

¹⁰² Ann Jordan. Annotated Guide to the Complete UN Trafficking Protocol, 2002, p. 7

¹⁰³ Mohamed Y. Mattar. INCORPORATING THE FIVE BASIC ELEMENTS OF A MODEL ANTITRAFFICKING IN PERSONS LEGISLATION IN DOMESTIC LAWS: FROM THE UNITED NATIONS PROTOCOL TO THE EUROPEAN CONVENTION, Tulane Journal of International and Comparative Law, Spring, 2006, pp. 371

¹⁰⁴ Marta Iñiguez de Heredia, People Trafficking: Conceptual issues with the United Nations Trafficking Protocol 2000, Springer Science + Business Media B.V. 2007, p.300

¹⁰⁵ Ann Jordan. Annotated Guide to the Complete UN Trafficking Protocol, 2002, p. 3

¹⁰⁶ Angelika Kartusch. REFERENCE GUIDE FOR ANTI-TRAFFICKING LEGISLATIVE REVIEW WITH PARTICULAR EMPHASIS ON SOUTH EASTERN EUROPE, Ludwig Boltzmann Institute of Human Rights, Vienna, 2001, p. 40

¹⁰⁷ Fredette, Kalen. Revisiting the UN Protocol on Human Trafficking, Cardozo journal of international and comparative law, 17(2009/10), 1, S. 114-115

¹⁰⁸ Kara Abramson. Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol, Harvard International Law Journal, 2003 (44)

¹⁰⁹ Marta Iñiguez de Heredia, People Trafficking: Conceptual Issues with the United Nations Trafficking Protocol 2000, Springer Science + Business Media B.V. 2007, pp.308-310

logical since transfer and receipt actions which are supposed to include transfer of money in exchange of a victim are included. Moreover, one of the means: “the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”¹¹⁰ may be understood as acknowledgement of a possible situation of purchase and sale¹¹¹. Therefore, it is not clear why purchase and sale were not included into the list of actions. For instance, purchase and sale were included in the definition of trafficking drafted by the UN Special Rapporteur on violence against women, its causes and consequences.¹¹²

The definition was criticized for being too complicated for domestic use since there are many components of the crime to be proved by prosecution, and for equivocal language that provides defendants with the additional possibility for legal challenges.¹¹³ However, removing means from the definition may lead to blurring the difference between trafficking in persons and smuggling,¹¹⁴ which are mixed a lot in practice.

The Protocol definition left two terms: “exploitation of prostitution” and “sexual exploitation” to be defined on domestic level since they raised a lot of controversies when the Protocol was negotiated.¹¹⁵ The Interpretative Note emphasizes that “the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the

¹¹⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 3, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

¹¹¹ Marta Iñiguez de Heredia, *People Trafficking: Conceptual issues with the United Nations Trafficking Protocol 2000*, Springer Science + Business Media B.V. 2007, pp.308-310

¹¹² Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women, 29 February 2000, paragraph 13, [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf) as of March 2, 2011

¹¹³ Ann Jordan. *Annotated Guide to the Complete UN Trafficking Protocol*, 2002, p. 3

¹¹⁴ Andreas Schloenhardt. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children – commentary*, 2009, p.4, <http://www.law.uq.edu.au/documents/humantrafficking/legislation/UN-TiP-Protocol-2000-Commentary-Analysis.pdf> as of Feb. 11, 2011

¹¹⁵ *Supra* Note, p.4

context of trafficking in persons.”¹¹⁶ There were two opposite positions regarding whether or not there is a difference between voluntary and forced prostitution. The Coalition Against Trafficking in Women and Equality argued that prostitution is exploitative by itself, therefore no distinction should be made, while the majority of delegates and the Human Right Caucus established that voluntary prostitution does not constitute exploitation and should be excluded from the Protocol.¹¹⁷ I believe this compromise was an appropriate solution in that political situation, however, practically, it left a gap for traffickers to avoid prosecution and oppress victims. For instance, in countries where prostitution is prohibited and criminally punished, like in UAE, if a victim addresses police claiming that she was involved into forced prostitution, she, rather than the traffickers, is very likely be convicted to imprisonment.

Nevertheless, there are some positive features of the definition. First, it recognizes all forms of trafficking, not only trafficking for sexual exploitation; second, it does not set any limitation on who may be a victim; third, it does not consider crossing international borders as a mandatory element of the crime; and fourth, it disregards the victim’s consent to further exploitation¹¹⁸ that allows to rebut the presumption that the victim knew what s/he agreed on and therefore is not a genuine victim. Moreover, peculiarities of trafficking in children were addressed by establishing that actions and purpose are the only mandatory elements of the child trafficking crime.

¹¹⁶ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, A/55/383/Add.1, paragraph 64, http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf as of March 2, 2011

¹¹⁷ Ann Jordan. Annotated Guide to the Complete UN Trafficking Protocol, 2002, p.4; Andreas Schloenhardt. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children – commentary, 2009, p.4, <http://www.law.uq.edu.au/documents/humantraffic/legislation/UN-TiP-Protocol-2000-Commentary-Analysis.pdf> as of Feb. 11, 2011

¹¹⁸ Angelika Kartusch. REFERENCE GUIDE FOR ANTI-TRAFFICKING LEGISLATIVE REVIEW WITH PARTICULAR EMPHASIS ON SOUTH EASTERN EUROPE, Ludwig Boltzmann Institute of Human Rights, Vienna, 2001, p. 40

The Protocol established a standard of anti-trafficking legal framework for governments all over the world in shaping their anti-trafficking policies. Although there are some flaws of the definition identified and disputed, advantages of introducing it are remarkable, like unification of the domestic legislation to simplify extradition and mutual legal assistance, more efficient data collection and analysis¹¹⁹, and removal of gaps in criminalization in different countries that were used by criminals to avoid liability.¹²⁰

SECTION 1.3. STATE PARTIES' OBLIGATIONS REGARDING CRIMINALIZATION: CONTENT AND SCOPE OF APPLICATION OF THE TWO INSTRUMENTS

In this section I will make a comparative analysis of the criminalization clauses of the two international instruments in question. In particular, I will focus on particular actions to be established as offences, liability of legal entities and sanctions.

Both instruments under analysis include identical mandatory obligations regarding the criminalization of trafficking offence committed intentionally (Article 5(1) of the Protocol and Article 18 of the CoE Convention, and attempt to commit such offence (Article 5(2) of the Protocol and Article 21(2) of the CoE Convention).

There are some provisions of both instruments that require criminalizing some other offences distinct from trafficking in persons, like forging a travel or identity document; procuring or providing such a document; retaining, removing, concealing, damaging or destroying a travel or identity document of another person when committed intentionally and for the purpose of

¹¹⁹ Anne Gallagher, Trafficking, Smuggling and Human Rights: Tricks and Treaties, <http://www.mafhoum.com/press3/104S25.htm> as of nov.6, 2010

¹²⁰ Fredette, Kalen. Revisiting the UN Protocol on Human Trafficking, Cardozo journal of international and comparative law, 17(2009/10), 1, S. 113

enabling the trafficking in human beings.¹²¹ Moreover, since the Protocol is interpreted *mutatis mutandis* with the TOC Convention, and trafficking offences established according to the Protocol are considered as offences established by the TOC Convention, the provisions of the TOC Convention require State Parties to criminalize the laundering of the proceeds received from trafficking in persons¹²², obstruction of justice¹²³ when carried out with respect to the trafficking in persons offence. Analysis of the obligations aimed at the criminalization of offences other than the trafficking in persons is beyond the frameworks of this research; therefore I mention these obligations, but focus mainly on criminalization of the crime of trafficking in persons only.

The other obligations established by the two instruments in the field of criminalization of trafficking in persons are formulated differently, but overlap to some extent. For instance, Article 5 of the Protocol requires State Parties to establish as criminal offence participating as an accomplice in the trafficking offence and organizing or directing other persons to commit the offence.¹²⁴ Surprisingly, the CoE Convention does not require this, but at the same time sets forth an obligation to establish as criminal offences aiding or abetting the commission of trafficking in human beings when committed intentionally.¹²⁵ However, aiding or abetting and participating as an accomplice may have similar or overlapping content. Black's Law Dictionary says that to ABET means "to aid, encourage, or assist (someone), esp. in the commission of a crime"¹²⁶ and ACCOMPLICE – "a person who is in any way involved with another in the commission of a

¹²¹ Council of Europe Convention on Action against Trafficking in Human Beings <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011, Article 20

¹²² UN Convention against Transnational Organized Crime, Article 6, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31, 2011

¹²³ Supra Note, Article 23

¹²⁴ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 5, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

¹²⁵ Council of Europe Convention on Action against Trafficking in Human Beings, Article 21, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

¹²⁶ BLACK'S LAW DICTIONARY, p. 11

crime.”¹²⁷ Furthermore, organizing or directing other persons to commit the offence is not covered by the CoE Convention within criminalization provisions. The only provision that could somehow correspond talks about committing the offence within the framework of a criminal organization which may include organizing or directing.¹²⁸ Anyway, the CoE Convention defines committing an offence within the framework of criminal organization as an aggravating circumstance which shall be regarded in the determination of penalty.¹²⁹

Thus, in comparison with the Protocol, the CoE Convention focuses on trafficking in human beings in general, while the Protocol indeed warrants its scope of application to the offences which are transnational in nature and involve an organized criminal group, therefore it includes more specific provisions. I assume the rationale of such provisions of the CoE Convention is that all the CoE Member States except Andorra and the Czech Republic are Parties to the UN Convention and the Protocol¹³⁰, therefore there is no sense in duplicating all the provisions.

Unlike the Protocol, the CoE convention attempts to persuade State Parties to criminalize **the use of services of a victim** by introducing a requirement to consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation [...] with the knowledge that the person is a victim of trafficking in human beings.¹³¹ In fact, the purpose of the criminalization is discouraging demand. The rationale is that buying the services of the exploited means participating in exploitation, therefore people who knowingly use their labor or services

¹²⁷ Supra Note, p. 48

¹²⁸ Council of Europe Convention on Action against Trafficking in Human Beings, Article 24, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

¹²⁹ Supra Note, Article 24

¹³⁰ <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> as of March 4, 2011

¹³¹ Council of Europe Convention on Action against Trafficking in Human Beings <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011, Article 19

should be punished as well.¹³² This looks logical to me. For instance, trafficked people can work more for less money; they do not need insurance and other social benefits, etc. Therefore, it is more profitable to use victims of trafficking than usual workers because it can reduce expenses. It is still unclear how State Parties will implement this provision; however, at least two countries in Europe, namely Sweden and Macedonia, have introduced liability for use of the services of a victim of trafficking.¹³³

Both international instruments oblige State Parties to establish **liability of legal entities** (in the CoE Convention –“corporate liability”) for trafficking in persons. The rationale behind this is that traffickers often use travel, model, marriage and employment agencies or other for-profit organizations to commit the crime, and prosecution of individuals is not enough to stop the criminal activity, therefore legal entities should also be liable to ensure confiscation of criminal proceeds and compensations to victims.¹³⁴ The Protocol does not include an appropriate provision but the TOC Convention establishes mandatory obligation for State Parties to introduce the liability of legal entities¹³⁵ including for offences established by the Supplementary Protocols (Article 1(3) of the Protocol). The obligation is not absolute: it takes account of the diversity of approaches and legal systems and allows introducing at least one of the suggested types of liability, e.g. criminal, and/or civil and/or administrative.¹³⁶ Moreover, liability of legal entities should not exclude individual criminal liability of the natural persons who committed the

¹³² Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 232-233

¹³³ Mohamed Y. Mattar. INCORPORATING THE FIVE BASIC ELEMENTS OF A MODEL ANTITRAFFICKING IN PERSONS LEGISLATION IN DOMESTIC LAWS: FROM THE UNITED NATIONS PROTOCOL TO THE EUROPEAN CONVENTION, Tulane Journal of International and Comparative Law, Spring, 2006, p. 373

¹³⁴ Angelika Kartusch. REFERENCE GUIDE FOR ANTI-TRAFFICKING LEGISLATIVE REVIEW WITH PARTICULAR EMPHASIS ON SOUTH EASTERN EUROPE, Ludwig Boltzmann Institute of Human Rights, Vienna, 2001, p. 43

¹³⁵ United Nations Convention Against Transnational Organized Crime, Article 10, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31, 2011

¹³⁶ LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOL THERETO. UNODC, 2004, paragraph 253, http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf as of March 3, 2011

offences.¹³⁷ Both a person who committed the offence and the legal entity on behalf of which s/he acted must be held responsible.¹³⁸ Lastly, States are required to ensure that legal persons who are liable for committing the offences are “subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.”¹³⁹

The CoE Convention provides for similar requirements, however, the obligation includes stricter language like “[e]ach Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention”¹⁴⁰. The Article emphasizes that the criminal offence shall be committed by a natural person, acting individually or as a member of the organ of the legal entity for the benefit of the legal entity, who has a leading position there.¹⁴¹ In particular, someone who is senior, or who is authorized to take important decisions at a legal entity, or who has powers to supervise the legal entity’s activities can cause liability of the entity.¹⁴² Moreover, the Article sets an obligation for the CoE Convention signatories to hold a legal entity liable even in case when the crime is committed for the benefit of a legal entity not by a person in a leading position but by lower level people like employees or agents within their competence, if the leading person failed to supervise or control them appropriately.¹⁴³ The rationale is that management, owners and other persons in leading positions at the entity should be pro-active and prevent employees from being involved into criminal activities on behalf of the legal entity.

¹³⁷ United Nations Convention Against Transnational Organized Crime, Article 10,

<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31, 2011

¹³⁸ LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOL THERETO. UNODC, 2004, paragraph 254, http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf as of March 3, 2011

¹³⁹ United Nations Convention Against Transnational Organized Crime, Article 10,

<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31, 2011

¹⁴⁰ Council of Europe Convention on Action against Trafficking in Human Beings, Article 22, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

¹⁴¹ Supra Note, Article 22

¹⁴² Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 248

¹⁴³ Supra Note, paragraph 249

The provisions of both instruments establish quite similar frameworks for the liability of legal entities; however, the CoE Convention is more specific regarding conditions under which legal entities should be held responsible. This fact can be explained by the more universal character of the TOC Convention and the Protocol in comparison with the CoE Convention which is a regional instrument with about 20 signatories. Nevertheless, I believe more concrete requirements lead to closer unification of standards and easier cooperation, therefore the CoE Convention is going to be more efficient from this point of view. Moreover, its clear connection with the European Convention on Human Rights and Fundamental Freedoms (ECHR)¹⁴⁴ demonstrates a comprehensive approach which was also used by the ECtHR in the recent ECtHR's judgment in the case of *Rantsev v. Cyprus and Russia* where the court said that “in addition to criminal law measures to punish traffickers, Article 4 [of the ECHR] requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking.”¹⁴⁵

As to sanctions for the trafficking offences, the Protocol does not provide specific guidelines for **the severity of sanctions**¹⁴⁶. However, the TOC Convention includes general provisions regarding sanctions that are applicable to trafficking offences. It is important to note that the scope of application of the TOC Convention and the Protocol is limited to those offences which are transnational in nature and involve an organized criminal group, while the CoE Convention applies to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime. Therefore it would be logical to expect higher

¹⁴⁴ Council of Europe Convention on Action against Trafficking in Human Beings, Preamble and Article 30, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

¹⁴⁵ Case of *Rantsev v. Cyprus and Russia*, paragraph 284, [http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=rantsev&sessionId=68670831&skin=](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=rantsev&sessionId=68670831&skin=hudoc-en)
hudoc-en as of March 27, 2011

¹⁴⁶ Angelika Kartusch. REFERENCE GUIDE FOR ANTI-TRAFFICKING LEGISLATIVE REVIEW WITH PARTICULAR EMPHASIS ON SOUTH EASTERN EUROPE, Ludwig Boltzmann Institute of Human Rights, Vienna, 2001, p. 43

requirements to be set forth by the TOC Convention and the Protocol rather than by the CoE Convention.

The TOC Convention includes the general requirement that sanctions for the commission of the offences for both natural and legal persons should be proportionate to the gravity of the offence.¹⁴⁷ In general, penalties for serious crimes are covered by the discretion of national law-makers; however, if they want the TOC Convention to be applied to these crimes, the maximum penalty should be at least four years' deprivation of liberty.¹⁴⁸ The CoE Convention does not use gravity of the offence as a criterion to determine sanctions. It establishes the standard of sanctions: they should be effective, proportionate and dissuasive.¹⁴⁹ The same standard has been established by the TOC Convention regarding sanctions against legal entities, which I will discuss below. Moreover, it links penalties to the possibility of extradition: they should involve an appropriate term of deprivation of liberty for the extradition to be applicable. In particular, the European Convention on Extradition reads that "[e]xtradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty."¹⁵⁰ Additionally, the CoE Convention obliges States "to deny the perpetrator, temporary or permanently, the exercise of the activity in the course of which this offence was committed."¹⁵¹ Furthermore, the CoE Convention requires States to ensure that

¹⁴⁷ United Nations Convention Against Transnational Organized Crime, Article 11(1), <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31, 2011

¹⁴⁸ LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOL THERETO. UNODC, 2004, paragraph 272, http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf as of March 3, 2011

¹⁴⁹ Council of Europe Convention on Action against Trafficking in Human Beings <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011, Article 23(1)

¹⁵⁰ European Convention on Extradition, Paris, 13.XII.1957, Article 2, <http://conventions.coe.int/Treaty/EN/Treaties/Html/024.htm> as of Jan.31, 2011

¹⁵¹ Council of Europe Convention on Action against Trafficking in Human Beings, Article 23(4), <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

confiscation of proceeds and property corresponding to the offence is enabled¹⁵² that can be applied to both natural and legal persons either through criminal law or civil confiscation provisions.¹⁵³

As regards liability of legal entities, the TOC Convention established a more specific requirement for sanctions used against them. Legal entities should be subjected to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.¹⁵⁴ The CoE Convention puts the same requirements to sanctions against legal entities. Moreover, it obliges States “to enable the temporary or permanent closure of any establishment which was used to carry out trafficking in human beings.”¹⁵⁵

Article 24 of the CoE Convention sets an obligation for Parties to ensure that the following circumstances are taken into consideration when punishment for trafficking offence is determined:

- 1) the offence deliberately or by gross negligence endangered the life of the victim;
- 2) the offence was committed against a child;
- 3) the offence was committed by a public official in the performance of her/his duties;
- 4) the offence was committed within the framework of a criminal organization.¹⁵⁶

Moreover, the CoE Convention obliges each Party to adopt such legislative and other measures to ensure that final sentences passed by another Party in relation to trafficking offences

¹⁵² Supra Note, Article 23

¹⁵³ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 255

¹⁵⁴ United Nations Convention Against Transnational Organized Crime, Article 10, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31, 2011

¹⁵⁵ Council of Europe Convention on Action against Trafficking in Human Beings, Article 23(4), <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

¹⁵⁶ Council of Europe Convention on Action against Trafficking in Human Beings Article 24, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

established in accordance with this Convention are taken into consideration when determining the penalty.¹⁵⁷

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I think the requirements regarding the severity of sanctions are quite mild – minimum one year of deprivation of liberty. Just for comparison, the EC Framework Decision requires EU countries to introduce sanctions for committing trafficking in persons of at least eight years imprisonment.¹⁵⁸ Trafficking in persons' crime commodifies human beings, severely harms individual physical and psychical health and undermines social values. It includes a number of separate crimes like rape, tortures, bodily injuries, etc. Therefore, in my view, punishment should be commensurate at least to punishment established in domestic law for rape or for severe bodily injuries. Only in that situation will sanctions be effective and proportionate, and correspond to the gravity of the crime as established by both instruments.

Although the two instruments include identical definitions of trafficking in persons, only part of criminalization clauses are identical, the rest have their peculiarities. This fact can be explained by a different scope of application of the instruments in question, and by different approaches used. The Protocol is aimed at finding minimum common ground and minimum standards; the CoE Convention goes further and includes more demanding requirements in comparison with the Protocol. Nevertheless, the two instruments complement each other very well, which will definitely benefit the overall fight against trafficking in human beings in Europe.

¹⁵⁷ Supra Note, Article 25

¹⁵⁸ Council Framework Decision on Combating Trafficking in Human Beings, 2002/629/JHA, Article 3(2), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:203:0001:0004:EN:PDF> as of March, 5, 2011

SECTION 1.4.STATE PARTIES' OBLIGATIONS REGARDING INVESTIGATION, PROSECUTION AND ADJUDICATION

In this section I will outline and compare the standards established by the two instruments regarding investigation, prosecution and adjudication of trafficking offences. I will also make references to the ECHR and the ECtHR jurisprudence when they can be applicable.

Although specialized anti-trafficking instruments do not specifically require State Parties to investigate and prosecute, combating trafficking in persons is one of the purposes of the Protocol (Article 2) and the CoE Convention (Article 1), ensuring effective investigation and prosecution is one of the purposes of the CoE Convention (Article 1), and scope of application of the Protocol explicitly includes investigation and prosecution of the trafficking offences (Article 5). Therefore, it is possible to conclude that investigation and prosecution of trafficking crimes is part of the States Parties' obligations according to the two instruments under analysis.¹⁵⁹

Moreover, according to Obokata, "obligation to investigate, prosecute and punish non-state actors, including traffickers, with "due diligence" is established by jurisprudence of international human rights law."¹⁶⁰ In *Siliadin v. France*, the ECtHR said that Article 4 of the ECHR establishes a positive obligation of States to effectively criminalize and prosecute all actions aimed at holding a person enslaved,¹⁶¹ and to be in compliance with the standard a Member State should establish "a legislative and administrative framework to prohibit and

¹⁵⁹ Anne T. Gallagher. *The International Law of Human Trafficking*, Cambridge University Press, 2010, p. 382

¹⁶⁰ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective, Towards a Holistic Approach*, Leiden, Boston, 2006, p.150

¹⁶¹ Case of *Siliadin v. France*, ECtHR, [http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=siliadin&sessionid=70120684&skin=](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=siliadin&sessionid=70120684&skin=hudoc-en) as of April 24, 2011

punish trafficking.”¹⁶² Since in *Rantsev v. Cyprus and Russia*, the ECtHR concluded that human trafficking as defined by the Protocol and the CoE Convention falls within the meaning and scope of Article 4 of the ECHR¹⁶³, any positive obligation derived from Article 4 can be transposed to any act which constitutes trafficking in persons. Among such obligations, there are also such as follows: “to take operational measures to protect victims, or potential victims of trafficking” when the state authorities are aware of a risky situation in relation to a particular person; and “to investigate situation of potential trafficking.”¹⁶⁴

Establishment and further observance of the due diligence standard is very important since even very good laws can be inefficient because of lack of enforcement. In particular, trafficking offence can be perfectly criminalized in a domestic criminal statute, but if police is reluctant to conduct investigations because they are not trained appropriately, prosecutors refuse to prosecute, and courts do not “bear in mind the grave nature of the offences”¹⁶⁵ when sentencing, a State is unlikely “to pass the due diligence test.”¹⁶⁶

The Protocol does not include many provisions regarding investigation, prosecution or adjudication of trafficking cases; however, as it was mentioned above, it is interpreted *mutatis mutandis* with the TOC Convention that gives the Protocol additional “possibilities” in comparison with the CoE Convention. Article 10 of the Protocol establishes that law enforcement, immigration or other relevant authorities of State Parties shall, as appropriate, cooperate with one another by exchanging information with the purpose of identifying traffickers and victims among other travelers crossing the border, types of documents they use and the

¹⁶² CASE OF RANTSEV v. CYPRUS AND RUSSIA (2010), ECtHR, paragraph 285, [http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=rantsev&sessionid=70120684&skin=](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=rantsev&sessionid=70120684&skin=hudoc-en) as of April 24, 2011

¹⁶³ Supra Note, paragraph 282

¹⁶⁴ Supra Note, paragraphs 286 and 288

¹⁶⁵ United Nations Convention Against Transnational Organized Crime, Article 11(4), <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31,2011

¹⁶⁶ Anne T. Gallagher. *The International Law of Human Trafficking*, Cambridge University Press, 2010, p. 383

means and methods used by organized criminal groups for the purpose of trafficking in persons. Moreover, the article establishes a standard that law enforcement training is to be provided by the States Parties.¹⁶⁷ This requirement is also mentioned in Rantsev case as a Member State obligation.¹⁶⁸

In the TOC Convention, Article 20 obliges State Parties to introduce the investigative techniques of controlled delivery, electronic surveillance and undercover operations into domestic law if permitted by the basic principles of its domestic legal system.¹⁶⁹ The rationale of this is that often only these techniques can be efficient in uncovering crimes committed by sophisticated organized criminal rings, since other less intrusive methods do not work.¹⁷⁰

The CoE Convention includes provisions that are related to criminal proceedings in general, and to investigation and prosecution in particular. Article 27 establishes an important standard that investigation and prosecution of trafficking offence should not depend on a victim's submission accusing someone. Moreover, the same article obliges State Parties to ensure that any group, foundation, association or non-governmental organization which aims at fighting trafficking in human beings or protection of human rights has the possibility to assist and/or support the victim with his or her consent during criminal proceedings regarding trafficking offence.¹⁷¹ The last provision demonstrates a political will to engage civil society members into execution of governmental functions. I believe it is highly advantageous for the

¹⁶⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 10, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

¹⁶⁸ CASE OF RANTSEV v. CYPRUS AND RUSSIA (2010), ECtHR, paragraph 287, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=rantsev&sessionid=70120684&skin=hudoc-en> as of April 24, 2011

¹⁶⁹ United Nations Convention Against Transnational Organized Crime, Article 20, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31,2011

¹⁷⁰ LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOL THERETO. UNODC, 2004, paragraph 384, http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf as of March 3, 2011

¹⁷¹ Council of Europe Convention on Action against Trafficking in Human Beings <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011, Article 27(3)

government, especially for police and prosecutors, to involve NGOs since NGOs are better positioned to establish a good relationship with victims and support them in criminal proceedings.

Both instruments include witness protection clauses¹⁷² that provide for extensive protection measures during criminal proceedings, like physical protection, relocation, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of persons, and permitting testimony to be given through the use of communications technology such as video links or other adequate means. Additionally, the CoE Convention suggests assisting in obtaining jobs. However, a particular measure to be implemented will depend on particular case circumstances. In some cases, it would be enough to provide a confidential telephone number or cell phone for emergency calls or to install some preventive equipment. In other cases, bodyguards, change of identity or relocation may be needed.¹⁷³ Importantly, the CoE Convention pays a special attention to protection of a child victim with securing his/her best interests.¹⁷⁴

Both instruments provide protection from “potential retaliation or intimidation”¹⁷⁵ to witnesses and victims, and their relatives. Unlike the CoE Convention, the TOC Convention also provides protection to other persons close to witnesses or victims. As regards duration of the

¹⁷² United Nations Convention Against Transnational Organized Crime, Article 24, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31,2010; Council of Europe Convention on Action against Trafficking in Human Beings, Article 28, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

¹⁷³ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 286

¹⁷⁴ Council of Europe Convention on Action against Trafficking in Human Beings, Article 28, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

¹⁷⁵ United Nations Convention Against Transnational Organized Crime, Article 24, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31,2010; Council of Europe Convention on Action against Trafficking in Human Beings, Article 28, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

protection, the TOC Convention does not specify it, while the CoE Convention clearly outlines it as “during and after investigation and prosecution of perpetrators.”¹⁷⁶

Moreover, the CoE Convention pays special attention to court proceedings where a victim’s private life and, if appropriate, identity should be protected, and their safety and protection from intimidation ensured, in accordance with domestic law requirements and in compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁷⁷ The European Court of Human Rights case-law can serve as a guide on how to protect victims’ private life and ensure their safety. There are at least **four measures** that can help efficiently implement Article 30: **non-public hearings, audiovisual technology, recordings of testimony, and anonymous testimony.**¹⁷⁸ With the purpose of a clear understanding of what standards should be followed by State Parties I will briefly outline the ECtHR’s case-law in this regard.

Although public hearings are a fundamental principle of Article 6(1) of the ECHR, **closed hearings** can be conducted

*in the interests of morals, public order of national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*¹⁷⁹

Audiovisual technology allows avoiding intimidation of victims and witnesses. In particular, if the victim/witness testifies through a video link or other video technology, it is possible to avoid psychological pressure and traumatic repetitive hearings, face-to-face contacts with the accused. There are some practices utilized like testifying from another room in the same

¹⁷⁶ Council of Europe Convention on Action against Trafficking in Human Beings, Article 28, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

¹⁷⁷ Supra Note, Article 30

¹⁷⁸ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 307

¹⁷⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1), http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf as of Jan.31, 2010

court premises or testifying from another premises. In such situations, it is advisable to ensure that no unauthorized intrusion preventing the truth from being established and doing harm to a victim/witness may occur.¹⁸⁰

Use of recordings of testimony has often been considered problematic from the point of rights of the defense to be respected. As a general rule, the defense should have an opportunity to examine or have examined witnesses against the defendant as required by Article 6(3d) of the ECHR that is not possible when the testimony is recorded. However, the ECtHR considered the use of recorded testimonies lawful in cases related to sexual violence by saying that the Article 6(3d) requirement cannot be interpreted as covering all cases.¹⁸¹ At the same time, in the *Saidi v. France* judgment the Court said that if the testimony is the sole basis for the conviction and the defense did not have a chance to confront the witness, to a certain extent it amounts to deprivation of fair trial.¹⁸² This discrepancy can be explained by the fact that these two cases are of different character: *S.N. v France* is about S.N.'s conviction of sexual relations with a child, and *Saidi v. France* is a drug trafficking case. Indeed, the category of the case and the extent to which rights of the defense were restricted matters when the lawfulness of using recordings of testimony is assessed.

Finally, the most disputable issue out of the four is the **use of anonymous testimony**. The ECtHR's position is that "the use of anonymous statements to found a conviction is not in all circumstances incompatible with the ECHR".¹⁸³ In the ECtHR's jurisprudence¹⁸⁴, I have

¹⁸⁰ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraphs 309,310

¹⁸¹ *S.N. v. Sweden* case judgment, ECtHR, 2 July 2002, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=S.N.%20%7C%20SWEDEN&sessionid=67477732&skin=hudoc-en> as of March 5, 2011

¹⁸² *Saidi v. France* case judgment, ECtHR, 20 September 1993, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=saidi%20%7C%20FRANCE&sessionid=67477732&skin=hudoc-en> as of March 5, 2011

¹⁸³ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraphs 320

identified **three factors** to be considered in this regard: **balance of interests, minimal restrictions to defense, and role of the testimony in question in conviction.**

First of all, the use should be justified by the circumstances of a particular case where interests of the defense should be balanced with interests of a victim/witness, and threats to life, liberty or security, and privacy which are protected by the ECHR may justify use of anonymous witnesses.¹⁸⁵ Another important consideration for understanding the standard is how the procedure is organized to minimize defense restrictions. For instance, in *Doorson v. the Netherlands* an anonymous witness was interviewed by an investigating judge who was familiar with the identity of the witness, in the presence of the defense counsel who was able to ask questions. This scenario was considered compatible with the defense rights. At the same time, when an anonymous witness was interviewed via sound link the Court held that it was a violation of Article 6 (3d) of the ECHR.¹⁸⁶ Another factor that presupposes the Court decision is a particular role which the anonymous testimony plays in the conviction: whether it is the only basis for conviction, crucial or does not influence the final conviction. Therefore, it is clear that procedural safeguards should be in place to balance the interests of defense and a victim/witness.

The main differences between the witness protection clauses of the two instruments include the extent to what they are mandatory for the State Parties and categories of protected

¹⁸⁴ *S.N. v. Sweden* case judgment, ECtHR, 2 July 2002, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=S.N.%20%7C%20SWEDEN&sessionid=67477732&skin=hudoc-en> as of March 5, 2011; *Saidi v. France* case judgment, ECtHR, 20 September 1993, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=saidi%20%7C%20FRANCE&sessionid=67477732&skin=hudoc-en> as of March 5, 2011; *Doorson v. the Netherlands*, paragraph 70, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=doorson%20%7C%20%22THE%20NETHERLANDS%22&sessionid=67477732&skin=hudoc-en> as of March 5, 2011; *Van Mechelen and Others v. the Netherlands*, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Van%20%7C%20Mechelen%20%7C%20%22THE%20NETHERLANDS%22&sessionid=67477732&skin=hudoc-en> as of March 5, 2011

¹⁸⁵ *Doorson v. the Netherlands*, paragraph 70,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=doorson%20%7C%20%22THE%20NETHERLANDS%22&sessionid=67477732&skin=hudoc-en> as of March 5, 2011

¹⁸⁶ *Van Mechelen and Others v. the Netherlands*,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Van%20%7C%20Mechelen%20%7C%20%22THE%20NETHERLANDS%22&sessionid=67477732&skin=hudoc-en> as of March 5, 2011

people. For instance, Article 24 of the TOC Convention establishes that “[e]ach State Party shall take appropriate measures within its means”. Such formulation diminishes the obligatory character of the clause and provides State Parties with a reasonable excuse for non-implementation. On the contrary, the CoE Convention clearly puts on State Parties an obligation “to ensure and to offer various kinds of protection.”¹⁸⁷

Moreover, the TOC Convention requires providing protection to witnesses and victims giving testimonies in criminal proceedings regarding offences established, and as appropriate, to their relatives and other persons close to them.¹⁸⁸ The CoE Convention gives protection to family members only, but adds two more categories to the protected people: collaborators and members of groups, foundations, associations or non-governmental organizations which assist and/or support the victim during criminal proceedings.¹⁸⁹ Both instruments provide for quite a wide range of measures to protect witnesses, victims and other appropriate persons, and from my point of view providing protection for collaborators and civil society workers looks reasonable as well as transposing the ECHR and the Court’s case-law into the context of criminal proceedings of the trafficking offences.

Efficiency of the investigation and prosecution of trafficking crimes may be increased by introducing specialization within police or the prosecutor’s office¹⁹⁰ required by Article 29 of the CoE Convention¹⁹¹, not specifically with respect to police or prosecutors, but in general. In particular, it says that each Party shall adopt such measures as may be necessary to ensure that

¹⁸⁷ Council of Europe Convention on Action against Trafficking in Human Beings, Article 28(2), <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2010,

¹⁸⁸ United Nations Convention Against Transnational Organized Crime, Article 24 (1), <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31,2010

¹⁸⁹ Council of Europe Convention on Action against Trafficking in Human Beings, Article 28, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2010

¹⁹⁰ Angelika Kartusch. REFERENCE GUIDE FOR ANTI-TRAFFICKING LEGISLATIVE REVIEW WITH PARTICULAR EMPHASIS ON SOUTH EASTERN EUROPE, Ludwig Boltzmann Institute of Human Rights, Vienna, 2001, p. 50

¹⁹¹ Council of Europe Convention on Action against Trafficking in Human Beings, Article 29 <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2010

persons or entities are specialized in the fight against trafficking, including providing relevant agency-specific training.¹⁹²

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Comparative analysis of the Protocol and the CoE Convention demonstrates that they do not set contradictory standards. Rather, both instruments establish mostly similar, complementary standards in the field of criminalization, prosecution and investigation of trafficking in persons. In particular, the Protocol and the Convention give the same definition of trafficking in persons. The criminalization provisions are almost the same. However, the prosecution, investigation and adjudication standards cover different issues: while the Protocol and the TOC Convention set more general standards, which focus on transnational organized crime, the CoE Convention covers more specific standards with respect to trafficking in persons.

¹⁹² Council of Europe Convention on Action against Trafficking in Human Beings, Article 29, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2010

CHAPTER 2. ASSESSMENT OF THE IMPLEMENTATION OF THE PALERMO PROTOCOL AND THE COE CONVENTION IN UKRAINE'S LEGISLATION AND PRACTICE

In this chapter I will make an analysis of the relevant substantive and procedural law of Ukraine, in particular the criminal law statute on human trafficking (Article 149 of the Criminal Code of Ukraine) and some other criminal law provisions, and criminal procedures. I will use a criminal case completed with conviction of traffickers as an example to demonstrate the implementation of the two instruments. As criteria I will use minimum standards established by the Palermo Protocol and the CoE Convention, and conclude with recommendations on further improvements of laws and their practical enforcement.

SECTION 2.1. IMPLEMENTATION OF THE INTERNATIONAL STANDARDS INTO LEGISLATION OF UKRAINE

Ukraine has a civil law legal system. Since Ukraine is a unitary country, national legislation is equally applicable on its whole territory. As regards implementation of international conventions into national legislation, Ukraine is a monist country where according to Article 9 of the Constitution of Ukraine, “international conventions which have been ratified by the Supreme Council of Ukraine (Ukraine’s parliament) are a part of the national legislation of Ukraine.”¹⁹³ However, crimes and punishments are exclusively established by the 2001 Criminal Code of Ukraine (CCU),¹⁹⁴ and international conventions cannot serve as a sole source/basis for criminalization of a particular action. The 1960 Criminal Procedures Code, which rules out criminal proceedings has been amended but it is still conceptually inquisitorial

¹⁹³ Constytutsiya Ukrainy (Constitution of Ukraine), Article 9, translated by Olena Kustova, <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=254%EA%2F96-%E2%F0> as of Sept. 20, 2011

¹⁹⁴ Kryminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Article 3, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

and needs comprehensive reform. Thus, criminal proceedings can be started upon identification of a crime by law enforcement, media, state enterprises, private companies or individuals, or upon the victim's submission. As the first step, an inquiry is conducted to conduct an initial check of facts. If facts are likely to be true, a pre-trial investigation starts. The investigator qualifies actions as a particular offence, with the help of operative services identifies suspect(s), collects and files evidence, and drafts indictment to transfer the complete case investigation file to the prosecutor's office. The prosecutor's office is responsible for bringing a criminal case to court and support public prosecution there. The judge considers the case and delivers a verdict where he sentences a defendant to a punishment established by a particular article of the CCU. The verdict can be appealed at a higher court by the defendant and victim, and their lawyers, and prosecutor.

I will start my assessment with the definition of human trafficking, which is included into Article 149 of the CCU. I will compare it with the Protocol and the CoE Convention definitions, which are identical as noted above. Although the standards established by the Protocol and the CoE Convention are minimum, and states are encouraged to do more,¹⁹⁵ I will focus on a comparative analysis of the minimum required.

Article 149 of the Criminal Code of Ukraine (CCU) established criminal liability for trafficking in persons and any other illegal agreement where the person is considered as an object. The last version of the article was adopted on January 12, 2006. Text of the Article 149 in force follows¹⁹⁶.

¹⁹⁵ 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. Opinion-Nr: TRAFF-UKR/041/2005(MASz/DP). OSCE-ODIHR, www.legislationline.org/documents/id/1962 as of September 21, 2011

¹⁹⁶ Criminal'nyy Codeks Ukrainy(Criminal Code of Ukraine), in force starting September 1, 2001, Article 149, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

Article 149. Trafficking in persons or other illegal agreement in which a person is an object (enacted on Feb.10, 2006)

1. Trafficking in persons or any other illegal agreement in which a person is an object, as well as recruiting, moving, hiding, transferring or receiving a person when committed by deceit, blackmailing, or with the use of vulnerable condition of the person, for the purpose of exploitation, -

shall be punishable by imprisonment for a term of three to eight years.

2. Actions referred to in paragraph 1 of the present Article, if committed in respect to a minor [less than 18 years of age], or perpetrated upon several persons, or repeatedly, or by a group of persons upon their prior conspiracy, or by an official through abuse of his office, or by a person upon whom the victim was financially or otherwise dependent, or associated with violence that does not endanger the life or health of the victim or his or her close associates, or with the threat of use of such violence, -

shall be punishable by imprisonment for a term of five to twelve years, with or without forfeiture of property.

3. Actions referred to in paragraphs 1 or 2 of the present Article if committed in respect to an underage minor [less than 14 years of age] or by an organized group, or associated with violence that endangers the life or health of the victim or his close associates, or with the threat of use of such violence, or if such actions resulted in serious consequences, -

shall be punishable by imprisonment for a term of eight to fifteen years with or without forfeiture of property.

Note 1. The word “exploitation” of a person in the present Article refers to all forms of sexual exploitation, use in pornography business, forced labor or services, slavery or practices similar to slavery, servitude, indebteding, removing organs, carrying out experiments on a person without consent of the latter, adoption for profiteering purposes, forced pregnancy, involving in criminal activities, using in armed conflicts, etc.

[Note] 2. In Articles 149 and 303 of the present Code, “vulnerable condition” of a person means a condition influenced by physical or mental characteristics or external circumstances, such condition depriving or restricting his ability to realize or direct his actions (inactivity), take independent decisions upon his own will, oppose violent or any other illegal actions, [and including] any combination of serious personal, family, or any other circumstances whatsoever.

[Note] 3. Liability for recruiting, moving, hiding, transferring, or receiving a minor [less than 18] or an underage minor [less than 14], under the present Article, arises regardless of whether such actions have been committed with the use of deceit, blackmailing, or helpless state of the said persons or with the use of violence or threat thereof, official position, or by a person on whom the victim was financially or otherwise dependent.¹⁹⁷

In Table 1, I will demonstrate how elements of the Palermo Protocol definition are reflected in Ukraine’s criminal statute, and assess compliance.

¹⁹⁷ Criminal’nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Article 16, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

**Table 1. Ukrainian Definition of Human Trafficking: Compliance with
International Standards**

	Palermo Protocol definition	Definition from Article 149 of the Criminal Code of Ukraine	Compliance with the international standard
	(a) “Trafficking in persons” shall mean the		
A C T I O N S	recruitment, transportation, transfer, harbouring or receipt of persons,	recruiting, moving, hiding, transferring or receiving a human being ¹⁹⁸	Fully compliant since all the actions are included
M E A N S	by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person	associated with violence that does not endanger the life or health of the victim or his or her close associates, or with the threat of use of such violence ¹⁹⁹ when committed by deceit, blackmailing, or with the use of any other vulnerable condition of the human being or by an official through abuse of his office, or by a person upon whom the victim was financially or otherwise dependent ²⁰⁰	Compliant with reservation since not all the means are included. Implementation of the means “the giving or receiving of payments or benefits to achieve the consent of a person having control over another person” ²⁰¹ looks questionable since the Ukraine’s criminal statute says “committed by a person upon whom the victim was financially or otherwise dependent” ²⁰² . This formula does not fully cover this particular means, therefore it may mean that in Ukraine trafficking in persons is

¹⁹⁸ Criminal’nyy Kodeks Ukrainy(Criminal Code of Ukraine), in force starting September 1, 2001, Paragraph 1 of Article 149, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

¹⁹⁹ Supra Note, Article 149(2)

²⁰⁰ Supra Note, Article 149(2)

²⁰¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 3, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011,

²⁰² Criminal’nyy Kodeks Ukrainy(Criminal Code of Ukraine), in force starting September 1, 2001, Article 149, paragraph 2, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

			criminalized in relation to a person who can influence the victim, but not to a person who recruits victims using their relatives or other people who can influence them for the purpose of exploitation. However, the trafficker should get a victim's consent anyway to recruit her/him, therefore it does not matter who has been influenced: the victim or the person who controls the victim. ²⁰³ Moreover, Article 149 criminalizes "Trafficking in persons or any other illegal agreement in which a person is an object", ²⁰⁴ with the purpose of exploitation, therefore any deal between the trafficker and a person who controls the victim is criminalized. ²⁰⁵
PURPOSE	for the purpose of exploitation	for the purpose of exploitation	Fully compliant
	Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services,	The word "exploitation" of a human being in the present Article refers to all forms of sexual exploitation, use in pornography business, forced labor or services,	Fully compliant The Ukraine's definition includes the minimum standard. Moreover, the list is not exhaustive that allows wide interpretation of the term "exploitation" once any

²⁰³ Interview with Andrey Orlean, professor, National Academy of Prosecutors, September 20, 2011, Kyiv, Ukraine

²⁰⁴ Criminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Article 149, paragraph 1, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

²⁰⁵ Interview with Volodymyr Romanov, Department for Combating Cyber Crime and Human Trafficking, Ministry of Interior of Ukraine, September 19, 2011, Kyiv, Ukraine; Andrey Orlean. Nova Redaktsiya Statti, scho Peredbachaye Criminal'nu Vidpovidal'nist' za Torgivlyu Lyud'my: Analiz Skladu Zlochynu. (New Version of the Article Which Sets Forth Criminal Liability for Trafficking in Persons, Yurydychnyy Zhurnal (Legal Journal), 2006 (4), <http://justinian.com.ua/article.php?id=2211> as of November 11, 2011

	slavery or practices similar to slavery, servitude or the removal of organs;	slavery or practices similar to slavery, servitude, indebteding, removing organs, carrying out experiments on a human being without consent of the latter, adoption for profiteering purposes, forced pregnancy, involving in criminal activities, using in armed conflicts, etc.	new forms of exploitation appear. However, some forms of exploitation remain undefined on national level like sexual exploitation since they are not defined internationally as well. ²⁰⁶ —
	(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;		Non-complaint This provision has not been reflected in the Ukraine's legislation. This created confusion for police, prosecutors and judges who in some cases took a position that the fact that a person agreed on going abroad for employment releases traffickers from criminal liability or diminishes the gravity of the offense. ²⁰⁷ — Therefore, Methodological Recommendations on Detection and Investigation of Crime Set Forth by Article 149 of the Criminal Code of Ukraine issued by Ministry of Interior of Ukraine clarified the situation by saying that "the fact that a person agreed on employment

²⁰⁶ Andreas Schloenhardt. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children – commentary, 2009, p.5, <http://www.law.uq.edu.au/documents/humantrafficking/legislation/UN-TiP-Protocol-2000-Commentary-Analysis.pdf> as of Feb. 11, 2011

²⁰⁷ Interview with Oksana Horbunova, International Organization for Migration. September 1, 2011, Kyiv, Ukraine

			abroad, even with forged documents, does not mean that s/he agreed on free work, beating and tortures, and on other conditions of slavery.” ²⁰⁸
	(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;	Liability for recruiting, moving, hiding, transferring, or receiving a minor [less than 18] or an underage minor [less than 14], under the present Article, arises regardless of whether such actions have been committed with the use of deceit, blackmailing, or of vulnerable condition of the human being or with the use of violence or threat thereof, of official position, or by a person on whom the victim was financially or otherwise dependent	Compliant, but with — reservations since as I mentioned above, not all means were directly included into the definition initially, therefore not all means are included into the child trafficking definition accordingly.
	(d) “Child” shall mean any person under eighteen years of age. ²⁰⁹ —		Fully compliant, however, in the Criminal Code of Ukraine in general, and in Article 149 in particular, crimes committed against children of up-to-14 years old are considered more serious than those committed against children of 15-to-18. ²¹⁰

The comparative table above demonstrates that the definition of the crime of human trafficking in Ukraine is compliant with the Protocol and the CoE Convention. The three components like actions, means and purpose, which form the international definition, are

²⁰⁸ Methodological Recommendations on Detection and Investigation of Crime Set Forth by Article 149 of the Criminal Code of Ukraine, Ministry of Interior of Ukraine, Kyiv, 2009, translated by Olena Kustova

²⁰⁹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 3, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

²¹⁰ Kryminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, for example, Article 152 (rape), 303 (pimping), <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

included into the Ukrainian one. However, one issue looks problematic in a comparative perspective: Ukraine's legislation does not reflect the provision about the victim's consent on future exploitation. Some Ukrainian scholars including Orlean recognized this flaw and suggested the TIP Statute to be amended by the words "with or without victim's consent".²¹¹ The amendment would remove misinterpretations caused by omitting the consent provision from the Statute. This solution looks logical, however, the issue of consent itself contradicts logic as well, since victims usually agree on migrating, on employment abroad, but not on exploitation.²¹²

Both the Protocol and the CoE Convention require criminalization of trafficking offence committed intentionally²¹³. Article 149 of the CCU does not say anything in this regard, but from the general context, it is presumed that all crimes are committed intentionally, except those which are described as unintentional.²¹⁴

The CoE Convention requires three more offences to be criminalized, namely "forging a travel or identity document; procuring or providing such a document; retaining, removing, concealing, damaging or destroying a travel or identity document of another person."²¹⁵ These actions should be committed deliberately and with the purpose of enabling human trafficking crime.²¹⁶ The Criminal Code of Ukraine criminalizes intentional forging of a travel or identity document with the purpose of using it by the forger or another person, and using forged

²¹¹ Interview with Andrey Orlean, professor, National Academy of Prosecutors, September 20, 2011, Kyiv, Ukraine

²¹² Mohamed Y. Mattar. INCORPORATING THE FIVE BASIC ELEMENTS OF A MODEL ANTITRAFFICKING IN PERSONS LEGISLATION IN DOMESTIC LAWS: FROM THE UNITED NATIONS PROTOCOL TO THE EUROPEAN CONVENTION, Tulane Journal of International and Comparative Law, Spring, 2006, pp. 371

²¹³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011; Council of Europe Convention on Action against Trafficking in Human Beings, Article 5 (1), 18 <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

²¹⁴ Interview with Andrey Orlean, professor, National Academy of Prosecutors, September 20, 2011, Kyiv, Ukraine

²¹⁵ Council of Europe Convention on Action against Trafficking in Human Beings, Article 20, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

²¹⁶ Supra Note, Article 20

documents²¹⁷. Neither procuring nor providing such a document has been criminalized. As regards retaining, removing, concealing, damaging or destroying a travel or identity document of another person, Article 357 of the CCU criminalizes taking illegal possession of a passport or other important personal documents.²¹⁸

Although States Parties to the CoE Convention shall consider criminalization of the services of a victim²¹⁹, Ukrainian parliament has not considered any bill establishing this.²²⁰

As regards criminalization of an attempt to commit human trafficking,²²¹ Article 149 of the Criminal Code of Ukraine (CCU) does not include it, but there is a provision in the Code that applies equally to all crimes and prescribes criminal liability for unfinished crime – Article 16.²²²

As to aiding, abetting, organizing and directing, Articles 26 and 27 of the Criminal Code of Ukraine provide for different types of accomplices depending on their role in a crime. In particular, Article 27 sets three categories of accomplices: organizer, abettor, and aider.²²³ Moreover, Article 28 separates complicity from committing a crime by a group of people, and differentiates committing a crime by a group without preliminary agreement, committing a crime by a group with preliminary agreement, and committing a crime by an organized criminal group or criminal organization.²²⁴ This differentiation allows the identification of the role of a particular accomplice and appropriate sentencing. All these provisions fully cover the Protocol

²¹⁷ Kryminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Article 358, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

²¹⁸ Supra Note, Article 357

²¹⁹ Council of Europe Convention on Action against Trafficking in Human Beings, Article 19, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

²²⁰ http://w1.c1.rada.gov.ua/pls/zweb_n/webproc2_5_1.J?ses=10007&num_s=2&num=&date1=&date2=&name_zp=%F2%EE%F0%E3%B3%E2%EB+%EB%FE%E4%FC%EC&out_type=&id= as of November 22, 2011

²²¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011; Council of Europe Convention on Action against Trafficking in Human Beings, Article 5 (2), 21 (2) <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

²²² Kryminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Article 16, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

²²³ Supra Note, Article 27

²²⁴ Supra Note, Article 18

and the CoE Convention requirements as regards criminalization of aiding or abetting, participating, organizing or directing human trafficking. Therefore, I conclude that criminalization standards are fully satisfied by Ukraine's legislation.

Establishment of liability of legal entities is a problematic issue in Ukraine. The concept of the CCU is the following: crimes are committed exclusively by natural persons, therefore only natural persons can be criminally punished. However, legal entities can be responsible for non-criminal unlawful acts like violations of tax or customs law and punished by fines according to Ukraine's Code for Administrative Offences.²²⁵ Anyway, since standards of liability of legal entities have not been implemented in Ukraine at all, I will not discuss difficulties with understanding and embracing the concept itself.

As to the severity of sanctions standards, Article 149 of the CCU provides for punishment of imprisonment for a period of three to 15 years with or without confiscation of property. The minimum punishment of three years is prescribed to a person who trafficked another person without any aggravating circumstances. This is more than required by the CoE Convention. As to trafficking in persons committed by an organized criminal ring, the punishment established is much more severe than required by the TOC Convention – “by imprisonment for a term of eight to fifteen years with or without forfeiture of property.”²²⁶

However, the CoE Convention's standard of effective, proportionate and dissuasive sanctions²²⁷ is satisfied in Ukraine de jure, but not de facto. Moreover, the TOC requirement for “national courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of

²²⁵ Codeks Pro Administratyvni Pravoporushenn'ya, (Code for Administrative Offences), <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=80731-10> as of October 26, 2011.

²²⁶ Criminal'nyy Codeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Article 149, paragraph 3, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

²²⁷ Council of Europe Convention on Action against Trafficking in Human Beings, Article 23, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

persons convicted of such offences”²²⁸ is not observed either. In reality, the sanctions established by the criminal statute are rarely imposed as required and, therefore, are not effective and dissuasive enough. There are two provisions in the Criminal Code of Ukraine that allow judges to considerably change Article 149 sanctions in a particular case in relation to a particular offender. First, Article 69 of the CCU allows reducing sentences below the minimum which the criminal statute establishes, under condition that there are more than two mitigating circumstances and the personality of the criminal has been taken account of.²²⁹ For instance, paragraph 3 of Article 149 of the CCU establishes sanctions for the most serious trafficking crimes which shall be punished by imprisonment for a term of eight to fifteen years with or without forfeiture of property.²³⁰ Judicial statistics demonstrate how judges applied Article 69 and minimized punishments. In 2010, the Judicial Administration of Ukraine reported that 33 individuals were convicted according to this paragraph. Eight of them were sentenced to probation, of the remaining 25 people, 13 individuals were convicted to imprisonment for terms up to five years, 11 – from five to 10 years, and one person to a term of more than 10 years. As we see, more than 50% of the traffickers were convicted to less severe penalties than established by law.²³¹ Second, Article 75 of the CCU allows the judge to release the trafficker from imprisonment and put him/her on probation (suspended sentence) under condition that correction of the criminal is possible without imprisonment.²³² The same judicial data shows that out of 33 traffickers convicted for the most serious trafficking crimes, 24% received suspended

²²⁸ United Nations Convention Against Transnational Organized Crime, Article 11 (4), <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31, 2011

²²⁹ Criminal’nyy Codeks Ukrainy(Criminal Code of Ukraine), in force starting September 1, 2001, Article 69, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

²³⁰ Supra Note, Article 149(3)

²³¹ Judicial statistics for 2010, State Judicial Administration of Ukraine, received from the US Embassy to Ukraine

²³² Criminal’nyy Codeks Ukrainy(Criminal Code of Ukraine), in force starting September 1, 2001, Article 75, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

sentences.²³³ In fact, only 50% of the traffickers were punished as the law requires, the rest — received very light punishments which are not commensurate with the gravity of the offence.

Moreover, particular aggravating circumstances should be taken account of when the punishment is determined. If one looks at the requirements of Article 24 of the CoE Convention, there are four such circumstances:

- a the offence deliberately or by gross negligence endangered the life of the victim;
- b the offence was committed against a child;
- c the offence was committed by a public official in the performance of her/his duties;
- d the offence was committed within the framework of a criminal organisation.²³⁴

Article 149 of the CCU implements all the circumstances except the last one. In particular, *a* is included into paragraph 3 of Article 149, *b* – in paragraphs 2 and 3, and *c* – in paragraph 2.²³⁵ *d* is not included. Article 149 criminalizes trafficking in persons committed by an organized group, not a criminal organization. Although participation in criminal organization has been criminalized separately, according to Article 255 of the CCU²³⁶, it is not established as aggravating circumstance in relation to the crime of human trafficking. Therefore, in case of trafficking in persons committed by criminal organization, these two Articles (149 and 255 of the CCU) will be incriminated.

In addition to substantive law, I will analyze provisions of the Criminal Procedure Code to assess the level of implementation of the standards of investigation, prosecution and adjudication.

Article 10 of the Protocol establishes that law enforcement, immigration or other relevant authorities of State Parties shall, as appropriate, cooperate with one another by exchanging

²³³ Judicial statistics for 2010, State Judicial Administration of Ukraine, received from the US Embassy to Ukraine

²³⁴ Council of Europe Convention on Action against Trafficking in Human Beings, Article 24, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

²³⁵ Criminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Article 149, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

²³⁶ Supra Note, Article 255

information²³⁷. It is important to note that in Ukraine, a law enforcement agency may have inquiry or investigation authority or both. Thus, the Ministry of Interior, State Border Guards Service (SBGS), Security Service, Tax Militia, and Customs Service have inquiry authority. This means that they may collect information about a crime, i.e. document a crime, within their jurisdiction. For instance, the Customs Service may do this only as regards the offence of goods smuggling, SBGS – in relation to smuggling of people or deliberate use of forged documents to cross the state border.²³⁸ Investigation authority is vested in the Ministry of Interior, Security Service, Tax Militia and Prosecutors' Office.²³⁹ These agencies may institute a criminal case and conduct pre-trial investigation. However, only the Ministry of Interior investigators are authorized to investigate human trafficking crimes.²⁴⁰ Therefore, although the State Border Guards Service (SBGS) is in charge of protecting state borders and has jurisdiction over documentation of crimes like smuggling of people, it does not have the authority to investigate it and has to transfer the documents to Security Service investigators as required²⁴¹. Moreover, if a SBGS officer gets information about trafficking offence, s/he should transfer it to an authorized agency, the Ministry of Interior, for further processing. The other law enforcement agencies like the Ministry of Interior (MOI) and the Security Service of Ukraine (SSU) can have both functions: inquiry and investigation. The Prosecutor's offices may do investigations only; they may not document crimes and should rely on the operational services of either MOI or SSU.²⁴²

²³⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 10, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

²³⁸ Criminal'no-Protsesual'nyy Codeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Translated by US Embassy to Ukraine, Article 101, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=1001-05> as of October 24, 2011

²³⁹ Supra Note, Article 102

²⁴⁰ Supra Note, Article 112

²⁴¹ Supra Note, Article 112

²⁴² Zakon pro Militsiyu (Law on Militia) <http://zakon2.rada.gov.ua/laws/show/565-12> as of November 7, 2011, Zakon pro Prokuraturu (Law on Prosecutors Service), Article 36, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1789-12> as of November 7, 2011; Zakon pro Derzhavnu Prykordonnu Sluzhbu Ukrainy (Law on State Border Guard Service) adopted on April 03, 2003, <http://zakon2.rada.gov.ua/laws/show/661-15> as of November 7, 2011

However, the prosecutor can take any criminal case away from MOI or SSU investigators and continue its investigation on its own.²⁴³

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If one looks through the laws on the militia and prosecutors service, one will not see any requirement as regards cooperation and information sharing between law enforcement agencies. Only the Law on SBGS includes the requirement to cooperate with other law enforcement agencies in particular situations like in combating terrorism.²⁴⁴ However, there are internal agency guidelines on interagency cooperation that set forth the requirement to conduct joint operations and share information.²⁴⁵

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Nevertheless, interagency cooperation is still a challenge in Ukraine because of the following reasons. First, there are a number of law enforcement agencies in Ukraine. Their competences are not set forth clearly enough and sometimes overlap. There is a lack of clear legislative provisions which would delineate the competences of different law enforcement agencies and set up a system of such agencies.²⁴⁶ Moreover, reform of law enforcement agencies is needed since some of the agencies like the Security Service have functions which are not inherent to them. For instance, according to international standards, the Security Service should get rid of law enforcement functions and execute intelligence functions exclusively.

Second, there seems to be some kind of competition among law enforcement agencies in Ukraine, therefore the Security Service and Border Guards are not eager to exchange information

²⁴³ Criminal'no-Protsesual'nyy Kodeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Article 112, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=1001-05> as of October 24, 2011

²⁴⁴ Zakon pro Derzhavnu Prykordonnu Sluzhbu Ukrainy (Law on State Border Guard Service) adopted on April 03, 2003, Article 19, <http://zakon2.rada.gov.ua/laws/show/661-15> as of November 7, 2011

²⁴⁵ For instance, Instruktsiya pro Vzeyemodiyu Pravookhoronnykh Organiv u Sferi Borot'by z Organizovanoyu Zlochynnistyu (Instruction on Cooperation of Law Enforcement Agencies in the Field of Combating Organized Crime), adopted by Ministry of Interior and Security Service of Ukraine on June 10, 2011, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z0822-11> as of November 7, 2011

²⁴⁶ Mateyuk O. Kireyeva O. Negativni Psykhologichni Chynnyky Vzeyemodiyi Pidrozdiliv Derzhavnoyi Prykordonnoyi Sluzhby UKrayiny ta Inshykh Pravookhoronnykh Organiv (Negative Psychological Factors of Cooperation Between State Border Guards Service of Ukraine and Other Law Enforcement Agencies of Ukraine), *Vistnyk Akademiyi Upravlinnya MVS (Bulletin of the Ministry of Interior Management Academy)*, 2009 (3), p. 169, http://www.nbu.gov.ua/portal/soc_gum/VAUMVS/2009_3/mateuk.pdf as of November 1, 2011

with the MOI since they care only about crimes which fall into their competence and do not want to do other agencies' job by collecting and sharing data. However, specialized anti-trafficking units of the Ministry of Interior in regions have managed to improve cooperation with border guards recently, which resulted in traffickers being apprehended on the border.²⁴⁷

A standard that law enforcement training is to be provided by the States Parties²⁴⁸ is not implemented in Ukraine. There are no provisions found in Ukraine's legislation that require governmental agencies to conduct specialized anti-trafficking training for law enforcement personnel. Though the new Law on Counteracting Human Trafficking obliges central executive bodies as well as local state administrations to conduct activities on raising awareness about counteracting human trafficking in judicial and law enforcement spheres,²⁴⁹ this provision can hardly be considered as implementing the requirement to "provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons"²⁵⁰ since it is too general and does not include particular issues to be addressed, unlike the Protocol.

As regards incorporation of investigative techniques of controlled delivery, electronic surveillance and undercover operations into domestic law, controlled delivery is not allowed as regards individuals, only goods can be subjected to controlled delivery according to Article 8 (2) of the Law on Operative Investigation Activity²⁵¹. However, Ukraine has ratified the Second

²⁴⁷ Interview with V. Romanov, Department for Combating Cyber Crime and Human Trafficking, Ministry of Interior, November 8, 2011, Kyiv, Ukraine

²⁴⁸ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 10, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

²⁴⁹ Zakon pro Protydiyu Torgivli Lyud'my (Law on Counteracting Human Trafficking), Articles 7 and 8, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3739-17> as of November 8, 2011

²⁵⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 10, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

²⁵¹ Zakon pro Operativno-rozshukovu Diyal'nist' (Law on Operative Investigation Activity), Article 8(2) <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2135-12> as of October 23, 2011

Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters²⁵²

and agreed on Article 18, which sets forth controlled deliveries.²⁵³

Other techniques are allowed. The Law provides for the following:

The departments conducting operative investigation activity shall be entitled to:

- penetrate in the criminal gang of secret agent of operative department or a person who cooperates with him/her keeping in secret reliable information concerning his/her personality;
- obtain information from communication means, use other technical means of getting information;
- control selecting by separate features telegraph postal items of mail;
- conduct visual observation in public places using photo, film, video shooting, optic and radio equipment, other technical means.²⁵⁴

As one can see in the Article, electronic surveillance and undercover operations are implemented into the national legislation while controlled delivery in relation to individuals is allowed by the international instrument, and is not allowed by the law which creates confusion among practitioners who should strictly follow the law and should not exceed their authorities.

Article 27 of the CoE Convention establishes an important standard that investigation and prosecution of trafficking offence should not depend on a victim's submission accusing someone.²⁵⁵ According to Article 94 of the CCU, investigation can be started and criminal case be instituted upon

- 1) *applications or reports from enterprises, institutions, organizations, officials, representatives of government, public, or particular citizens;*
- 2) *reports from representatives of government, public, or particular citizens who caught the suspect red-handed at the scene of crime;*
- 3) *surrender;*
- 4) *publications in the press;*
- 5) *finding indicia of crime by the inquiry agency, investigator, prosecutor, or court.*²⁵⁶

²⁵² Zakon pro Ratyfikatsiyu Drugoho Dodatkovoho Protocolu do Yevropeys'koyi Conventsiyi pro Vzayemnu Pravovu Dopomohu u Cryminal'nykh Spravakh (Law on Ratifying Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters), of June 1, 2011, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3449-17> as of November 11, 2011

²⁵³ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Article 18, <http://conventions.coe.int/Treaty/en/Treaties/html/182.htm> as of November 11, 2011

²⁵⁴ Zakon pro Operativno-rozshukovu Diyal'nist' (Law on Operative Investigation Activity), <http://zakon1.rada.gov.ua/cgi-bin/laws/annot.cgi?nreg=2135-12> as of October 25, 2011

²⁵⁵ Council of Europe Convention on Action against Trafficking in Human Beings, Article 27(3) <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan. 31, 2011

²⁵⁶ Cryminal'no-Protsesual'nyy Codeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Article 94, translated by US Embassy to Ukraine, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=1001-05> as of October 24, 2011

There are grounds for starting investigation of trafficking offence other than the victim's submission. It means that formally Ukrainian authorities can initiate an investigation of a human trafficking case without the victim's complaint. In practice, this never happened since victim's testimonials are often central among other evidence and should appear in court anyway.²⁵⁷

Article 27 of the CoE Convention obliges State Parties to ensure that any group,[—] foundation, association or non-governmental organization which aims at fighting trafficking in human beings or protection of human rights has the possibility to assist and/or support the victim with his or her consent during criminal proceedings regarding trafficking offence.²⁵⁸ According to Article 49 of the Criminal Procedures Code of Ukraine (CPCU) the victim can have a representative²⁵⁹ who has the following rights:

*produce evidence; enter pleas; review all records of the case after the completion of pre-trial investigation and, in case where pre-trial investigation has not been conducted, – after the assignment of the case to trial; participate in trial; propose disqualifications; submit complaints against actions of the inquirer, investigator, prosecutor, and court, as well as challenge court's judgment or rulings and decisions taken by people's judge, and, with appropriate grounds present, have his/her security protected.*²⁶⁰

However, it is assumed that the victim's representative is an individual, not legal entity like an NGO, and participation of NGOs in criminal proceedings is not regulated at all. In reality, local NGOs in Ukraine and private lawyers hired by the International Organization for Migration usually represent victims in court.²⁶¹

I will demonstrate implementation of the main standards as regards witness protection in Table 2.

²⁵⁷ Interview with V. Dyubina, Department for Combating Cyber Crime and Human Trafficking, Ministry of Interior, September 2, 2011, Kyiv, Ukraine

²⁵⁸ Council of Europe Convention on Action against Trafficking in Human Beings, Article 27(3) <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

²⁵⁹ Criminal'no-Protsesual'nyy Kodeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Article 49, translated by US Embassy to Ukraine, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=1001-05> as of October 24, 2011

²⁶⁰ Supra Note.

²⁶¹ Interview with Oksana Horbunova, International Organization for Migration. September 1, 2011, Kyiv, Ukraine

Table 2. Implementation of the Witness Protection Standards

	CoE Convention	TOC Convention and the Protocol	Ukraine's legislation²⁶²
Who is protected:			
1. Witnesses	✓	✓	✓
2. Victims	✓	✓	✓
3. Family members of p.1 and 2	✓	--	✓
4. Relatives of p.1 and 2		✓	✓ - close relatives
5. Other persons close to p.1 and 2		✓	--
6. Collaborators	✓	--	✓
7. Members of groups, foundations, associations, or NGOs	✓	--	✓ - if they represent a victim in a criminal case
What is provided: effective protection from potential retaliation or intimidation	✓	✓	Protection of life, housing facilities, health and property from infringements and ensuring appropriate conditions for justice
Measures set forth:			
Physical protection	✓	✓	✓
Relocation	✓	✓	✓
Identity change	✓	✓	✓
Non-disclosure or limited disclosure of identity or whereabouts	✓	✓	✓
Assistance in obtaining jobs	✓	--	✓ - change of work place

The CoE Convention requires witness protection to be ensured “during and after investigation and prosecution of perpetrators”,²⁶³ but according to Ukraine's Law on Protection

²⁶² Criminal'no-Protsesual'nyy Kodeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Article 52-1, translated by US Embassy to Ukraine, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=1001-05> as of October 24, 2011; Zakon Pro Zabezpechennya Bezpeky Uchasnykiv Kryminal'nogo Sudochynstva (Law on Protection of Persons Who Participate in Criminal Proceedings), December 23, 1993, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3782-12> as of October 24, 2011

of Persons Who Participate in Criminal Proceedings, the duration of protection is not limited by the investigation or prosecution period, it depends on the existence of a real threat to the life, health and property of a person who is under protection²⁶⁴. The rationale of this provision is that officials who made the decision about protection always make interim risk assessments and if protection is no longer needed, it can be removed, or if additional measures should be taken, another decision can be made.

It is important to look at the extent of obligation provided for by the two international instruments. Ukraine's legislation satisfies the TOC Convention and the Protocol's standard of ensuring protection within a State's means. At the same time, the CoE Convention's standard of various kinds of protection ensured and offered is not implemented since the Ukrainian Government does not bear full responsibility for the protection: according to Article 27 of the Law, financing protection measures should be done on the basis of current legislation and as regulated by the Cabinet of Ministers, and also at the expense of protected persons if they submit a written consent."²⁶⁵ In fact, taking account of insufficient funding provided to law enforcement agencies and to protection measures providers²⁶⁶ it is possible to conclude that various types of protection are offered but not ensured and not used. This conclusion is indirectly supported by data collected by Bardatska and Orlean.²⁶⁷ They interviewed 53 investigators who investigated 290 criminal cases on human trafficking. Of these, 38% confirmed that illegal pressure on witnesses and victims was used in this category of criminal cases.²⁶⁸ However, the investigators

²⁶³ Council of Europe Convention on Action against Trafficking in Human Beings, Article 28, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

²⁶⁴ Zakon Pro Zabezpechennya Bezpeky Utchasnykiv Kryminal' nogo Sudochynstva (Law on Protection of Persons Who Participate in Criminal Proceedings), December 23, 1993, Article 20, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3782-12> as of October 24, 2011

²⁶⁵ Supra Note, Article 27

²⁶⁶ Bardatska O. Orlean A. Ensuring Security of Victims and Witnesses in Criminal Cases Related to Trafficking in Persons. Kyiv, Tiutiukin, 2010, p. 25, 28

²⁶⁷ Supra Note, p. 6

²⁶⁸ Supra Note, p. 6

could not recall particular cases where protection measures were implemented in human trafficking cases, although overall data as regards all categories of cases show that 78% of protection measures are related to non-disclosure or limited disclosure of a person's identity or whereabouts, and 20% - to closed court hearings and physical protection as well as protection of housing facilities and property.²⁶⁹ This means that protection measures have not been used in trafficking cases.

The CoE Convention requires States to ensure “the protection of victims’ private life and, where appropriate, identity, and victims’ safety and protection from intimidation”²⁷⁰ during court proceedings, in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The explanatory report to the CoE Convention suggests four measures which help implement the standard mentioned above: **non-public hearings, audiovisual technology, recordings of testimony, and anonymous testimony**.²⁷¹ I will discuss their implementation into the national legislation below.

Article 16 of the Law on Protection of Persons Who Participate in Criminal Proceedings provides for **closed court hearings** in case the judge decides that closed hearings are in the interests of protected people.²⁷² Moreover, closed hearings should be conducted in cases on human trafficking according to the recently adopted Law on Counteracting Human Trafficking²⁷³ which amended Article 20 of the Criminal Procedures Code²⁷⁴. However, in

²⁶⁹ Supra Note, p. 22

²⁷⁰ Council of Europe Convention on Action against Trafficking in Human Beings, Article 30, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

²⁷¹ Explanatory report to the CoE Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series, No. 197, 16.V.2005, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> as of Nov.26, 2010, paragraph 307

²⁷² Zakon Pro Zabezpechennya Bezpeky Utchasnykiv Kryminal' nogo Sudochynstva (Law on Protection of Persons Who Participate in Criminal Proceedings), December 23, 1993, Article 16, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3782-12> as of October 24, 2011

²⁷³ Zakon pro Protidiyu Torgivli Lyud'my (Law on Counteracting Human Trafficking), Final Provisions, p.2, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3739-17> as of November 8, 2011

²⁷⁴ Kryminal'no-Protsesual'nyy Kodeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Article 20, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1001-05> as of October 24, 2011

practice, human trafficking cases have often been considered publicly leading to a disclosure of victims' confidentiality and additional trauma. A judge from Ivano-Frankivsk, who focuses on TIP cases, believes the primary reason for this is that many of his colleagues continue to view victims of trafficking as prostitutes who have gone abroad to make money, rather than perceiving them as victims of a crime warranting special protection, therefore he believes judges rarely make court hearings closed to the public or relieve victims from the obligation to attend a court hearing even if written confirmation of the veracity of their statement to the police is provided.²⁷⁵

The Criminal Procedures Code provides for a possibility to interview a witness who is under protection using **audiovisual technology**. In particular, audio or video conference communication can be established with a witness or victim who is located either in the same building or in other premises including those located abroad²⁷⁶. Moreover, Article 303 sets forth an opportunity for alteration of the victim's or witness's voice during the interview²⁷⁷. However, if no technical solution is available the witness can be interviewed without presence of the defendant.²⁷⁸ So far, there are only some courts in Ukraine which have technical capacities to conduct interviews using audiovisual technology: Chernihiv, Ivano-Frankivsk, Kherson, Khmelnytsky, Lutsk, and Luhansk. These courts have a separate witness room for a victim or witness to safely testify through video or telephone connection and, if necessary, keep his/her identity confidential. A witness can enter the court premises through a secure side entrance accessible by car, and then be escorted to the room. In this situation, judges can conduct a comprehensive, impartial, and direct examination of all evidence including witness testimony

²⁷⁵ Interview with L. Kyshakevych, Ivano-Frankivsk city court judge, September 6, 2011, via phone

²⁷⁶ Criminal'no-Protsesual'nyy Codeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Articles 85-3 and 303, translated by US Embassy to Ukraine, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1001-05> as of October 24, 2011

²⁷⁷ Supra Note, Article 303

²⁷⁸ Criminal'no-Protsesual'nyy Codeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Article 303, translated by the US Embassy to Ukraine, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1003-05> as of October 24, 2011

collected by an investigator and presented by the prosecutor as required by the Criminal procedures Code of Ukraine. At the same time, the rights of victims, witnesses, defendants are observed. Prosecutors also benefit by having the possibility to convince more witnesses especially members of criminal groups to testify in court ensuring their security during a court trial.

Recordings of testimony are not provided for in Ukraine's legislation. However, the witness or victim can be relieved from the obligation to attend a court hearing if the veracity of the testimony given at the pre-trial stage is provided in written form.²⁷⁹ In practice, investigators often record witnesses' and victims' interviews conducted during the pre-trial investigation and submit them to court²⁸⁰ where they can be considered as documents. Documents constitute a source of evidence and may include "photos, tapes, videos, and other mediums (including electronic ones), which contain information on circumstances established in the course of criminal proceedings by an inquiry agency, investigator, prosecutor, or court."²⁸¹ In courts, judges usually prefer witnesses or victims to testify in front of the court, therefore they should have solid justification to use the recordings instead of real-time testimony.

Anonymous testimony is not allowed. However, the witness can testify under a pseudonym²⁸² and using audiovisual technology with voice alteration²⁸³ which minimizes the

²⁷⁹ Zakon Pro Zabezpechennya Bezpeky Utchasnykiv Kryminal' nogo Sudochynstva (Law on Protection of Persons Who Participate in Criminal Proceedings), December 23, 1993, Article 16, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3782-12> as of October 24, 2011; Kryminal'no-Protsesual'nyy Kodeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Articles 292, 306, translated by the US Embassy to Ukraine, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1003-05> as of October 24, 2011

²⁸⁰ Interview with O. Pustova, Senior Investigator, Main Investigations Department, Ministry of Interior of Ukraine, September 19, 2011, Kyiv, Ukraine

²⁸¹ Kryminal'no-Protsesual'nyy Kodeks Ukrainy (Criminal Procedures Code of Ukraine), adopted on December 28, 1960, Article 83, translated by the US Embassy to Ukraine, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=1001-05> as of October 24, 2011

²⁸² Zakon Pro Zabezpechennya Bezpeky Utchasnykiv Kryminal' nogo Sudochynstva (Law on Protection of Persons Who Participate in Criminal Proceedings), December 23, 1993, Article 15, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3782-12> as of October 24, 2011

risk of disclosure of the witness's identity. To balance the interests of defense, it is required to give the defense an opportunity to participate in court hearing where a witness under pseudonym testifies (via audiovisual connection), and ask questions. In cases when there is no technical capacity, the witness can testify in absence of the defendant, who is removed from the court room, but the defense council remains there and asks questions, and after the witness has testified, the defendant comes back, the judge informs him/her about testimonials given and s/he can comment on it.²⁸⁴ Anyway, the judge has access to identity of a witness in any case as required by Article 257 of the Criminal Procedures Code that establishes the principle of direct examination of a case when "trial court, when hearing a case, should directly examine evidence in the case: examine defendants, victims, witnesses, hear expert findings, inspect exhibits, read out records and other documents."²⁸⁵ In such a way, the balance of interests and minimal restrictions to defense are ensured, and I see more risks and challenges for a witness to have his/her identity disclosed rather than for the defendant to have his/her due process rights infringed.

The standards established by the Protocol and the CoE Convention as regards witness protection are partially implemented in the legislation of Ukraine. First, other persons close to victims and witnesses are not entitled to protection which gives an opportunity to exert pressure on a witness by threatening a person who is not a family member or a close relative, and therefore cannot be protected. Second, both instruments establish protection from *potential* retaliation and intimidation as a standard while Ukraine's law puts it differently: "protection of life, housing facilities, health and property from infringements and ensuring appropriate

²⁸³ Criminal'no-Protsesual'nyy Kodeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Article 303 (6,7), translated by the US Embassy to Ukraine, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1003-05> as of October 24, 2011

²⁸⁴ Supra Note, Article 303

²⁸⁵ Supra Note, Article 257

conditions for justice”²⁸⁶, therefore practitioners who make decisions as regards providing protection are inclined to assume that there should be evidence of an attempt to target witnesses or their property to authorize protection measures.²⁸⁷ Third, insufficient funding provided to law enforcement agencies and to protection measures providers²⁸⁸ makes it possible to conclude that various types of protection are offered but not ensured and not used in contradiction to the CoE Convention and the Protocol requirements. Fourth, enforcement is a huge problem in Ukraine, and even a perfect law may remain on paper. Therefore, detailed instructions or guidelines on application of each protection measure provided for by the Law need to be adopted.²⁸⁹ Fifth, the fact that protection to witnesses and victims, and to judges and prosecutors is established by the same law and provided by the same service looks contradictory since in Ukraine judges and prosecutors are considered more important than ordinary citizens, therefore the efficiency of protection measures may vary.

International standards require specialization within police and/or the prosecutor’s office, generally saying, in any agency responsible for fighting against human trafficking.²⁹⁰ In Ukraine, specialization of detectives and investigators exists at the Ministry of Interior. According to the Law on Counteracting Human Trafficking, the Ministry of Interior and its regional divisions are responsible for detection and investigation of human trafficking crimes.²⁹¹ In 2005, a specialized anti-trafficking Department was established.²⁹² It is responsible for detection of this category of crimes. Another division – the Main Investigations Department – is responsible for

²⁸⁶ Zakon Pro Zabezpechennya Bezpeky Utchasnykiv Kryminal’noho Sudochynstva (Law on Protection of Persons Who Participate in Criminal Proceedings), December 23, 1993, Preamble, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3782-12> as of October 24, 2011

²⁸⁷ Bardatska O. Orlean A. Ensuring Security of Victims and Witnesses in Criminal Cases Related to Trafficking in Persons. Kyiv, Tiutiukin, 2010, p. 52

²⁸⁸ Supra Note, p. 25, 28

²⁸⁹ Supra Note, p. 54

²⁹⁰ Council of Europe Convention on Action against Trafficking in Human Beings, Article 29, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

²⁹¹ Zakon pro Protidiyu Torgivli Lyud’mu (Law on Counteracting Human Trafficking), Article 11, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3739-17> as of November 8, 2011

²⁹² Nakaz MVS (Ministry of Interior Order) #931 of October 20, 2005.

investigations, and it has investigators assigned to this category of cases in each region²⁹³.

Prosecution of crimes in court is a responsibility of prosecutors.²⁹⁴ There are no prosecutors who are specialized in human trafficking cases.²⁹⁵

After analysis of the implementation of the Protocol and the CoE Convention into Ukrainian legislation I can conclude that most of the standards are incorporated, but some provisions should still be appropriately legislated. Moreover, some of the existing provisions have not been enforced properly due to financial and administrative constraints. Therefore, the Ukrainian Government should take steps to fill these gaps.

SECTION 2.2. PRACTICAL IMPLEMENTATION OF THE INTERNATIONAL STANDARDS IN CRIMINAL CASES ON HUMAN TRAFFICKING IN UKRAINE

In this section I will look at the practical implementation of standards, i.e. on how they are enforced in human trafficking investigations, prosecutions and convictions. In particular, I will show that incorporation into the national legislation does not mean enforcement in practice. First of all, I will focus on the analysis of sentencing and its problems, and touch on issues which cause the sentencing problems. Also, I will describe a real criminal case on human trafficking that was investigated and prosecuted, and demonstrate enforcement problems on the example of this case. Finally, I will conclude with recommendations.

Below, I will assess convictions data and demonstrate how sanctioning requirements are observed in court verdicts. Judicial data provided by the State Judicial Administration shows that almost half of the convicted traffickers were sentenced to non-custodial punishment, i.e. their sentences were suspended.

²⁹³ Supra Note.

²⁹⁴ Zakon pro Prokuraturu (Law on Prosecutors Service), Article 36, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1789-12> as of November 7, 2011

²⁹⁵ Interview with Andrey Orlean, professor, National Academy of Prosecutors, September 20, 2011, Kyiv, Ukraine

**Table 3. Human Trafficking Convictions
(2008-2010)²⁹⁶**

	Convictions	Custodial punishment	Non-custodial punishment	On Appeal²⁹⁷
2008	99	22	35	42
2009	110	33	41	36
2010	120	60	33	25
TOTAL	329	115	109	103

Table 4 demonstrates that despite the established three-year minimum sanction for trafficking, 33 persons out of 115 were sentenced to imprisonment for very short terms, from one to three years.

**Table 4. Custodial Convictions for Human Trafficking
(2008-2010)**

Terms of imprisonment	2008	2009	2010	Total
One year	1	1	1	3
From 1 to 2 years	0	3	5	8
From 2 to 3 years	4	5	13	22
From 3 to 5 years	11	17	15	43
From 5 to 10 years	6	7	25	38
From 10 to 15 years	0	0	1	1
Total	22	33	60	115

Table 5 shows how the most serious trafficking offences are punished in Ukraine. While the Criminal Code requires human trafficking committed by an organized criminal ring, or against a child under 14 years old, or which caused serious consequences to be sanctioned by imprisonment for a term of eight to fifteen years with or without forfeiture of property²⁹⁸, only four individuals were punished according to the law. As regards the other 17 who are punished

²⁹⁶ Judicial statistics for 2008-2010, State Judicial Administration of Ukraine, received from the US Embassy to Ukraine

²⁹⁷ Verdicts of these people were under appeal procedure and not in force as of January 1 of the next year after the year when the verdict was delivered.

²⁹⁸ Criminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Article 149(3), translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

by imprisonment for a term from five to ten years according to the statistics, it is not clear how many of them were imprisoned for eight and more years, therefore I cannot make a fair conclusion. Anyway, even if we calculate them, we will get 21 individuals out of 77, or 27%, who were punished properly.

Table 5. Convictions for the Most Serious Trafficking Offences (2008-2010)

(Note. According to paragraph 3 of Article 149 of the Criminal Code of Ukraine the sanction is imprisonment for 8 to 15 years)

Punishment	2008	2009	2010	Total
Terms of imprisonment				
One year	1	1		2
From 1 to 2 years		2	1	3
From 2 to 3 years		1	7	8
From 3 to 5 years	3	2	5	10
From 5 to 10 years	1	5	11	17
From 10 to 15 years	3		1	4
Other sanctions				
Fine	2			2
Suspended sentence	6	14	8	28
Total				77

As mentioned in Section 2.1 where I touched on the implementation of the CoE Convention's standard of effective, proportionate and dissuasive sanctions, in these cases, judges applied special provisions of the Criminal Code of Ukraine that mitigate liability.²⁹⁹ However, I do not think that this corresponds to the gravity of the offence as required by the CoE Convention, and sends an appropriate signal to traffickers who apparently feel relaxed in Ukraine since their chances to be imprisoned are quite low.

The situation with convictions described above can be explained first of all by the dysfunctional criminal justice system and widespread corruption.³⁰⁰ Low salaries in the law enforcement sector cause a high turnover of personnel, and as a result many officers do not have

²⁹⁹ Kryminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Articles 69 and 75, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

³⁰⁰ Ukraine's index of corruption perception is 2.4 according to Transparency International, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results as of November 20, 2011

enough skills to conduct trafficking investigations, which are quite difficult in comparison with others. Moreover, there are some problems specific to human trafficking which influence the quality of investigations, such as a need to send a Mutual Legal Assistance Request that takes much time and slows down the investigation, and finally does not guarantee that the foreign counterparts execute the request as required³⁰¹. Moreover, due to financial constraints, witness protection measures are not accessible for victims of trafficking and, as a result, they often refuse to participate in criminal proceedings. Furthermore, since the victim's testimony is often put to the center of the investigation, if the victim changes his/her view and refuses to witness, it dramatically influences the prosecution and eventually the final verdict.³⁰²

I will demonstrate some more problematic issues analyzing a particular criminal case which was investigated, prosecuted and considered in court in Luhansk, a city in Eastern Ukraine. In 2009, a criminal case was instituted against S. who recruited two adult girls and three underage girls for work as prostitutes in Russia, and transported them through the Ukrainian-Russian border where he was apprehended by specialized anti-trafficking police.³⁰³

His actions were qualified according to Article 149 (2) of the Criminal Code as recruitment, transfer and moving of a minor (14 to 18 years old) with the purpose of exploitation in relation to three underage girls only. While the trafficker committed the same actions in relation to adult girls, surprisingly, they were recognized as witnesses, not victims. The explanation was the following: they agreed to work as prostitutes and no violence was used to make them go, therefore S. cannot be incriminated with trafficking in persons. Interestingly, the abuse of the vulnerable condition of the human being in this case was not considered at all. However, the adult girls admitted that they agreed to work in Russia because of local unemployment and

³⁰¹ Analysis of Judicial Practices in Cases Related to Trafficking in Persons. Kyiv, 2010, pp. 9-10

³⁰² Supra Note. pp. 10-11

³⁰³ Delo (Case) #1-442/09, Prosecution of S., Article 149(2) of the Criminal Code of Ukraine, Krasnodonskyy City-District Court, Luhansk region

poverty. It appeared that in the Luhansk region a vulnerable condition in the form of unemployment, poverty and other circumstances that show a person's desperate desire to earn money is not acceptable since the Luhansk Prosecutor's Office is convinced that if the majority of the population in the country is poor, poverty cannot be considered a vulnerable condition in any particular case of human trafficking.³⁰⁴

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As to evidence collected, police officers conducted the investigation quite well. In particular, they did not rely on victims' submission only, monitored telephone conversations of S., and recorded his talks with victims about employment in Russia. Moreover, they coordinated the operation on interdiction of S. on the border with the border guards.

It is difficult to believe that S. acted alone and did not have any accomplices in Russia, but investigation did not identify them. Anyway, it is clear from the circumstances that S. was responsible for recruitment, transportation and transfer of victims. In Russia, there should have been somebody who received the victims and exploited them, but in this case this person remained unidentified and unpunished.

Finally, S. was convicted to three years of imprisonment without confiscation of assets and property.³⁰⁵ The punishment is lower than established by Article 149 of the Criminal Code.
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As mentioned in the verdict, the judge took account of the positive characterization of S., his health condition (he suffered from a chronic disease), his attitude to the crime committed – he regretted honestly and realized the wrongful nature of the crime, and the fact that he had no previous convictions, and decided to sentence S. to a punishment lower than established by Article 149 as allowed by Article 69 of the Criminal Code.³⁰⁶ Some of the mitigating

³⁰⁴ Interview with Andrey Orlean, professor, National Academy of Prosecutors, September 20, 2011, Kyiv, Ukraine

³⁰⁵ Delo (Case) #1-442/09, Prosecution of S., Article 149(2) of the Criminal Code of Ukraine, Krasnodonsky City-District Court, Luhansk region

³⁰⁶ Kryminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Articles 69 and 149(2), translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

circumstances look strange from the point of the documents attached to the case files. Thus, the results of the narcological examination of S. showed that his chronic disease is chronic alcoholism and drug addiction, and his honest regrets appeared only in the court trial, on pre-trial investigation he pleaded not guilty.

The following violations of the Protocol and the CoE Convention were found in this case.

1. Although trafficking in persons was penalized appropriately, in reality actions of a trafficker in relation to adult girls were not incriminated as human trafficking and not investigated in violation of the Protocol, the CoE Convention and national legislation.
2. Punishment did not comply with the CoE Convention, which requires effective, proportionate and dissuasive sanctions.³⁰⁷

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The analysis demonstrates that international standards are still not fully enforced in Ukraine. It is clear that perfect legislation can be useless if it is not enforced, which is partially the case in Ukraine. Therefore, special attention should be paid to appropriate investigation and prosecution (“due diligence” standard as discussed in Section 1.4) which should be ensured by the operational administrative system capable of identification, investigation and prosecution of human trafficking crimes and protection of victims.³⁰⁸

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³⁰⁷ Council of Europe Convention on Action against Trafficking in Human Beings, Article 23, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

³⁰⁸ CASE OF RANTSEV v. CYPRUS AND RUSSIA (2010), ECtHR, paragraphs 285-288, [http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=rantsev&sessionid=70120684&skin=](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=rantsev&sessionid=70120684&skin=hudoc-en)
hudoc-en as of April 24, 2011

RECOMMENDATIONS (CONCLUSION)

I have analyzed both law and practice as regards implementation of the standards of criminalization, investigation, prosecution and adjudication of human trafficking established by the CoE Convention and the Protocol. The main conclusion is that not all the standards have been implemented and much needs to be done to achieve full compliance, including legislative changes and measures to ensure appropriate enforcement of the legislation in effect. The following recommendations are aimed at improving national legislation and practice. I divided them into two groups: recommendations in the sphere of criminal law, and recommendations in the sphere of criminal procedures.

RECOMMENDATIONS IN THE SPHERE OF CRIMINAL LAW

1. Amend the Criminal code with the provision that the consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means provided for in Article 149 have been used or alternatively as Orlean suggested, paragraph 1 of Article 149 shall be amended by the words “with or without victim’s consent”³⁰⁹
2. Ensure unified interpretation of Article 149 on the whole territory of Ukraine to avoid violation of victims’ human rights, especially as regards the term “use of vulnerable condition of a person”.
3. Criminalize procuring and providing forged travel or identity documents with the purpose of trafficking as required by the CoE Convention³¹⁰.
4. Consider criminalizing use of services of victims of human trafficking as required by the CoE Convention³¹¹.

³⁰⁹ Interview with Andrey Orlean, professor, National Academy of Prosecutors, September 20, 2011, Kyiv, Ukraine

³¹⁰ Council of Europe Convention on Action against Trafficking in Human Beings, Article 20, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

5. Establish liability of legal entities for human trafficking as required by the TOC Convention and CoE Convention.³¹²
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6. Limit application of articles 69 (reducing criminal sanction lower than established by the law) and 75 (suspended sentence) of the CCU³¹³ in relation to human trafficking crimes to ensure implementation of the standard of effective, proportionate and dissuasive sanctions³¹⁴ is satisfied in Ukraine.
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7. Encourage prosecutors to perform prosecution in court appropriately and appeal non-custodial sentences in trafficking cases³¹⁵ that is required by “due diligence” standard.
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8. Establish participation in criminal organization as aggravating circumstance in relation to human trafficking crime as required by Article 24 of the CoE Convention³¹⁶.
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RECOMMENDATIONS IN THE SPHERE OF CRIMINAL PROCEDURES

Law Enforcement Cooperation

Conduct a law enforcement reform to establish an efficient system of law enforcement agencies which do not duplicate each other and have clearly delineated competences in particular as regards law enforcement cooperation.

Encourage interagency cooperation between law enforcement bodies.

Controlled Delivery

³¹¹ Council of Europe Convention on Action against Trafficking in Human Beings, Article 19, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

³¹² United Nations Convention Against Transnational Organized Crime, Article 10, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31, 2011;
Council of Europe Convention on Action against Trafficking in Human Beings, Article 22, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

³¹³ Kryminal'nyy Kodeks Ukrainy (Criminal Code of Ukraine), in force starting September 1, 2001, Articles 69 and 75, translated by Olena Kustova, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=2341-14> as of September 13, 2011

³¹⁴ Council of Europe Convention on Action against Trafficking in Human Beings, Article 23, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

³¹⁵ Trafficking in Persons Report 2011, <http://www.state.gov/g/tip/rls/tiprpt/2011/164233.htm> as of November 16, 2011

³¹⁶ Council of Europe Convention on Action against Trafficking in Human Beings, Article 24, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

Amend Article 8 (2) of the Law on Operative Investigation Activity to allow controlled delivery in relation to individuals as required by Article 20 of the TOC Convention³¹⁷.

Victim's Submission

Ensure enforcement of appropriate provisions of the Criminal Procedures Code³¹⁸ to make sure that the investigation and prosecution of a trafficking offence do not depend on a victim's submission accusing someone.³¹⁹

Ensure use of operative investigations techniques to investigate the case instead of focusing on victims' testimonials only.

Participation of NGOs

Establish a special status of NGOs and other civil society organizations in criminal proceedings to ensure they can represent victims as legal entities, not only individuals, and vest them with an appropriate scope of procedural rights as required by the CoE Convention.

Witness protection

Amend the Law on Protection of Persons Who Participate in Criminal Proceedings with the provision which entitles other persons close to victims and witnesses to protection.

Adopt detailed instructions on conditions under which protection measures shall be undertaken, including, as one of the main conditions, existence of potential, not already happened retaliation and intimidation as required by the CoE Convention.³²⁰ Moreover, similar

³¹⁷ United Nations Convention Against Transnational Organized Crime, Article 20,

<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31,2011

³¹⁸ Criminal'no-Protsesual'nyy Kodeks Ukrainy (Criminal Procedures Code of Ukraine), Adopted on December 28, 1960, Article 94, translated by the US Embassy to Ukraine, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=4&nreg=1001-05> as of October 24, 2011

³¹⁹ Council of Europe Convention on Action against Trafficking in Human Beings, Article 27(3)

<http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2010

³²⁰ Council of Europe Convention on Action against Trafficking in Human Beings, Article 28,

<http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2010; United Nations Convention Against Transnational Organized Crime, Article 24,

<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> as of Jan.31,2011

instructions shall also be adopted in relation to each protection measure and peculiarities of its implementation.

Ensure sufficient funding provided to law enforcement agencies and to protection measures providers in order to have all the protection measures available upon request.

Ensure equality in providing protection for all participants of criminal proceedings, i.e. victims and witnesses should get equal protection in comparison with judges and prosecutors under the Law on Protection of Persons Who Participate in Criminal Proceedings.

Specialization

Introduce specialization for trial prosecutors as required by the CoE Convention.³²¹

Law Enforcement Training on Human Trafficking

Establish a training program for law enforcement officers on the prevention of trafficking in persons that should include “methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers” and “take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”³²²

³²¹ Council of Europe Convention on Action against Trafficking in Human Beings, Article 29, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> as of Jan.31, 2011

³²² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 10, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf as of Jan.31, 2011

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