

**REPORT OF THE THIRD STUDY COMMISSION
ON HUMAN TRAFFICKING
International Association of Judges
Senegal, November 7-11, 2010**

I. INTRODUCTION

At its 2010 annual meeting, the Third Study Commission examined the various domestic legislative responses to human trafficking an extremely serious and pervasive problem that transcends national borders. The purpose of the questionnaire distributed to member countries prior to the annual conference was to explore the extent to which member countries have implemented anti-trafficking legislation and whether such legislation is effective in addressing the offence. The questionnaire explored the scope of conduct that is captured by human trafficking legislation, whether domestic legislation addresses the specific problem of children as victims, international cooperative investigative efforts, and the type of penalties imposed for the offence. The questionnaire also asked countries about their legal protections for the victims of human trafficking generally.

II. QUESTIONNAIRE RESULTS & DISCUSSION

The Commission received 31 responses to the questionnaire. Delegates from some 20 countries participated in two Study Commission sessions on the subject and provided valuable contributions to our discussions regarding the effectiveness of domestic legislative responses in curbing human trafficking. A chart summarizing the questionnaire responses is annexed to this report.

A. Defining Human Trafficking

i. The Palermo Protocol

The Palermo Protocols are two protocols adopted by the United Nations in 2000, together with the Convention against Transnational Organized Crime. They are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air. As of November 1, 2020, 141 countries are parties to the Palermo Protocol. This massive global response demonstrates that human trafficking is high on the international agenda. The Protocol underscores the importance of recognizing that human trafficking is a violation of human rights. It also recognizes international obligations previously set out in treaties. The intention of the Protocol is to converge the domestic criminal approaches to human trafficking offences and facilitate international cooperation in the investigation and prosecution of these offences. An additional objective of the Protocol is to protect the victims of human trafficking and ensure that their human rights are being fully respected.

The Palermo Protocol is the first global legally binding instrument with an agreed-upon definition of human trafficking. Article 3, paragraph (a) of the Palermo Protocol defines “trafficking in persons” as:

... 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.

29 out of the 31 countries who responded to the questionnaire have ratified the Protocol (93.5%).

ii. Special Legislation for Human Trafficking

Since the vast majority of Third Study Commission member countries have signed and ratified the Palermo Protocol, the domestic definitions of human trafficking often mirror the text of the Protocol. The definition in the Palermo Protocol has three constituent elements:

- The Act: "... the recruitment, transportation, transfer ... of persons."
- The Means: "by threat or use of force, coercion ... by giving payment ... to a person in control of the victim ..."
- The Purpose: "... to exploit the prostitution of others ... forced labour ... or removal of organs."

Nearly half of the responding countries depart from the Palermo Protocol by eliminating the Means component of their offence. Eleven countries constitute the offence solely by reference to the Act and the Purpose (Japan, Israel, Latvia, Belgium, Hungary, France, Slovenia, Switzerland, England, the United States, and South Africa). Additionally, nine more countries remove the Means element of the offence where the victim is a minor (Georgia, Denmark, Finland, Iceland, Ireland, Netherlands, Portugal, Ukraine and Sweden).

France's Penal Code includes offences that threaten human dignity such as begging and hazing in a school setting that threaten human dignity.

Estonia, Kazakhstan, and Morocco have not specifically defined human trafficking in their domestic legislation, but have instead criminalized related offences, such as enslavement, abduction and prostitution. Poland also lacks a domestic definition, since the Polish Constitution incorporates ratified international instruments as a direct source of law.

Three commonly recognized elements of human trafficking are Prevention, Protection, and Prosecution.

iii. The Scope of Human Trafficking Offences

The questionnaire asked whether criminal liability could be incurred by attempting, participating in or directing others to commit a human trafficking offence. The questionnaire also asked whether corporations could be prosecuted for a human trafficking offence.

Corporations

Human trafficking legislation in only seven of the responding countries does not impose liability on corporations (Armenia, Japan, Iceland, Kazakhstan, Poland, South Africa). For the remainder of the countries that responded, corporations are liable for criminal offences under the general provisions of their criminal law (not specific to human trafficking). Notably, in Switzerland, corporate criminal liability may only be imposed where it cannot be attributed to a particular individual. Corporations involved in human trafficking as part of organized crime can be prosecuted for the offence of human trafficking.

Attempts

Only five responding countries specifically criminalize attempts at human trafficking offences (Germany, Japan, the United States, Belgium and South Africa). For the remaining responding member countries, attempted offences are generally captured under the general provisions of their criminal law.

Interestingly, in France, someone who has attempted the offence will be exempted from punishment if they warn the authorities, prevent the offence, and identify other perpetrators. An individual may therefore cooperate with the authorities without fear of punishment.

Being a Party to or Directing Mind of the Offence

Similarly to the criminalization of attempted offences, the vast majority of responding countries criminalize being a party to or a directing mind of a human trafficking offence through the general provisions of their criminal law. Of the four countries that specifically criminalize attempts at human trafficking offences, only Germany and South Africa also do so for being a party or a directing mind.

South Africa's pending legislation requires individuals to report to the police where they suspect a child may be a victim of human trafficking. Failure to report is an offence punishable by a fine or up to one year of imprisonment.

Functionaries

State functionaries whose actions facilitate the commission of a human trafficking offence can be found criminally liable in Algeria.

B. The Prosecution and Punishment of Human Trafficking Offences

i. Penalties

There is a wide range of maximum penalties for non-aggravated human trafficking offences (between three years and life imprisonment). Additionally, among the responding countries that impose a minimum sentence, the range is similarly broad (between 3 months and 7 years).

The majority of responding countries also impose higher maximum penalties for aggravated forms of the basic human trafficking offence. Fourteen countries (Ukraine, Algeria, Slovenia, Switzerland, Latvia, Israel, Japan, Hungary, France, Finland, Canada, Belgium, Austria and Australia) treat the trafficking of minors as an aggravating factor that automatically entails a higher maximum penalty. Conversely, Poland and Lithuania do not draw a legal distinction between adults and minors. Another means of protecting children from exploitation such as begging and forced labour is through the application of domestic child protection laws.

Deportation is not available as a penalty specific to human trafficking offences. However, in the majority of countries, it may be ordered pursuant to a country's general immigration laws. For example, in England, deportation of an alien offender is automatic if the term of imprisonment exceeds one year.

The vast majority of responding countries provide for the confiscation of the proceeds and instruments of human trafficking. Notably, the United States requires restitution to be paid to the victims of trafficking.

In some countries, such as Israel, Portugal, Sweden, Switzerland and the U.S.A., citizens who commit human trafficking offences on foreign soil can be prosecuted in their home country. This

provision prevents human traffickers from sheltering themselves in foreign jurisdictions where, for example, they have been active in organizing prostitution rings.

ii. Prosecution and Conviction Rates

The availability of human trafficking prosecution and conviction statistics is limited. To further compound the difficulty, these statistics may be difficult to compare across jurisdictions, since many human trafficking cases may be prosecuted under other offences related to human trafficking (e.g. abduction, prostitution, exploitation).

Where statistics are available, the conviction rate for human trafficking prosecutions appears to be in the range of 30-40%.

In Belgium, where the victim is a minor, the limitation period for prosecution does not begin until the victim attains the age of majority. Incidentally, Belgium also possesses the highest prosecution rate among responding countries, with over 200 convictions in 2007 alone.

Where policing statistics are available concurrently with prosecution statistics, it suggests that only a very small percentage of reported human trafficking cases eventually turn into convictions. For example, in 2009 in Portugal, there were 85 reported victims of trafficking and 7 convictions. In that same year, in Ireland, there were 68 sex trafficking investigations and only 3 convictions. One possible explanation for this phenomenon may be the difficulties securing the necessary witnesses and evidence for the prosecution of these offences, particularly if immigration laws do not permit victims to remain in the country for the completion of the criminal prosecution of the perpetrators.

iii. International Cooperative Efforts

All member countries who responded indicated that they support international cooperation related to human trafficking investigations. INTERPOL was the most commonly cited example of an international police organization through which countries cooperate. Other multinational policing organizations were also mentioned, such as EUROPOL, EUROJUST, and FRONTEX. Additionally, several member countries are parties to bilateral treaty agreements that promote mutual legal assistance, such as the Kishinev Agreement and Minsk Bilateral Protocol entered into by Kazakhstan.

The Netherlands especially focuses on building cooperative relationships with Nigeria, Bulgaria, Romania and Hungary, as those countries are its primary sources of victims and perpetrators.

The United States established the Human Smuggling and Trafficking Center in 2004, which coordinates international efforts and assists foreign law enforcement.

C. Protection for Victims of Trafficking

All responding countries have provisions that prevent an individual from being deported where doing so would represent a significant risk to the individual or their family. These provisions are not specific to victims of human trafficking, and apply to any individual facing deportation.

However, twelve responding countries (Belgium, Estonia, Finland, Germany, Ireland, Latvia, Slovenia, South Africa, the United States, Switzerland, Sweden and the Netherlands) allow victims to obtain special protections against deportation on the condition that the victims cooperate with the authorities. These countries typically provide a reflection period of 30 days to allow the victim to recover and decide whether they would like to cooperate with the authorities. Finland has the longest rest and reflection period, which may be up to 6 months.

South Africa and Georgia specifically prevent victims of human trafficking from being criminally prosecuted. Although most responding countries do not explicitly exempt victims from prosecution, the majority of member countries indicated that prosecution of victims was very rare in practice.

D. Recommendations

1. THAT member countries who have not yet done so ratify the Palermo Protocol as soon as possible and enact specific criminal legislation against human trafficking.
2. THAT member countries who have not yet done so develop a systematic approach to gathering statistics on their level of compliance with the Protocol, the rates of conviction for human trafficking offences, and identify factors hampering the investigation and prosecution of these offences.
3. THAT member countries who have not yet done so comply with Resolution A/RES/59/166 adopted on February 10, 2005 by the U.N. General Assembly that emphasizes the importance of adopting effective mechanisms to receive complaints, monitor enforcement agencies, exchange information and report on human trafficking activities in their country.
4. THAT member countries who have not yet done so develop provisions that reflect the principles of redress, rehabilitation and reintegration and provide for the temporary residence and protection of vulnerable alleged victims of human trafficking including the provision of adequate financial, social and psychological resources for them during the criminal trial process, with special protections for child victims of trafficking.
5. THAT judicial authorities be vigilant in protecting the dignity of the alleged victims of human trafficking during the trial process and that judges receive education and training to increase their awareness of issues affecting the alleged victim during the trial process.

III. TOPIC FOR 2011

The topic chosen for next year's questionnaire and conference is Criminal Organizations: Identification, Seizure and Forfeiture.

IV. INTERPRETATION SERVICES

The delegates to the Third Study Commission very much appreciated the simultaneous interpretation (English to French; French to English) provided at both our plenary sessions this year, along with consecutive interpretation from English/French to Spanish and Spanish to English/French. We hope that interpretation services will continue to be provided for our Study Commission meetings next year.

V. STUDY COMMISSION OFFICERS

The officers elected at the annual 2010 meeting for a two-year term are: Mr. Frans Bauduin (Netherlands) as President; and Mme. Marit Bergendhal (Sweden), Mme. Virginie Duval (France), and Mr. Charles Simpson (U.S.A.) as Vice-Presidents.

Respectfully submitted by Mme. Mary Moreau
President - Third Study Commission