

# **An Analysis of the Legal Framework governing Prosecution of Traffickers and Victim Protection in Central Asian Countries**

*Katerina Badikova*

Slavery, institutions and practices similar to slavery have a long history of existence in Central Asia. These traditions were practiced during the ancient time and middle ages, and many of them continued to exist, albeit illegally, under the Soviet regime. In fact, the penal codes of the Soviet Socialist Republics of Central Asia included articles on abduction of a person, illegal detention, rape, forced marriage, marriage with more than one person, and sexual relations with a minor. Such acts were legally punishable in Turkmen, Tajik, Kazakh, Kyrgyz and Uzbek Soviet Socialist Republics.

However, the observance of some slavery-like traditions persisted and the majority of the population continued to practice the rituals even under the risk of criminal prosecution. The traditional practices included such rituals as payment of kalym<sup>60</sup> for the bride and arranged marriages. Bride kidnapping ritual was also widespread. At the time, it was impossible to prosecute anyone on the charges of human trafficking, because as a phenomenon or a legal concept it was generally unknown and therefore, not addressed in the criminal legislations.

In the early 1990s, the newly independent republics of the former Soviet Union tried to amend the inherited Soviet legislation, adapting it to the new social and economic conditions. However, amended Soviet laws were still inadequate in reflecting the emerging realities in Central Asian countries and therefore, by the middle of the decade, the governments introduced a set of new legislations that included new Penal Codes, Codes on Criminal [Investigation and Prosecution] Procedures, Codes on Administrative Misdemeanors, Civil Codes, Codes of Civil Trial Procedures, Tax Codes and Customs Codes.

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<sup>60</sup> Kalym – a payment

The new and improved legislations more or less corresponded to the emerging realities of independent Central Asian Republics, however, the results of the further development demonstrated that in some countries the new legislation reflected the economical and social situation and feed the needs of the society better than in the others. In Kazakhstan and Kyrgyzstan, the legislation facilitated the development of a free-market economy, despite of weak enforcement of some law, high level of bureaucratic procedures, and corruption, preventing small and medium businesses from rapid development. In Uzbekistan, agriculture and heavy industry continued to be controlled by the state and the development of a small business sector was curtailed by high taxes and strict government control. The government in Turkmenistan took under the control all spheres of economy. In Tajikistan, the economical development was seriously impeded by civil wars of mid 90-ies. As a result, the differences between the economical, social, and political development became more and more obvious in the five countries. In recent years, Kazakhstan demonstrated stability and progress in the economy, especially in comparison with the neighbor Kyrgyzstan and Uzbekistan. In the same time, the significant commercial activity moved into the conditions of a shadow economy, especially in Uzbekistan, with its high income tax forcing many people to seek unofficial ways of employment. This situation has been creating conditions for the organized criminal activities in general and for the successful development of human trafficking networks and structures, in particular. In this context, human trafficking became one of the most profitable economic activities in Central Asia, along with illicit drug trafficking and other kind of organized crime.

The main forms of human trafficking that have been registered until now in Central Asia are trafficking for labor and sexual exploitation. Men are most vulnerable to become victims of the first form, while women and under-age girls are at the highest risk for the second.

Central Asia is a source, transit and destination region for trafficking in persons. During the period from September 2003 to May 2005, IOM registered 370 victims of trafficking, 66 male and 304 female, who were trafficked from, through, and within Central Asia for sexual and labor

exploitation. Among them, 292 persons were trafficked abroad from CAR, and 44 were trafficked from one country to another within the region. There were also 34 victims of in-country trafficking registered.

The registered cases were divided along the gender lines, with the majority being young women who were mainly trafficked to the UAE, Turkey, Israel, South Korea, Greece, Thailand, Malaysia, and, more rarely, Western Europe. Incidence of internal trafficking cases from oblast<sup>61</sup> centers to larger cities and Astana is increasing as well. However, it is difficult to calculate the actual total number of trafficking cases due to the deep social misgivings that confuse the phenomenon of human trafficking for sexual exploitation with voluntary prostitution. This stigma along with maltreatment of trafficking victims by the authorities and lack of overall public conception of human trafficking as an issue of human rights abuse discourage victims from reporting the crime or relaying their experience even to their' closest friends and relatives. Moreover, law enforcement often fails to recognize trafficking cases as such if the victim was not subjected to physical abuse, but was coerced into exploitation through psychological pressure. Therefore, many trafficking cases remain unaccounted.

In addition to trafficking of young women from Central Asia for sexual exploitation abroad, the work of hotlines<sup>62</sup> revealed cases of young and middle age men being recruited for labor in slavery-like conditions in other states. Furthermore, cases of Uzbek, Kyrgyz and Tajik girls trafficked to Kazakhstan, as well as cases of unacceptable conditions for Uzbek and Kyrgyz workers on tobacco and cotton plantations in southern parts of Kazakhstan and construction sites all over the country, have been reported.

Central Asian traffickers establish connections with each other and network with the criminals who exploit victims in the countries of

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<sup>61</sup> "Oblast" is for administrative unit, a province in many NIS countries.

<sup>62</sup> IOM in close cooperation with its partner NGOs started establishing counter-trafficking hotlines in Central Asia in 2001. Currently, NGOs operate 12 hotlines in Kazakhstan, 8 in Tajikistan, and 10 in Uzbekistan. During the period from September 2003 to May 2005 the hotlines served over 40,000 phone calls.

destination. Central Asian countries, especially Kazakhstan and Kyrgyzstan, also serve as transit territories. A trafficking victim recruited in Uzbekistan may leave for the United Arab Emirates with a false Kyrgyz passport from an airport in Kazakhstan.<sup>63</sup> Many Tajik and Uzbek labor migrants, who become subjected severe exploitation in Russia, cross Kazakhstan on their way from home to the country of destination.

Despite some visible progress in adopting legislation criminalizing trafficking in persons, the official criminal statistics register few trafficking prosecution cases in Central Asia. In 2004, Kyrgyzstan and Tajikistan passed amendments, which included the article “Trafficking in persons” into their penal codes; in 2003, Kazakhstan improved the article which punishes recruitment for sexual and other exploitation and developed a number of amendments to other laws in order to strengthen victim protection mechanisms and to improve the capacity of law enforcement to prosecute the crime of trafficking. These amendments were presented to the Parliament in May 2005. Uzbekistan has not yet passed any counter-trafficking legislation but has been trying to prosecute traffickers relying on the articles of the penal code that punish recruitment for exploitation and pimping. In Turkmenistan, the government agreed to participate in a workshop on prevention of trafficking in persons in 2005, which can be viewed as a positive development for a country where human trafficking never before has been treated as a politically acceptable term or a relevant problem for the state.

In the framework of the existing legislations it is difficult to prosecute all those involved in the Central Asian trafficking network (from recruiters to exploiters to corrupted officials). Usually, law enforcement may only charge individual criminals on separate charges individually. Active legislation in the sphere of social protection also provides little in terms of reintegration and rehabilitation of victims.

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<sup>63</sup> Presentation by the representatives of the Committee for National Security of the Republic of Kazakhstan at an IOM workshop for prosecutors and investigators, Medeo / Almaty, April 2003

According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing UN Convention against Transnational Crime, the crime of human trafficking involves numerous elements including: recruitment, facilitation of dependency and exploitation. However, to this day and despite recommendations from the national and international legal experts, the Criminal Codes of Kazakhstan and Uzbekistan still lack an article that would address “human trafficking” as a specific and autonomous crime.

The UN Convention against Transnational Organized Crime (so-called UNTOC Convention) was signed by Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan, and ratified, along with its counter-trafficking supplementary Protocol, by Kyrgyzstan (2004) and Tajikistan (2005). After the ratifications, the two countries made amendments in their national legislation, and currently, trafficking in persons is punishable as a specific crime according to the penal codes of Kyrgyzstan and Tajikistan.

Uzbekistan announced the ratification of the Protocol in 2003; however, the ratification of this document contained a number of reservations, which referred to the already existing laws covering prosecution of organized crime and for confiscation of criminal incomes. In the result, despite theoretical legal possibility of confiscating assets obtained from criminal acts, in practice such confiscations are not enforced.

In June 2001, Uzbekistan signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially in Women and Children supplementing the UN convention against Transnational Organized Crime. The Protocol urges states to establish human trafficking as a criminal offense under their national legislations and introduce measures that would uphold protection of victim’s rights and recognize their special status. In subsequence, the government of Uzbekistan passed a law on 29.08.2001 N 254-II which imposed tougher sentences for crimes that have direct relevance to human trafficking. However, this law failed to introduce any amendments to the country’s Criminal Code that would allow consideration of human trafficking activity as an autonomous crime whose definition would reflect that included in the Protocol.

Kazakhstan has planned to ratify the UN TOC Convention and to sign its supplementary Protocol by the end of 2005. In October 2004, the amendments to the current legislation were submitted to the Parliament of Kazakhstan.

The amendments included:

- Incorporating the definition of trafficking in persons as a separate article in the Penal Code of Kazakhstan;
- Sentencing traffickers to no less than eight years of imprisonment;
- Confiscating traffickers' assets that were acquired as a result of activities related to TIP directly or indirectly;
- Protecting trafficking victims from various threats during the investigation, trial, and after the sentence to traffickers is pronounced;
- Providing rehabilitation and reintegration assistance to trafficking victims by government bodies and local executive bodies in cooperation with NGOs and IGOs;
- Protecting trafficking victims who serve as witnesses from immediate deportation and/or charges for their illegal stay in the country, and giving them the right to stay in-country legally at least for the duration of their testimony in court.

To date, these amendments were not passed yet.

Currently, certain articles included in the penal codes of the Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan can be evoked in prosecution of crime of trafficking (in Kyrgyzstan and Tajikistan) or at least separate stages of the trafficking process.

In Kazakhstan and Uzbekistan, the countries which have not passed the laws allowing prosecution of trafficking as autonomous crime, not all of the interconnect acts mentioned in the Protocol that are correlated with the crime of human trafficking can be regarded as illegal under the law. For instance Article 128 of the Penal Code of Kazakhstan and Article 135 of the Criminal Code of Uzbekistan, on "recruitment of persons for

the purposes of sexual or other exploitation committed by using deception” can be, and often is used in cases of human trafficking. Yet, this article addresses only the act of recruitment and requires proof of deception, the fact of which is very difficult to argue in courts. Therefore, recruiters often escape responsibility and transporters or exploiters, under this article, cannot be charged at all, unless it can be proven that they were committing the act of transportation for the purpose of “illegal limitation of a person’s freedom”, which is criminalized in another articles of the penal codes.

In Kyrgyzstan and Tajikistan, the articles which allow prosecution of trafficking as autonomous crime contain all the parts of definition of trafficking in persons as it is given in the Protocol. However, investigators and prosecutors often try to avoid prosecution of traffickers under these articles but initiate criminal investigations under other articles which don’t need such a complicated procedures of gathering evidences of all the stages of the crime of trafficking, from recruitment to exploitation. Practically all of the noted methods of exploitation and of facilitation of dependency are criminalized according to Kazakhstan’s, Kyrgyzstan’s, Tajikistan’s and Uzbekistan’s criminal law. These include such crimes as “selling or buying a child” (in Kazakhstan and Tajikistan only), “death threats and use of force”, “abandonment in a dangerous situation”, rape, satisfaction of a sexual urge in an unnatural way using force, forcing a woman to consent to sexual intercourse, intercourse with or seduction of a minor under the age of 16, extraction of organs and human tissue, kidnapping of a person, fraud, abuse of position of power or vulnerability.

In addition, other general criminal acts committed towards victims of trafficking during the trafficking process can also be prosecuted under the criminal law of Central Asian countries.

These crimes include:

- causing physical harm and injuries of varying degrees of severity
- murder and causing a suicide
- coercing a woman to have an abortion

- involving of a minor in antisocial behaviour
- coercion of a woman to enter into marriage or hindering her entering a marriage
- intentional harm or destruction of assets
- accepting bribes
- giving bribes
- abetting in the process of bribery
- production, use or distribution of forged documents, stamps, or forms

As a result, despite the lacking definition of human trafficking as an autonomous crime in Kazakh and Uzbek legislation, it appears that the existing legislation in Central Asia offers a broad base for the law enforcement authorities to prosecute the crime of trafficking in its entirety and to convict traffickers. In practice, however the necessity to invoke a large number of different articles to lay charges against traffickers complicates prosecution of human trafficking crime in its entirety. As a result, it is only possible to convict some traffickers and only for some committed acts leaving the majority of offenders and particularly the organizers of the trafficking process free.

At the initial stage of the trafficking process – recruitment, the offender committing the act of recruitment can theoretically be charged for the recruitment for the purposes of exploitation. In practice, in order for a person to be charged for the recruitment, prosecution must provide proof that the fact of recruitment (active dissemination of information about alleged lucrative employment opportunities abroad or offering of services for organization of departure) was committed with the goal of exploitation of the recruited individuals. Considering that the fact of exploitation usually occurs in the country of destination and thus outside of legal jurisdiction of the country of origin, it is extremely difficult to obtain convicting evidence of exploitation.

Moreover, the necessity to wait for exploitation of the recruited persons to occur in the country of destination involves a high risk of victimization of the recruited individuals and does not guarantee their release even if the recruiter was charged and committed in the country of



origin. Also, the time gap between the point of recruitment and exploitation can be used by the recruiter to escape the country or hide from the authorities.

Another problem emerges due to absence of legal definition of the term “exploitation” in Kazakhstan’s, Tajikistan’s and Uzbekistan’s criminal law. As a result, the term is subject to individual interpretation of a judge and thus, can be construed in divergence with minimal standards dictated by the Protocol. Cases have been registered, when exploitation of prostitution was used to acquit the offenders, when victims confessed that they were aware that they might have to engage in prostitution. The fact that a victim had no choice but to submit to the condition of exploitation were not considered. Similarly, in cases of trafficking for labour exploitation, the fact that victims left the country voluntarily was used as evidence of consent to future exploitation.

Another problem in convicting traffickers emerges when prosecution must prove an existence of a relationship between recruiter and exploiter and show that they have acted on agreement to recruit and exploit the victim. If it cannot be shown that such agreement was made between the parties, then it is impossible to argue that the goal of recruitment was exploitation. Proving such interdependency is difficult even in cases of in-country trafficking. When the nature of the crime was transnational and collection of evidence outside of Central Asian countries’ jurisdiction was required, assuming that the victim was able to return back home, victim and witness testimonies often become the only proof of occurred exploitation.

As a result, many criminal cases initiated under the article punishing trafficking in persons (in Kyrgyzstan and Tajikistan) and recruitment for the purpose of exploitation (in Kazakhstan and Tajikistan) were either dismissed or closed during investigation for lack of sufficient evidence. The cases that made it to court and were tried and convicted often resulted in lighter sentences, if not amnesties, in which cases the recruiter was freed directly from the courtroom and was able to continue engaging in the crime. Hence, it is not surprising that investigators either try to avoid laying charges on “trafficking in persons” articles

completely or strengthen the accusation by evoking charges on other articles in order to raise the likelihood of conviction in court.

Convictions of traffickers on charges for kidnapping of a person are also very rare, because victims of trafficking are not usually kidnapped. Human trafficking is a well-organized activity in Central Asia and thanks to convincing work of recruiters, majority of the trafficking victims independently makes a decision to travel abroad for work.

Article punishing for illegal keeping of the person becomes relevant only after the victim has been recruited and the traffickers must ensure that the victim is kept in conditions that he or she cannot escape. Thus, this article can be applied to cases when victim is forcefully kept at the place of exploitation or transported there by force. Yet, again, forced transportation or detention of the victim occurs rarely in the country of origin and forced transportation or detention of the victim in the countries of transit or destination is often outside of Central Asian countries' legal realm. Surely, this article is applied to cases of internal trafficking, however courts interpret the term "illegal keeping of the person" to mean physical limitation of a person's ability to move (keeping the person locked up, beating the person, limiting his or her connection with the outside world, etc.). Such interpretation ignores other types of psychological or economic manipulation that traffickers often rely on to facilitate victim's obedience without necessarily locking him or her up. Examples of such psychological and economic manipulation include debt-bondage, blackmail, threats, etc.

In cases of human trafficking for sexual exploitation, the articles on keeping of the brothels and pimping are used. Application of these articles is best only for cases of in-country trafficking, where the exploiter is present in the country of origin and derives direct profit from exploitation of prostitution of the third persons. To convict under this article, it is necessary to present evidence of a trafficker keeping of a brothel and receiving revenue from operating the brothel. This means, that it is impossible to evoke this article to prosecute cases of out-of-country trafficking.

Considering that one or several criminal groups have to cooperate closely in order to execute the crime of trafficking, prosecution of traffickers is possible under any one of the noted articles for the qualified crimes and harsher sentences for perpetration of the act by an organized criminal group. However, proving of a criminal agreement, organization of the trafficking network, relationships between the network's actors are very difficult especially in cases, when different stages of trafficking occur in different jurisdictions.

Other shortcomings of the criminal law system that complicate prosecution and prevention of human trafficking are the lack of a proper mechanism for the protection of victims and witnesses in court or during investigations and existence of poor legal foundations for seeking compensation for moral harm, health and material damages by the victim. This discourages the already reluctant victims of human trafficking to report their cases to the police and initiate proceedings against their traffickers.

Legislation of the studied countries contains a number of articles that incriminate acts committed by victims of human trafficking as a result of their situation of dependency on traffickers. One of such example is article 190 on prostitution in the Code of Administrative Misdemeanors in Uzbekistan. Persons that are arrested on prostitution charges are subject to fine and in cases of second conviction the amount of the fine increases. Considering that neither administrative nor the criminal code of Uzbekistan criminalize the acts of involvement of a person into prostitution or coercing a person to engage in prostitution, the exploiter risks nothing in forcing a victim to engage in prostitution, because even if the victim is arrested for provision of sexual services, it is the victim and not the person who coerced her into prostitution who bares the responsibility for the act. On the other hand, victim is discouraged from seeking assistance from law enforcement authorities to protect her from exploiter's actions out of fear of prosecution.

In Central Asia, the victim of trafficking can be prosecuted for the following offenses:

- Spreading of a venereal disease or.
- Illegal crossing of the state borders.
- Using of forged documents.

In practice, when victims are charged with violations described above, considerations of particularities and dependencies inherent to the situation of human trafficking are not taken into account. Thus, the facts that a victim was forced to commit an illegal act or if she was deceived about consequences of her voluntary offense are not considered.

Paradoxically, however, a human trafficking victim under prosecution for some committed offenses has greater protection and legal rights guarantees during the case hearing than a victim involved in trial as a plaintiff or a witness. The apparent contradiction is explained by the fact that following accepted standards of criminal trial dictate that a right of defense must be guaranteed to each person suspected or accused of committing a criminal act. Guarantees of defense for the plaintiff are expected to follow from the work of investigative services and the court.

The legal right for protection in court for all involved parties is guaranteed by the codes of criminal law procedures, which state that honour and dignity of all parties involved in the criminal process must be upheld though the state protection of the parties' rights and freedoms. Yet, special emphasis is placed on protection of the rights of the accused, implying that victim's rights are automatically protected through prosecution of the crime. This means, that first the investigator and then the prosecutor act to protect and uphold the rights of the victim. However, practice shows that mixing of prosecution of traffickers and defense of victims functions often interferes with observing the principle of contest in a criminal trial. Moreover, both the investigator and the prosecutor are so fully focused on proving the case that they often lack time or opportunity to ensure quality defense for the victim.

Moreover, when Central Asian victims report their cases to the police, the latter often view the victim as an offender for violation of the border crossing regime, rules of stay in the country of destination, or illegal prostitution abroad but not a victim of a transnational organized crime. Even when a criminal case is initiated, the police and other law enforcement services are often unable to collect necessary evidence due to insufficient experience of investigating trafficking cases and weak cooperation with law enforcement agencies in the countries of transit and destination. Thus, victims that are trafficked from one country to another within Central Asia or returning to the region from abroad fear recriminations by either traffickers, border guards, customs or law-enforcement officers and have little faith in the ability of the law enforcement to protect them and bring the traffickers to justice.

In recent years, when local police apprehended foreign citizens that were trafficked to Kazakhstan from the neighboring countries, they immediately deported them back to the country of origin as illegal migrants. Few other alternatives are available to the law enforcement in treating such cases because Kazakhstan lacks clear legal procedures to allow the victims to remain in the country for the duration of investigation and the court hearing. Moreover, law enforcement has no facilities, except for the detention centers, where the victims could safely stay before undertaking a return to their home country.

This situation has been changing slowly since 2003, when Kazakhstani police began to open criminal cases against traffickers who imported victims from a neighboring state to exploit them sexually in Kazakhstan<sup>64</sup>. Approximately at the same time, law enforcement in Kyrgyzstan, Tajikistan and Uzbekistan started investigating a number of trafficking cases related to trafficking of their citizens abroad. Investigations focused almost exclusively on the cases of trafficking for sexual exploitation, while labor exploitation cases were almost not investigated at all.

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<sup>64</sup> Before, the police did not react to such cases at all.

The brief analysis presented above is not complete by any means. The author considered mainly criminal legalization regulating legal procedures relevant to counter-trafficking. Meanwhile, a more comprehensive examination of issues connected with assistance provision to victims of human trafficking would entail a detailed analysis of laws regulating social and labour relations. To develop substantial recommendations on the issues of detection and prosecution of human trafficking cases, it would be necessary to review not only criminal law, but financial, tax and citizenship law as well. Such extensive analysis is possible only in a framework of a large research on jurisprudence and not in the context of a brief article based on materials to be presented at a conference. The author intends to continue this work in the future.

As for IOM and the current legal framework for regulation of questions of counter-trafficking in persons, IOM always includes a legal component in its projects, participating in development of national legislations through organization of trainings and seminars for the law enforcement services and lawyers. These events take place in the framework of a currently active IOM project on counter-trafficking in persons in Central Asia. In the future, IOM plans to continue organization of such events.

For the conference in question, the author's main objective was to attract the attention of lawyers and other relevant counterparts from the countries of destination in order to develop foundations for future cooperation on harmonization of legislations between the countries of origin, transit and destination, which would facilitate better and more encompassing prosecution of all actors involved in the criminal networks of human trafficking. This would also ensure better protection of rights and lawful interests of human trafficking victims at every stage of the transnational crime of human trafficking.