

An Evaluation of Ukrainian Legislation to Counter and Criminalize Human Trafficking

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One of the areas of the world where trafficking is growing fastest is the former Soviet Union.¹ Human trafficking from Ukraine, especially for sex work, is a serious and increasing problem for the country.² Evidence exists from a wide variety of sources, including police, NGOs, healthcare providers, prosecutors, and international organizations, of the widespread and worsening nature of the problem.³ Following a recent study by the International Organization of Migration (IOM),⁴ some 420,000 women were estimated to have been trafficked out of the country in the last few years alone.⁵ In 1998, the Ukrainian legislature adopted a criminal law (Article 124-1 in the Criminal Code of Ukraine) against trafficking in people, making Ukraine one of the first countries in Europe to formally criminalize this offense by adopting a discrete trafficking statute.

Because most Western countries have imposed strict limits on the numbers of legal migrants who can enter their territories, many women are forced to accept the service of traffickers if they wish to migrate. Most forms of labor migration are severely restricted; however, one available and legal work option available to migrant women is work in the entertainment sector as “artists” or “dancers.” In practice this type of work is frequently linked to work in the sex industry.

Contemporary population movements are characterized by increasing pressures by individuals seeking, through migration, either to escape war, persecution, poverty, or human rights violations, or simply to find better economic opportunities.⁶ Women from Ukraine also have a strong economic incentive to seek employment in Central Europe, where living standards are higher than in the countries of transition. There are several other reasons that Ukrainian women want to go to abroad. First, liberalization of laws has enabled international travel both to Ukraine and to the European Union.

Second, with the introduction of a free market economy, unemployment has for the first time affected the nation, and primarily women, both economically

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and psychologically. Women were the first to lose their jobs, and the possibilities of finding a new position are, to say the least, not promising, especially outside the big cities. Migration is especially popular among young women from small, underdeveloped cities and the countryside, where jobs are very scarce. In those areas, women cannot find positions in their own professions, as salespersons, teachers, or nurses, for example. Even if they do, those occupations are very low paid and cannot assure economic independence.

A third motivation for Ukrainian women to migrate to the West is the disappearance of the state social security system. Finally, the myth of an easy and affluent life in the West and the tradition of migrant workers also contribute to the phenomenon.

In Ukraine the transition to a market economy has resulted in huge job losses and an increase in poverty.⁷ Given this context, it is not surprising that many young women are keen to find employment in the West and to travel to countries that for years have been inaccessible to them. The economic and political reform process in Ukraine has been slow compared to some other former Soviet countries. Today, whereas some FSU countries are showing remarkable political, social, and economic progress toward stability and democracy, Ukraine is lagging behind in its transition process. The most notable reason for that is the issue of governance. Ukraine has been hesitant to embark on the political, economic, and social reforms essential to democratization. The prolonged political and socio-economic transition has had severe implications, including the marginalization and, to some extent, exclusion of some groups from the social and political forefront. One of those groups is women.

Ukrainian Governmental Response

The government of Ukraine has employed different strategies to address the issue of human trafficking. Primarily, it has adopted several international instruments that put Ukraine at the forefront of the criminalization of human trafficking in Europe. The latest international instrument—the “Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Conventions Against Transnational Organized Crime”—was signed by Ukraine on 15 November 2001 and is in the process of being ratified by the Ukrainian legislature.

When reviewing and considering legal measures to counter a particular societal problem, the legal and social contexts in which these measures will function are crucial. This is especially important when penal measures are considered. Criminal law is one of the most intrusive instruments in the hands of state authorities with respect to private citizens. The question is, first and foremost, whether a law promotes the rule of law.⁸ Moreover, it is important to distinguish between the law on the books and the law in practice. Preventive measures for human trafficking should primarily aim at strengthening the position of women and other vulnerable groups. The protection of the human rights of trafficked persons should be at the core of any antitrafficking policies.⁹

Ukraine may be considered a country in transition from a communist totali-

tarian state to a democratic society, which is governed by the rule of law. One of the major problems in this process is widespread corruption, which affects all levels of society, including police, prosecutors, and judges. Ineffective privatization, the lack of law enforcement, lack of rule of law, the professionalization of organized crime, and the absence of a legal culture have allowed organized crime to flourish from human trafficking.

In September 2001, the new criminal code of Ukraine came into force, which constitutes a radical departure from the previous one, essentially based on the Soviet criminal code. Article 149 of the new code makes human trafficking a crime. As stipulated by the law, a person who is found guilty of involvement in direct or indirect, open or hidden trafficking in human beings with the intent to sell them for sexual exploitation, pornographic business, or use in military conflict, as well as any person who adopts children for commercial purposes, will face criminal charges and will be punished by imprisonment for a period of three to eight years, with confiscation of property. A person who is involved in the sale of children or an official abusing his or her position in relation to trafficking will be punished by imprisonment for a period of five to ten years. In situations where the trafficking has led to serious consequences, is managed by a criminal organization, or is intended for the transplantation of human organs, the punishment increases to eight to fifteen years. This new article is more in accordance with the international standards stipulated in the UN Protocol¹⁰ than the one found in the old criminal code;¹¹ however, Ukraine still has to reform its national legislation and is currently drafting such a proposal.

Critiques of the Ukrainian Antitrafficking Law

Article 124-1 has been criticized on the basis that elements of the crime were not defined, and so police and prosecutors were unclear as to how to apply its provisions in practice. New terms such as “debt bondage,” “sexual exploitation,” and “exploitation of work” were used with no guidance as to their definition. No official commentaries were provided concerning implementation of the law, and although these commentaries are not binding, courts generally rely on them in interpreting the law. Also, law enforcement officers were not provided with any new procedures in relation to trafficking, as is normally the case in connection with the enforcement of new crimes. The overall effect of these inadequacies has been to discourage police from investigating allegations of trafficking, and prosecutors have also been reluctant to initiate new cases. Until now, more than 250 trafficking cases have been filed, and many other cases are under active investigation.¹² (Unfortunately, the data regarding the number of criminal cases is controversial. For example, according to information provided by the Committee Against Torture at its twenty-seventh session, 12–23 November 2001, only thirty criminal cases on human trafficking were filed since the adoption of Article 124-1 in 1998 till the start of 2001, and thirty-seven such cases were filed in 2001.¹³) In any case, the number of prosecuted cases is steadily growing, demonstrating the political will of the Ukrainian government to fight this phenomenon.

However, because of the difficulty in proving such cases, the lack of jurisprudential precedents, and the lack of experience of law enforcement and judicial agencies in regard to trafficking, a number of cases are only being prosecuted under related crime definitions and not as cases of “trafficking.”¹⁴ Nevertheless, as public awareness is raised and law enforcement bodies and the judiciary receive training, a greater number of cases are being prosecuted under the “trafficking” statute (see table 1).

As I mentioned before, a new article was meant to correspond with international standards and to prevent the commitment of human trafficking crimes. Nevertheless, this new article is deeply rooted in Article 124-1 of the earlier Criminal Code. The same terminology described above is used without further definition, and it is not clear whether new procedures will be issued to the police for their guidance in investigating crimes of trafficking. One aspect of the new law that worsens the position of trafficked women is the requirement that the person be trafficked across an international border. But according to international standards, human trafficking does not necessarily have to be international in nature, nor do the victims have to have been exploited.¹⁵ Many of the women trafficked in Ukraine are only moved from one region to another and do not leave the country. The traffickers of such individuals could not be prosecuted under Article 149 of the Criminal Code.

As for the definition of the crime, it is noteworthy that Ukraine already uses a broad definition of trafficking, including purposes for which human being are trafficked. However, in general the terms in the criminal code are insufficiently clear to be used in practice; for example, elements such as “coercion,” “border crossing,” “consent,”¹⁶ “systematic,”¹⁷ and “organized group” are vague. Absolutely unclear is whether or not coercion is a constitutive element in cases of sexual exploitation. Is any facilitation of migration for sex work punishable as human trafficking, or only if there is an element of coercion or deception? And does all work

TABLE 1. Number of Criminal Cases Filed in Ukraine under Article 124 of the Old Ukrainian Criminal Code and under Article 149 of the New UCC

Year	Number of Cases
1998	2
1999	11
2000	42
2001	91
2002	107
Total	253

in the sex industry constitute sexual exploitation per se, or does only sex work under exploitative and coercive conditions qualify as “sexual exploitation”?

Furthermore, many important actors on the international level consider the use of the term “sexual exploitation” as inadequate and propose to abolish the term.¹⁸ “In order to highlight the commonality between the different purpose for which people are trafficked, the focus should be on the forced, exploitative, or slavery-like conditions of the work or relationship and whether those conditions were freely and knowingly consented to by the person.”¹⁹

In a country in which the judicial system cannot be said to be entirely incorruptible, ambiguous crimes definitions open the possibility for corruption, not only at the level of law enforcement officers and prosecutors, but also at the level of judges, as it gives them too much discretionary power.

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Another concern is that the principal route of trafficking in women lies through employment agencies, which legalize this activity. Article 149 of the Criminal Code does not provide any efficient mechanisms

that could make it possible to prove that the activities of such agencies are for the “purpose of further sale” or other criminal purposes.

When it comes to investigation, in practice it appears to be difficult for the police to get a trafficking case opened by the prosecutor. One of the reasons is the fear among prosecutors of losing a case because of too little evidence, because the victim or witness refuses to testify in court. Prosecutors can be disciplined for losing a case, which severely affects their independence. As trafficking cases are complex, time consuming, and carry a high risk of failure, there is disinterest among prosecutors for this kind of case at all levels in prosecutors’ offices.

A special problem in bringing cases of trafficking to court is the reluctance of victims to report to the police and subsequently testify in court. Although not required by law, a request by the victim is seen as indispensable. Many reasons can be mentioned to explain the reluctance of the victims. One is absence of witness protection and procedural safeguards for victims or witnesses during criminal proceedings, especially with regards to the protection of the privacy and safety of the victim.

The Ukrainian government has undertaken various approaches to fighting human trafficking. In February 1999, the Licensing Chamber of Ukraine, the State Employment Center of Ukraine, and the Ministry of Labor and Social Policy issued an order authorizing the suspension of licenses for businesses that arrange for work abroad when the committee inspecting those businesses found violations of Ukrainian law. The order, however, targets employment agencies only. A certain number of licenses were subsequently suspended, but none of

those seems to have been on the grounds of their connection with trafficking. The order has not been considered effective in addressing trafficking, because it merely prompted criminal groups to disguise themselves as tourist agencies rather than employment agencies, as they did before.

Travel agencies or “tourist firms” are often fronts for traffickers and have little trouble obtaining passports and visas for victims in much less time than is generally required. The connection of such businesses with corrupt officials is therefore open to question. The committee responsible for inspecting registered travel agencies suspects some of them of involvement with the trafficking business, but it is not empowered to suspend such licenses. All it can do is recommend that licenses are relinquished. Furthermore, many suspicious travel agencies operate without licenses.²⁰ The government, however, has not conducted any investigation into the practices of these firms.

The government of Ukraine created a National Coordination Council for Prevention of Trafficking in People, headed by the parliamentary ombudsman. Also, on 25 September 1999, the Cabinet of Ministers of Ukraine adopted a comprehensive national Program for Prevention of Trafficking in Women and Children by Decree 1768. This program is to be financed from the state budget funds, and its implementation is to be supervised by the State Committee for Youth and Family Affairs. However, the government’s commitment to this program is questionable. First, no funding has been provided for the program by the government.²¹ Funding provided by the European Commission and USAID allowed accomplishing certain countertrafficking initiatives in Ukraine, which in fact implemented several aspects of the national program.²² However, in the absence of these funds no governmental countertrafficking activities would exist. Second, following governmental reforms, the State Committee for Youth and Family Affairs, responsible for the implementation of the national program, was disbanded and it remains unclear which governmental body takes responsibility for the supervision of the implementation of the national program in its place.

Conclusions and Recommendations

Trafficking in women and girls for the purposes of sexual exploitation, forced marriage, and domestic servitude is a serious and growing problem in Ukraine. Although the government has taken certain legislative and policy measures to address the issue, it appears that there is little political commitment to tackle the problem. I recommend that the government amend Article 149 of the Criminal Code to make trafficking that takes place within the borders of Ukraine a crime.²³ I also recommend that interpretative commentaries for judges and other officials as well as comprehensive procedural guidelines for police and immigration officers on prevention and prosecution of trafficking offenses are developed.

Measures to encourage victims of trafficking to identify traffickers and act as witnesses in criminal prosecutions should also be explored. These might include witness protection measures and restrictions on deportation of victims who are prepared to act as witnesses.²⁴ Victims of trafficking should have access to legal, psychological, and medical assistance. They should be awarded compensation

through criminal compensation schemes, which could be financed through the confiscated criminal revenue of traffickers.

Intergovernmental agreements to guarantee the voluntary and safe return of women and ensure that protection and support is provided to trafficked women awaiting repatriation proceedings should be elaborated. The human rights of victims should be assured, and steps should be taken to ensure that they are not criminalized or imprisoned. Bilateral agreements that require cooperation between local immigration officials and consulates to assist trafficked women should be developed and publicized. Measures to guarantee the voluntary and safe return of trafficked women should be established, and barriers for trafficked women to return to their countries, with or without passports or identification documents, should be eliminated.

Broad efforts to strengthen training and public awareness of civil servants dealing with migration, particularly those at embassies and consulates and those in charge of the delivery of visas, should be increased, and governments should train law enforcement officials at all levels with respect to trafficking, violence against women, and recognition of trafficking situations, including identification of front companies and groups. Broad-based, ongoing educational and awareness-raising campaigns, including media efforts, to combat domestic and international trafficking should be introduced nationally, regionally, and internationally. Vulnerable groups should be particularly targeted and community-based strategies employed. Relevant cases and evidence should be collected and shared, and the modus operandi of traffickers should be exposed so as to provide a concrete basis for legal and policy change.

By all means, strategies aimed at eliminating trafficking should focus on the criminal nature of the activity and those who carry it out, rather than on the victims, whose human rights should be assured.

NOTES

1. Commission on Security and Cooperation in Europe (the Helsinki Commission), *Sex Trade: Trafficking of Women and Children in Europe and the United States*, report given by L. Shelley, 28 June 1999, available at <<http://www.american.edu/traccc/pdfs/HTMLs/testimony699.htm>>.

2. Ukraine is recognized as a supplier of "human stock" to Yugoslavia, Hungary, Czechia, Italy, Cyprus, Greece, Turkey, Israel, the United States, United Arab Emirates, and other countries. According to the Embassy of Ukraine in Greece, there are three thousand young Ukrainian women working in legal or illegal sex businesses in Athens and Saloniki, and five thousand such women are in Turkey. See: O. V. Druz' and O. O. Hryshynska, *Trafficking in Young Women: Observation of Women's Human Rights and Relevant Tasks of Law Enforcement Bodies in Ukraine*, ed. University of the Interior of Ukraine and International Women's Human Rights Protection Center (Kharkiv-Kyiv: La Strada Ukraine, 1999), 88.

3. Minnesota Advocates Group, "Trafficking in Women: Moldova and Ukraine," December 2000, 16. The International Helsinki Federation for Human Rights, in its "Women 2000" report, cites the figure of one hundred thousand having been transported across the border illegally since 1991 from the Ukraine. Current estimates appear much higher, however.

4. IOM, "Information Campaign against Trafficking in Women from Ukraine: Research Report," 1998, 16.

5. Nina Karpachova, parliamentary ombudsman for human rights in Ukraine, has also been reported as referring to this number of women trafficked from Ukraine. However, these figures appear somewhat exaggerated and thus dubious to experts in sociology. Still, Ukraine has no published official statistics on the magnitude of the problem, and unofficial estimates of the numbers of persons being trafficked out of the country differ.

6. Vanessa von Struensee, "Globalized, Wired Sex Trafficking in Women and Children: A Worldwide, Dehumanising, Epidemic of Poverty, Disease, Corruption, Collaboration, Crime, Violence, Murder, Slavery, and the Valuing of Unprecedented Profits at the Expense of Human Dignity, Decency, and the Rule of Law," available at <<http://www.uri.edu/artci>>.

7. Ukraine now has marginalized women who have been largely excluded from the development of democratic processes through discriminatory policies practiced by political parties, governments, and individual employers. Recent studies and discussions in Ukraine on the subject of women's situation confirm that the past political and economic changes have not been gender neutral. Women make up 54 percent of the population of Ukraine and 45 percent of its labor force. Over 60 percent of all Ukrainian women have higher education (college level and above). However, the unemployment rate of women is very high compared to men with the same educational background (80 percent of all unemployed in Ukraine are women), not to mention the extensive hidden unemployment among women.

8. The term "rule of law" embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights. A predictable legal system with fair, transparent, and effective judicial institutions is essential to the protection of citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals. Unfortunately in Ukraine, where the democratic tradition is weak and judicial independence is compromised, individual rights are not truly guaranteed.

9. Ukraine is a member of the United Nations and has committed to adhering to internationally recognized human rights standards. Specifically, Ukraine ratified the Convention on the Elimination of All Forms of Discrimination against Women with a Decree of the Presidium of the Supreme Council of the Ukrainian Soviet Socialist Republic in 1981.

10. United Nations, Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Conventions Against Transnational Organized Crime.

11. Criminal Code of Ukraine (old), Article 124.

12. S. Cook and F. Larson, "Combating Trafficking in Women in Ukraine, Belarus and Moldova," paper presented at the European Conference on Preventing and Combating Trafficking in Human Beings: Global Challenge for the 21st Century, European Parliament, Brussels, 18–20 September 2002.

13. These figures are cited in World Organization Against Torture (OMCT), "Violence Against Women in Ukraine: Mainstreaming the Human Rights of Women," report presented at the 27th Session of the Committee Against Torture, 12–23 November 2001, New York City.

14. Ibid.

15. United Nations, Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Conventions Against Transnational Organized Crime.

16. Criminal Code of Ukraine (new), Article 149.

17. Criminal Code of Ukraine (new), Article 303.

18. Roelof Haveman and Marjan Wijers, *Review of the Law on Trafficking in Persons in Ukraine* (Brussels: OIM, 2001).

19. Ibid., 9.

20. OMCT, *Violence against Women in Ukraine*.

21. Information obtained from La Strada, a women's rights NGO affiliated with the Dutch organization of the same name, which has operated in Ukraine since 1997. Minnesota

Advocates Group, "Trafficking in Women: Moldova and Ukraine," December 2000, 29, also reports that resources are yet to be dedicated to the program to counter trafficking.

22. IOM Kyiv reports that it is working with an interministerial coordination group to implement a European Committee project on countertrafficking, which includes implementing the relevant aspects of the national program.

23. This recommendation was made in the alternative report prepared by the Analytical and Research Group of Kharkiv Center for Women Studies, Kharkiv, Ukraine.

24. Government agencies in Europe and North America are taking steps to use a temporary resident permit in schemes to protect trafficking victims and successfully prosecute traffickers. The U.S. government has announced that the Department of Justice will soon start issuing T-visas to protect the victims of severe forms of human trafficking. The visa will allow the victims to remain in the United States and assist federal authorities in the investigation and prosecution of human trafficking cases. For details, see "Temporary Resident Permits: A New Way to Protect Trafficking Victims?" *Trafficking in Migrants*, IOM Quarterly Bulletin 25 (spring 2002).