

IOM IRAQ

THE PROTECTION OF VICTIMS OF TRAFFICKING IN IRAQ

REVIEW OF THE APPLICABLE LEGAL REGIME AND
ASSESSMENT OF RELATED PRACTICES IN THE FIELD



ABOUT IOM

The International Organization for Migration (IOM) is committed to the principle that humane and orderly migration benefits migrants and society. As an intergovernmental organization, IOM acts with its partners in the international community to: assist in meeting the operational challenges of migration; advance understanding of migration issues; encourage social and economic development through migration; and uphold the human dignity and well-being of migrants.

The opinions expressed in this report are those of the author and do not necessarily reflect the views of IOM. The designations employed and the presentation of material throughout the report do not imply the expression of any opinion whatsoever on the part of IOM concerning the legal status of any country, territory, city, or area, or of its authorities, or concerning its frontiers or boundaries.

IOM endeavors to keep this information as accurate as possible but makes no claim –expressed or implied– on the completeness, accuracy and suitability of the information provided through this report.

This publication was made possible through the funding provided by the United States Department of State – Bureau for Democracy, Rights and Labor. The views expressed herein do not necessarily reflect the views of the United States Government or its constituent agencies.

International Organization for Migration
Iraq Mission, Main Office in Baghdad
UNAMI Compound (Diwan 2)
International Zone, Baghdad, Iraq
Tel.: + 3908 3105 2600
Email: iomiraq@iom.int
Website: iraq.iom.int

Report design and layout by Connard Co – www.connard.co

© 2019 International Organization for Migration (IOM)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without the prior written permission of the publisher.

TABLE OF CONTENTS

Introduction	4
PART I: Trafficking in Persons Under International Law: Overview of States’ Obligations	6
PART II: Review of the Criminalization of Trafficking in Persons in the Iraqi Law	16
PART III: Review of the Protection Response in Iraq: Theory and Practice in the Field	30
PART IV: Recommendations	42
Index	44

INTRODUCTION

SCOPE AND PURPOSE OF THE REPORT

IOM recently completed the implementation of a 24-month project entitled “Supporting availability and access to specialized services for victims of trafficking and individuals at risk through the provision of basic assistance and technical support of first responders.” Funded by the US Government’s Bureau of Democracy, Human Rights, and Labor, the purpose of the project was to assess protection needs, identify gaps and challenges, and subsequently enhance the protection response for victims of trafficking and populations at risk, in and out of camps, across Iraq.

In this framework, IOM launched a research project aimed at analyzing Iraq’s Law on Trafficking in Persons (Law No. 28 of 2012) and its implementation. The author of the report served as a Legal Analyst within the Protection and Counter-Trafficking Unit of IOM mission in Iraq from May 2019 until August 2019. The purpose of the consultancy was to analyze

the compliance of the law with international standards, in theory, and to the extent of available, in practice. The analysis will aid in understanding how effective the law is in addressing counter-trafficking needs and identify legal and operational gaps in peace time and war time. A thorough review of the Iraqi law and its interplay with other branches of national laws –notably criminal and residency law– was conducted. The research has also aimed at assessing the extent to which protection is available to victims of trafficking and people at risk of trafficking. It is an essential precondition to the development of effective strategies to contemplate any revisions to the law, rules or regulations, relating to the provision of protection and assistance to victims of trafficking. The report also provides a basis for IOM and other counter-trafficking actors in Iraq to self-reflect and adapt current projects.



METHODOLOGY

The first phase of the desk research intended to identify what the law says about trafficking in persons. As part of the first phase of the consultancy, the Legal Analyst collected relevant international treaty law, specifically on trafficking or indirectly covering trafficking related offences under international human rights law and international humanitarian law, as well as refugee law. This allowed the Legal Analyst to identify laws dealing with Iraq’s obligations vis à vis cases of trafficking. The Legal Analyst has also identified relevant dispositions of customary law applicable to situations of trafficking. Soft law, related to the United Nations Security Council or General Assembly resolutions, and reports of relevant Special Rapporteurs have been reviewed.¹ The Legal Analyst identified and assessed the articles of the Iraqi law related to trafficking in persons, with consideration of international law and international standards also identified in the first phase of the research. Other branches of the law have been examined to assess potential interplays or conflicts of law. The Legal Analyst has focused on residency law, labor law, criminal law, and anti-terrorist law. Research has also been undertaken on Iraq’s obligations to prosecute and criminal procedures relevant to trafficking in persons.

Under the second phase of the consultancy, the Legal Analyst conducted field visits and meetings to assess how Law No. 28 relates and engages with available assistance being provided to victims. This has allowed for a mapping of the practical challenges in the implementation of the legal protection regime for victims of trafficking and people at risk as well as operation and policy gaps. The Legal Analyst met on a regular basis with several IOM units, including the Migration Management Unit, the Preparedness and Response Unit (including, in particular, Camp Coordination and Camp Management (CCCM) colleagues), the Community Stabilization Unit, and the Return and Recovery Unit, both in Erbil and Baghdad, as well as in sub-offices, Community Resource Centers (CRCs), and camps. The Legal Analyst conducted field visits to camps and CRCs, notably to Haj Ali camp (Mosul) and Najaf to meet with Protection teams and camp or center managers. A mission to the district of Sinjar took place in early July 2019 to assess the protection available in the city of Sinjar. The Legal Analyst reached out to UNHCR, UNICEF, OHCHR, and UNDP for information sharing and coordination as well as with the Protection Cluster and

CCCM Cluster. Meetings with NGOs working on protection, trafficking in persons, and/or trafficking-related offences have been held. With regards to the dialogue with relevant governmental stakeholders, the Legal Analyst has met the Ministry of Justice’s Human Rights Department, the Anti-Human Trafficking Unit of the Ministry of Interior, the High Judicial Council, a distinguished judge specialized in counter-trafficking in Baghdad, and with the Ministry of Higher Education of the Kurdistan Regional Government in Erbil. The Legal Analyst has also attended a workshop on counter-trafficking organized in Baghdad by IOM. There are several other key stakeholders that IOM sought to consult within the context of this consultancy, but unfortunately, these meetings did not take place within the timeframe available.

The consultancy took place between May 2019 and August 2019, including the research and drafting phase. Time, human resources, and security constraints have limited the scope of the study but the report intends to provide an overview of the legal protection regime and of the challenges. Conclusions will help IOM shape discussions and develop strategies soon.

DISCLAIMER ON THE WORDING “VICTIMS”

Throughout the report, the wording “victims” is used. This choice is purely practical and motivated by the necessity to reflect the wording of related international and national legal instruments. The term “victim” has also its importance in the legal analysis and in the criminal justice system. That said, the author would like to stress that some people who have experienced trafficking in persons, especially in the form of sexual exploitation or sexual slavery –but not only– prefer to be referred to as survivors. How a victim/survivor feels about their experience goes beyond terminology, but terminology nonetheless remains a critical aspect of recognition and support.

¹ An effort was also made to obtain response from the Iraqi Government to these documents, but it was not ultimately possible to obtain this information within the relatively limited timeframe of this consultancy. In any case, it was made clear by some senior government officials during meetings that this information would not be shared.

PART I

TRAFFICKING IN PERSONS UNDER INTERNATIONAL LAW: OVERVIEW OF STATES' OBLIGATIONS

1. THE SHIFT TO A HUMAN RIGHTS APPROACH

In 1949, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was approved by General Assembly of the United Nation, with resolution 317 (IV) of 2 December 1949, and it entered into force on the 25 July 1951. The scope of the Convention was then limited to prostitution and sexual exploitation.² Since then, trafficking in persons has become a growing concern and a variety of international legal and policy instruments have been developed, be it on the issue of trafficking in persons as such or on related offences. Adopting a victim-centered approach, the international community has tried over the past decades to change how states and individuals consider and address human exploitation. The shift to a greater focus on the human rights aspects of trafficking has certainly been a milestone, and it is now widely accepted that states have an obligation to correctly identify victims of trafficking and protect human rights of all people within their jurisdiction, including all migrants, regardless of their immigration status. This first part of the report will detail how human rights are embedded in counter-trafficking, and what states' obligations are under international human rights law and under other branches of international law.

2. DEFINITION OF TRAFFICKING IN PERSONS IN INTERNATIONAL LAW AND KEY ELEMENTS METHODOLOGY

2.1. The Definition of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children

For decades, lines remained blurred between trafficking in persons and other commonly associated offences, such as the smuggling of migrants. Confusion resulted –and still results– in states and counter-trafficking actors failing to identify victims of trafficking.³ The first-ever agreed upon definition on trafficking in persons was adopted in the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women

and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter: Trafficking in Persons Protocol). Since then, the definition is used in most legal and policy instruments and national laws.

Pursuant to Article 3 of the Trafficking in Persons Protocol, “trafficking in persons” is defined as follows:

- (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.”*

2 “Article 1: The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
(2) Exploits the prostitution of another person, even with the consent of that person.”

3 The Inter-Agency Coordination against Trafficking in Persons, What is the Difference between Trafficking In Persons And Smuggling of Migrants? Issue 01, 10/2016, available at <https://icat.network/sites/default/files/publications/documents/UNODC-IB-01-draft4.pdf>

Since this is the narrower definition of trafficking in persons and Iraq is party to the Trafficking in Persons Protocol⁴, the author of the report has used it for their analysis.

2.2. Ratione Personae:

The Recognition of All Victims of Trafficking

Whereas the 1949 Convention on the Suppression on Trafficking in Persons limited trafficking in persons to movement and sexual exploitation of women and girls, the Trafficking in Persons Protocol has a broader and more comprehensive definition, upholding the principle that anyone can be subject to trafficking: men, women, boys, and girls. Pursuant to the Convention of the Rights of the Child, children are defined as persons up to the age of 18 years old⁵. The broad definition reflects the evolution of perception of trafficking in persons by the international community as well as the necessity to consider all victims of trafficking. As noted by OHCHR, one of the important features of the definition of trafficking in persons under the Protocol is the recognition that *“trafficking affects women, men, and children, [...] Trafficking was traditionally associated with the movement of women and girls into sexual exploitation. The international legal definition set out above makes clear that men and women”*.⁶

Victims of trafficking, even if they are outside of their country of origin or residence, cannot be discriminated in the application of international law and international protection standards simply based on their nationality, citizenship, or immigration status or of how they came into the territory. International human rights law applies to all persons within a state’s territory or jurisdiction.⁷

4 United Nations Treaty Collection, Status of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=en

5 Convention of the Rights of the Child (1989), “Article 1: For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

6 Office of the High Commissioner for Human Rights, Human Rights and Human Trafficking, Factsheet no 26, 2014, p.3

7 There exist some narrow exceptions that must be duly justified and that the author will not address in the report. The point here is to present the general scope of application of international human rights law and how it relates to trafficking in persons.

8 Office of the High Commissioner for Human Rights, Human Rights and Human Trafficking, Factsheet no 26, 2014, p.3

9 Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (United Nations publication, Sales No. E.05.V.2, p. 270)

10 Article 3(a) of the Trafficking in Persons 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; (emphasis added)

2.3. Ratione Materiae:

The Material Elements of the Definition

Trafficking in persons is composed of three cumulative elements: an action, means, and a purpose (exploitation). It is crucial here to note that the threshold is different for trafficking in persons involving children: the “means” element is not required. It suffices to show that an action took place with the specific purpose of exploitation. This is, however, should not be confused with the fact that consent remains irrelevant for both adults and children.

Indeed, as stated in Article 3, consent is always irrelevant: it means that once the three cumulative elements (or two in the case of children) are met, this is a case of trafficking in persons, regardless of the fact that the victim has given their consent or not. This derives from the fact that “international human rights law has always recognized that the intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which that personal freedom is taken away.”⁸ The drafters of the Trafficking in Persons Protocol wanted to stress that “once it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defense.”⁹

Another key feature of the definition is the wide range of exploitative practices associated with trafficking in persons. It is important to note, that the definition is open-ended, as stressed by the wording “at the minimum,”¹⁰ keeping therefore the Protocol flexible enough to tackle future evolutions of exploitation practices and avoid potential future grey zones or legal gaps.

The definition also addresses common misrepresentations of trafficking in persons. Indeed, the crime of trafficking does not require the crossing of an international border. As mentioned earlier, there is often a misunderstanding –even among practitioners– between trafficking in persons

and smuggling of migrants. Those are distinctive practices although migrant smuggling may lead to situation of trafficking in persons.¹¹ The definition of trafficking in persons covers both in-country/internal trafficking and cross-border/international trafficking. A victim can, therefore, be subject to trafficking within a single country, including its country of origin or residence.

3. SOURCES OF INTERNATIONAL LAW AND OTHER INSTRUMENTS RELEVANT TO TRAFFICKING IN PERSONS

3.1. Treaties

Treaty law is the primary source of international law and states' obligations.¹² A treaty –synonymous with convention– is a legally binding instrument, the ratification of which obliges states to respect the spirit of the text, comply with the provisions, and take any necessary steps to ensure that the legislation, policies, and practices are consistent with the standards set by the treaty. National laws of a state shall always comply with the rules set by international treaties signed by said state.

As such, the responsibility of counter-trafficking and protection of victims of trafficking relies on states foremost. It is often argued that the primary wrong is committed by individuals or organized groups or companies. However, states remain responsible if any act or omission in the prevention and prosecution of trafficking leads to a breach of international human rights law for individuals within their jurisdiction or control.

Trafficking in persons is a transversal issue and many treaties are relevant even to those not addressing specifically or

Finally, trafficking in persons does not necessarily involve movement. As stated in the definition of the “action,” there is more than one possible way to be trafficked. In practice, it means that the definition is not limited to situations where victims are moved to situations of exploitation but also where victims are “simply” maintained in a situation of exploitation. This is reflected by the choice of the terminology “receipt” and “harbouring” in article 3 of the Trafficking in Persons Protocol.

exclusively trafficking. In addition to international human rights treaties (addressed in the next sub-section), importance should be given to treaties addressing crimes and/or corruption as complementary tools when dealing with trafficking in persons: the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the Rome Statute of the International Criminal Court.¹³ In addition, the following treaties and instruments are particularly relevant to trafficking in persons:¹⁴

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000 (Trafficking Protocol)
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989

11 “Smuggling of migrants [is] the procurement of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit. The purpose of the Smuggling of Migrants Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among State Parties to that end, while protecting the rights of smuggled migrants” (Article 2 of Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime). The Protocol requires States not to criminalize migrants for the fact of having been the object of the crime of smuggling (Article 5). The Protocol against the Smuggling of Migrants refers only to the irregular movement of migrants across international borders. The Protocol also creates an obligation to establish ‘aggravating circumstances’ to the crime of smuggling of migrants. These include ‘circumstances (a) that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) that entail inhuman or degrading treatment, including for exploitation, of such migrants’ (Article 6(3)).” See ICAT, What is the Difference between Trafficking in Persons and Smuggling of Migrants? Issue Brief 01, October 2016

12 Sources of international law are defined in the International Court of Justice Status in Article 38(1) “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, [e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

13 Especially Article 7(c) ““Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;” Article 7(g) ““Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;” and Article 7(h) “(i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a state or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

14 Office of the High Commissioner for Human Rights, Human Rights and Human Trafficking, Factsheet no 26, 2014, p.10

- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000
- United Nations Convention against Transnational Organized Crime, 2000
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- Council of Europe, Convention on Action against Trafficking in Human Beings, 2005 (European Trafficking Convention)
- Charter of Fundamental Rights in the European Union, 2000, Article 5, and Directive 2011/36/EU of the European Parliament and Council on preventing and combating trafficking in human beings and protecting its victims, 2011
- South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

3.2. Other Sources of International Law

There are other subsidiary means for the determination of rules of law, including international custom –known as (international) customary law– general principles of law and certain judicial decisions, especially decisions of international courts or tribunals. In practice:

- The customary character of a rule means that states are bound by it regardless of whether they have become a party to a treaty establishing that rule; this is for instance the case of the prohibition of slavery.¹⁵
- The term “general principles of law” refers to principles that are common to all main legal systems and therefore constitute international law.
- The judgment *Rantsev v. Cyprus and Russia* (European Court of Human Rights, 2009) is considered a key judgment helping to establish and interpret the international legal framework on trafficking in persons.¹⁶

15 Note that there are specific elements required for the formation of a customary rule of international law.

16 Judgment available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-96549%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-96549%22]})

17 Office of the High Commissioner for Human Rights, Human Rights and Human Trafficking, Factsheet no 26, 2014, p.11

18 Adopted in 2010 without vote

3.3. Other Relevant Instruments

Some instruments adopted by regional organizations or set by international organizations may constitute as other relevant sources. This so-called “soft law” is not legally binding for states, meaning it does not create obligations or entitle individuals to rights. These instruments include various recommended principles and guidelines issued by UN agencies, resolutions adopted by the UN General Assembly and the Human Rights Council, findings and reports of international human mechanisms such as treaty bodies and special procedures, as well as non-treaty bilateral or multilateral agreements between states, notably on cooperation vis-à-vis repatriation and reintegration of trafficked persons. OHCHR has listed some important “non-treaty” instruments relevant to trafficking in persons:¹⁷

- Recommended Principles and Guidelines on Human Rights and Human Trafficking (Recommended Principles and Guidelines)
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines on the Right to a Remedy and Reparation)
- UNICEF Guidelines on the Protection of Child Victims of Trafficking (UNICEF Guidelines)
- Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines
- UNHCR Guidelines on International Protection: The application of Article 1(A)(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (UNHCR Trafficking Guidelines)
- UNGA Global Plan of Action to Combat Trafficking in Persons¹⁸

4. THE RELEVANCE OF THE INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK TO ADDRESS TRAFFICKING IN PERSONS

As explained, international law, including international human rights law, applies to all persons within the territory or jurisdiction of a state. In addition to the Trafficking in Persons Protocol, international human rights law provides an additional and complementary set of rules to address the issue. The relevance of this branch of the law is two-fold: first, trafficking in persons does constitute a human rights violation.¹⁹ This branch of international law indeed prohibits many practices which may either constitute or be associated with trafficking in persons (see the following paragraph). Second, victims of trafficking are entitled to a wide range of human rights. In other words, the adoption of a human rights-based approach means that every instrument of counter-trafficking, be it national or international, reflects human rights of victims of trafficking and the obligations of states as set by international human rights law.

Regarding the first aspect, it is key to point out that only two of the major human rights treaties refer directly to trafficking in persons.²⁰ That fuels a legal debate on whether international human rights law prohibit trafficking in persons

as such or rather practices/offences related to or associated with trafficking. Beyond the technicalities of the debate, counter-trafficking actors should keep in mind that international human rights law prohibits many of the practices associated with trafficking, namely forced labour,²¹ slavery,²² servitude,²³ child sexual exploitation,²⁴ forced marriage,²⁵ servile forms of marriage, child marriage,²⁶ enforced prostitution, exploitation of prostitution and debt bondage.²⁷

On the second aspect, OHCHR²⁸ has listed the human rights which are the most relevant to situations of trafficking in persons:

- The prohibition of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status
- The right to life
- The right to liberty and security
- The right not to be submitted to slavery, servitude, forced labour or bonded labour

¹⁹ Office of the High Commissioner for Human Rights, Human Rights and Human Trafficking, Factsheet no 26, 2014, p.14. See also for instance Council of Europe's Convention on Action against Trafficking in Human Beings and the European Union Directive on preventing trafficking as a violation of human rights.

²⁰ Convention on the Elimination of All Forms of Discrimination against Women (Article 6 "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.") and the Convention on the Rights of the Child (Article 35 "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.").

²¹ "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 [herself] voluntarily." Convention No. 29 concerning Forced or Compulsory Labour of the International Labour Organization (ILO)

²² Slavery Convention, 1926 "Article 1: For the purpose of the present Convention, the following definitions are agreed upon: (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."

²³ "Neither the Universal Declaration nor subsequent instruments offer a precise definition of "servitude." During discussions in the Third Committee of the United Nations General Assembly about the draft Universal Declaration, Professor Cassin (France) observed that "by the use of the word 'servitude' it was intended to cover certain forms of slavery, such as that imposed on prisoners of war by the Nazis, and the traffic in women and children," Ad Hoc Committee on Slavery, Development of article 4 of the Universal Declaration of Human Rights, United Nations document E/AC.33/5. On the difference between "slavery" and "servitude" in the European Convention on Human Rights, one commentary observes: "The status or condition of servitude does not involve ownership and differs from slavery on that count." D.J.Harris, M. O'Boyle and C. Warbrick, Law of the European Convention on Human Rights, 1995, p. 91" in David Weissbrodt and Anti-Slavery International, Abolishing Slavery and its Contemporary Forms, OHCHR 2002, p.7

²⁴ According to EUROPOL, "Child sexual exploitation refers to the sexual abuse of a person below the age of 18, as well as to the production of images of such abuse and the sharing of those images online." <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/child-sexual-exploitation>

²⁵ According to OHCHR "Forced marriages are marriages in which one and/or both parties have not personally expressed their full and free consent to the union." <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/ChildMarriage.aspx>

²⁶ According to OHCHR, "Child marriage, or early marriage, is any marriage where at least one of the parties is under 18 years of age. A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent." <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/ChildMarriage.aspx>

²⁷ "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;" in David Weissbrodt and Anti-Slavery International, Abolishing Slavery and its Contemporary Forms, OHCHR 2002, p.6

²⁸ Office of the High Commissioner for Human Rights, Human Rights and Human Trafficking, Factsheet no 26, 2014, p.4

- The right not to be subjected to torture and/or cruel, inhuman, degrading treatment or punishment
- The right to be free from gendered violence
- The right to freedom of association
- The right to freedom of movement
- The right to the highest attainable standard of physical and mental health
- The right to just and favourable conditions of work
- The right to an adequate standard of living
- The right to social security
- The right of children to special protection.

Finally, some individuals are entitled to additional or different (only more protective) rights and states may thus have more responsibilities towards those groups of individuals. This is a

case of persons who can be targeted based on their vulnerability (such as children) and/or suffer from gender-specific or discriminatory forms of harm and consequences to the situation of trafficking (notably persons with disability, women, and girls). Women and girls face for instance increased and/or specific risks of rape, forced marriage, unwanted or forced pregnancy, forced termination of pregnancy, and sexually transmitted diseases, including HIV/AIDS. With regards to the specific situation of children victims of trafficking, states have a greater responsibility in identifying victims and ensuring the immediate and long-term safety and well-being of the child. Pursuant to the principle of the Convention on the Rights of the Child, the best interest of the child prevails over any other considerations, such as –as often mentioned– public order or immigration status. Children not possessing the nationality of citizenship of a state are entitled to the same level of protection and rights as nationals since Convention applies to all children within the jurisdiction or control of a State.



5. IRAQ AND INTERNATIONAL LAW

5.1. Iraq's Status of Accession/Ratification of Major International Legal Agreements Relating to Trafficking in Persons

	SIGNATURE	ACCESSION/ RATIFICATION
1951 Convention Relating to the Status of Refugees and its 1967 Protocol	n/a	n/a
Convention on the Elimination of All Forms of Discrimination Against Women		1986
Convention on the Rights of the Child	n/a	1994
ILO Convention No. 105 – Convention Concerning the Abolition of Forced Labour	n/a	1959
ILO Convention No. 189 – Domestic Workers Convention	n/a	n/a
ILO Convention No. 29 – Convention Concerning Forced or Compulsory Labour		1962
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	n/a	n/a
LO Convention No. 182 – Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour	n/a	2001
Optional Protocol to the Convention on the Rights of the Child on the involve- ment of children in armed conflict 2000	n/a	2008
Optional Protocol to the Convention on the Rights of the Child Protocol on Sale of Children, Child Prostitution and Child Pornography	n/a	2008
Protocol of 2014 to the Forced Labour Convention, 1930	n/a	1962
Protocol to Suppress, Prevent and Punish Trafficking in Persons especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000	n/a	2009
Slavery Convention, 1926	1955	n/a
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956	1956	1963
United Nations Convention against Corruption	n/a	2008
United Nations Convention against Transnational Organized Crime, 2000	n/a	2008
United Nations International Covenant on Civil and Political Rights	1969	1971
United Nations International Covenant on Economic, Social and Cultural Rights	1969	1971

5.2. Scope of Application of the Law
in Peace Time and War Time

As explained, international law is a set of rules that regulates the relations between states, lays down obligations on states vis-à-vis individuals within their jurisdiction, and provides rights to those individuals. When it comes to examining the scope of the application of the law, there is often confusion as to whether a situation of “crisis” has an impact. It seems that this needs to be clarified, notably here, when it comes to law relevant to trafficking in persons.

International law disregards the term “crisis” and recognizes two types of situation: peace time and war time. In theory, international human rights law, refugee law, and trafficking in persons related law apply at all times. However, when an armed conflict²⁹ (the legal term for war) occurs, it triggers the application of a distinct body of law called international humanitarian law. It consists of a set of rules that seek, for humanitarian reasons, to limit the effects of armed conflict. Therefore, in a situation of armed conflict (be it international or non-international) international humanitarian law applies, regardless of the legality of the conflict (i.e. whether it was legal for the parties to the conflict to wage war). International humanitarian law is then often the *lex specialis* and therefore, certain provisions of the law that were applicable in time of peace (as *lex generalis*) become derogator.³⁰ The key element here is that the term “crisis” is irrelevant in defining the scope of application of the law. A state is either in a situation of peace (that includes internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature) or in a situation of armed conflict (non-international or international). Other situations of “crisis” such as natural disasters or “humanitarian crisis” that are not related to an armed conflict (famine or Ebola for example) are also irrelevant when it comes to applicable law. A situation of armed conflict will trigger the application of international humanitarian law. Certain provisions of international human rights law become then derogatory or “suspended.” Those derogations are however not related to any of the obligations of the state when it comes to preventing and combatting traf-ficking in persons, nor protecting victims.

In times of armed conflict, the only relevant difference is if trafficking in persons is committed in relation to the existing conflict, i.e., whether there is a nexus with the conflict. In this case, if the elements of the crime are met, elements consti-tutive of trafficking in persons and related offences could amount to war crimes, as defined by the Rome Statute of the International Criminal Court.³¹ In the case of Iraq, if we were to examine, for instance, the crimes committed by ISIL at the time where the threshold of an armed conflict was reached, some of them, notably the recruitment of child soldiers, the forced recruitment of fighters, and the enslavement of women and girls (which could all fall under the definition of trafficking in persons) may amount to war crimes.

5.3. KEY PRINCIPLES OF LAW

i. Principle of the Hierarchy of the Law

Between international law and national law, international obligations prevail; national legislation must adopt these obligations in accordance with international law. Similarly, as KRI is a federal entity within Iraq, a federal state, the Kurdish Regional Government (KRG) must comply with Iraqi law. Article 69 of the Kurdish Regional Constitution states that “Conventions, agreements and international declarations regarding human rights ratified or joined by Iraq are comple-mentary provisions of this Constitution.” As Iraqi law must comply with international law, so must the KRG. Therefore, the KRG is bound to the Trafficking in Persons Protocol since Iraq ratified it in 2009. At the national level, Iraq adopted a similar law in 2018. Some argue that KRG is not bound by the Iraqi law, stating Article 121 of the Iraqi Constitution: “In case of a contradiction between regional and national legis-lation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.” However, this argument disregards the fact that, in any case, in the situation we examine concerning trafficking in persons, there was no contradiction of the laws per se. The trafficking in persons law was not yet adopted by the KRG; Kurdish law was silent, not incompatible.

29 ICTY, The Prosecutor v. Dusko Tadić, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, para 70 “an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”

30 The interplay between *Lex specialis* and *lex generalis* is discussed below

31 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings in partnership with the Ludwig Boltzmann Institute of Human Rights and the Helen Bamber Foundation, Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment, Occasional Paper Series no. 5 (June 2013). See Article 8 of the Rome Statute of the International Criminal Court in particular Articles 8(2)(v) and (2)(b)(v). See also customary rules of International Humanitarian Law 93, 94 and 95 on rape and sexual violence, slavery and slave trade and forced labour available in many languages at <https://www.icrc.org/en/doc/resources/documents/misc/customary-law-translations.htm>

ii. Conflict of Law: *Lex Generalis v Lex Specialis*

In situations of so-called conflict of law, the most specific rules shall prevail over more general provisions of the law. The principle derives from the Latin legal maxim “*lex specialis derogat legi generali*.” It is generally used to discuss the interplay between international human rights law and international humanitarian law, therefore most of the legal debate around how the principle applies in practice has focused on those bodies of law. However, it applies both in national and international law and similar conclusions can be drawn. When different laws (within the same body of law) or bodies of laws apply to the same situation, it is necessary to decide which of the rules prevails over the other. If the rules are not incompatible, the most specific one, providing the greatest level of detail, applies. If rules contradict or compete, there exist two options: the first one is to apply the more detailed rule which is, therefore, the more precise vis-à-vis the given situation; the second option is to apply the rule providing the greatest level of protection.³²

All legal systems recognize the principle of *lex specialis* as a general principle of law, as mentioned in the drafting of the Statute of the Permanent Court of International Justice,³³ notably with respect to Article 38, which lists the sources of

international law.³⁴ It is an old legal principle, already described by Grotius: “What rules ought to be observed in such cases [i.e. where parts of a document are in conflict]. Among agreements which are equal...that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.”³⁵ The International Law Commission further explains that “a special rule is more to the point (‘approaches more nearly to the subject in hand’) than a general one and it regulates the matter more effectively (‘are ordinarily more effective’) than general rules do. This could also be expressed by saying that special rules are better able to take account of particular circumstances.”³⁶

This principle is to be taken into account when addressing the issue of trafficking in persons and assessing the legal protection regime for victims of trafficking. Indeed, as will be addressed later in this report, there is an interplay between the Iraqi Law on Trafficking in Persons and other branches of the law, including residency law, criminal law and labour law. A good understanding of general principles of law such as the application of the *lex specialis* is crucial to discuss and resolve potential conflicts of law.

32 ICRC, How Does Law Protect in War, Online Casebook. See definition of *Lex specialis* at <https://casebook.icrc.org/glossary/lex-specialis>

33 “The principle is, in truth, a general principle of law recognized in all legal systems, and it was cited as an example of such in the drafting of Article 38 of the Statute of the Permanent Court of International Justice. It follows that if the *lex specialis* contains dispute settlement provisions applicable to its content, the *lex specialis* prevails over any dispute settlement provision in the *lex generalis*.” ITLOS, Southern Bluefin Tuna case, (27 August 1999), para 123 in International Law Commission Study Group on Fragmentation, The Fragmentation of International Law, UN Session no 55, p.5, available at http://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf

34 United Nations, Statute of the International Court of Justice, 18 April 1946, “Article 38: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

35 International Law Commission Study Group on Fragmentation, The Fragmentation of International Law, UN Session no 55, p.5, available at http://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf

36 International Law Commission Study Group on Fragmentation, The Fragmentation of International Law, UN Session no 55, p.4, available at http://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf



PART II

REVIEW OF THE CRIMINALIZATION OF TRAFFICKING IN PERSONS IN THE IRAQI LAW

Iraq adopted the Law No. 28 Combating Trafficking in Persons on 23 April 2012.

It is modelled on the Trafficking Protocol. This section intends to provide an analysis of the legal provisions relative to international standards by, first, looking at international law or international guidelines, second examining what the Iraqi law states and finally commenting on the points of convergence or divergence.

1. KEY ELEMENTS OF THE DEFINITION OF TRAFFICKING IN PERSONS

1.1. Definition

i. International Standards

Article 3 of the Trafficking in Persons Protocol, “trafficking in persons,” is defined as follows:

“(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;”

iii. Comments

The Iraqi law contains various issues:

- First, it does not cover trafficking in all its forms, as detailed further in this paragraph. Different wording may be attributed to translation errors, though it currently omits “transfer,” which includes selling and transferring possession or control, and discusses sexual abuse rather than sexual exploitation, which are similar but

ii. Iraqi Law

Iraqi Law on Trafficking in Persons states in Article 1:

“**First:** For purposes of this law, the term ‘Human Trafficking’ shall indicate recruiting, transporting, housing, or receiving individuals by force, threat to use force, or other means, including by coercion, kidnapping, fraud, deception, misuse of power, exchange of money, or privileges to an influential person in order to sell and exploit the trafficked individuals by means of prostitution, sexual abuse, unpaid labor, forced labor, enslavement, beggary, trading of human organs, medical experimentation. **Second:** the victim here means, the person who suffered from material or moral damage caused by one of the crimes stipulated in this law.”

vitality distinct concepts, especially in the case of law enforcement and victim protection.

- The law only references forced labor and excludes forced services, and it omits mention of practices “similar” to slavery or servitude.

- The phrase “sell and exploit” sounds cumulative, whereas exploitation alone would be enough to reach the threshold of trafficking.
- The law further omits reference to the abuse of one’s position of vulnerability.
- The law appears to place a burden of proof of damage on the victims in a way that is incompatible with international standards.
- Overall, it is not comprehensive or sufficiently open-ended to allow for judicial interpretation or evolution.

1.2. Child Trafficking

i. International Standards

Article 3(c) of the Trafficking in Persons Protocol states:

“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.”

ii. Iraqi Law

The law remains silent of child trafficking as such.

iii. Comments

The Iraqi law, silent on child trafficking as such, does not mention child trafficking directly or include a provision stating the irrelevance of proving means for trafficking of children. This is even more problematic since Iraqi Labour Law 2015 defines as “a person under the age of 15”,³⁷ contrary to the Convention on the Rights of the Child. While Article 6 states that trafficking in persons under the age of 18 years is an aggravating circumstance, this is not a substitute for these omissions.

³⁷ “Article 1.21 “Child: Any person who has not reached the age of (15) fifteen”
<http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/96652/114261/E-218842884/IRQ96652%20Eng.pdf>

1.3. Irrelevance of Consent

i. International Standards

Article 3 [...] (b) of the Trafficking in Persons Protocol states:

“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.”

ii. Iraqi Law

Article 10 of the Iraqi Law on Trafficking in Persons provides that “consent by a victim to human trafficking shall not be accepted as a defense.”

iii. Comments

The Iraqi law’s wording focuses on the criminalization of trafficking in persons as an offence and does not take a victim-centered approach. It should be made clear that consent is always irrelevant to determine whether a person is a victim.

2. CRIMINALIZATION OF TRAFFICKING IN PERSONS

2.1. Establishing Trafficking In Persons As an Offence With Appropriate Penalties

i. International Standards

The Trafficking in Persons Protocol states in Article 5 on criminalization:

1. "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally."

ii. Iraqi Law

Iraqi Law on Trafficking in Persons establishes in Article 5:

First: A person who commits the crime of Human Trafficking stipulated in Article (1) of this law shall be punished by temporary imprisonment and a penalty not less than 5 million, and not exceeding 10 million, Iraqi dinars.

Second: A person who commits the crime of Human Trafficking by the following means shall be punished by imprisonment not exceeding 15 years and penalty not exceeding 10 million Iraqi dinars:

- A. The use of any form of coercion, including blackmail, threat, and/or confiscation of travel or official documents.
- B. The use of fraudulent means to deceive or victimize victims.
- C. Giving or receiving money or privileges in exchange for approval from a person of authority or guardianship over the victim."

iii. Comments

- Article 87 of the Iraqi Penal Code defines "temporary imprisonment" as imprisonment for a period of more than 5 years and less than 15 years which makes it difficult to distinguish paragraphs first and second of Article 5.
- Article 7 imposes penalties of not less than three years imprisonment and fines of between 10 million and 20 million IQD (US\$3,400 to US\$6,800) for trafficking established, managed, engaged, or facilitated using the internet. This is unlike Articles 5 and 6, which express custodial and financial penalties as alternative punishments, allowing

convicted traffickers with means to buy their way out of sentencing. Articles 5 and 6 should be amended to reflect the wording in Article 7.

- Penalties for trafficking in persons offences are generally in line with international standards, including prison sentences of up to 15 years. However, life imprisonment and death penalty sentences that may be prescribed in cases of aggravating circumstances are outside of international norms and contravene the position of the United Nations, which rejects the death penalty.³⁸

2.2. Criminalization of Attempts

i. International Standards

The Trafficking in Persons Protocol states in Article 5 on criminalization:

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;"

ii. Iraqi Law

Article 12 of the Iraqi Law on Trafficking in Persons reads as follows:

"The provisions of law number (111) of 1969 (Penal Code) shall apply to provisions not specifically stipulated in this law."

The relevant Penal Code provisions are the following:

- Part 1, Chapter 1, Section 3: Elements of a crime**
 - Sub-section 1: The physical element
 - 2: **An attempt to commit an offence**
- Paragraph 30** - This is the initiation of an act with intent to commit a felony or misdemeanor which is prevented or frustrated for reasons unrelated to the intentions of the offender.

An attempt to commit an offence is considered to include all acts that are impossible to carry out and which are attempted with intent to commit a felony or misdemeanor whether or not it is for a reason relating to the object of the offence or to the means by which it is committed as long as the offender does not believe as a result of misconception or total ignorance that it is within his power to achieve the result of the offence. Merely the intention to commit an offence or preparations to do so are not considered an attempt unless otherwise stipulated by law.

Paragraph 31 - Attempted felonies or misdemeanors are punishable by the following penalties unless otherwise stipulated by law.

- (1) Life imprisonment if the prescribed penalty for the offence is death.
- (2) Imprisonment for a term not exceeding 15 years if the prescribed penalty for the offence is life imprisonment.
- (3) Imprisonment for a term not exceeding half the maximum penalty prescribed for the offence if the penalty is imprisonment for a term of years. If half the maximum penalty is 5 years or less, then the penalty in that case shall be a period not exceeding half the maximum penalty prescribed for the offence.
- (4) A period of detention or a fine not exceeding half the maximum penalty prescribed for the offence.

Paragraph 32 - Provisions relating to incidental or supplemental penalties and precautionary measures prescribed for offences committed are applicable to attempted offences."

iii. Comments

The Iraqi law seems to correctly address criminalization of attempts.

2.3. Criminalization of Accomplices

i. International Standards

The Trafficking in Persons Protocol states in Article 5 on criminalization that:

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: [...] (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article;"

ii. Iraqi Law

The Trafficking in Persons Law is silent on the criminalization of accomplices, but the Iraqi Penal code provides the following legal framework:

"Part 1, Chapter 1, Section 5: Parties to a crime

1. The principal and accessory

Paragraph 47 - The following are considered to be principals to an offence:

- (1) Any person who commits an offence by himself or with others.
- (2) Any person who participates in the commission of an offence that consists of a number of acts and who wilfully carries out one of those acts during the commission of that offence.
- (3) Any person who incites another in any way to commit an act contributing to an offence if that person is not in any way criminally liable for the offence.

Paragraph 48 - The following are considered to be accessories to an offence:

- (1) Any person who incites another to commit an offence and that offence is committed on the basis of such incitement.
- (2) Any person who conspires with others to commit an offence and that offence is committed on the basis of such conspiracy.
- (3) Any person who knowingly supplies the principal to an offence with a weapon, instrument or anything else to commit an offence or deliberately assists him in any other way to carry out those acts for which he has received assistance.

³⁸ For more information on the UN position on death penalty see <https://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIIndex.aspx>

Paragraph 49 - An accessory is considered to be a principal to an offence under the provisions of Paragraph 48, if he is present during the commission of that offence or any act contributing to that offence.

Paragraph 50

- (1) Any person who participates in the commission of an offence as principal or accessory is punishable by the penalty prescribed for that offence unless otherwise stipulated by law.
- (2) An accessory is punishable by the penalty prescribed by law, even though the principal is not punishable due to lack of criminal intent on his part or for other circumstances in respect of him.

Paragraph 51 - If there exists material circumstances in the offence that would by their nature increase or decrease the penalty, then they will affect all parties to the offence, principal or accessory, whether they are aware of those circumstances or not.

If there are personal aggravating circumstances which facilitated the commission of the offence, then they will not affect any person other than the person concerned, unless that other person is aware of them.

Any other circumstance will not affect the person concerned, whether or not it is aggravating or extenuating.

Paragraph 52 - If there exists any personal defenses which absolve one of the parties to an offence, whether as principal or accessory, from the penalty or which reduce that penalty, then it affects only the person concerned.

Any material defense that absolves a party to an offence from the penalty or reduces that penalty will apply in respect of all parties to the offence.

Paragraph 53 - A party to an offence, whether as principal or accessory, is only punishable by the penalty for the offence that has actually been committed even though he did not intend to commit the offence, as long as the offence that is committed is the probable consequence of his participation in it.

Paragraph 54 - If the intent of a party to an offence, whether as principal or accessory, or if his knowledge of the offence differs from the intent of the other par-

ties to that offence or the extent of their knowledge of it, then they will each be punishable according to their intent or the extent of their knowledge of the offence.

2. Criminal Conspiracy

Paragraph 55 - A criminal conspiracy is considered to be an agreement between two or more people to commit a felony or misdemeanor such as theft, fraud or forgery, whether or not it is a specified offence or arises out of acts that are aided and abetted, even though that agreement is in the initial planning stages or has been in existence only for a short time.

The agreement is considered to be a criminal one whether the final objective is to commit an offence or to achieve a legitimate aim by the commission of that offence.

Paragraph 56

- (1) Any member of a criminal conspiracy, even though he did not attempt to commit the planned offence, is punishable by a term of imprisonment not exceeding 7 years if the planned offence is a felony or by a period of detention not exceeding 2 years or a fine not exceeding 150 dinars if the offence is a misdemeanor. This is as long as the law does not stipulate a specific penalty for conspiracy.
- (2) If the aim of the conspiracy is to commit a specified offence for which the penalty is less than that stipulated in the preceding Sub-Paragraph, then the penalty will not be greater than one quarter of the maximum limit prescribed for that offence.

Paragraph 57

- (1) Any person who attempts to set up a criminal conspiracy or who plays a major part in it is punishable by a term of imprisonment not exceeding 10 years if that offence is a felony and by a period of detention not exceeding 3 years or a fine or both if the offence is a misdemeanor.
- (2) If the aim of the conspiracy is to commit a specified offence and the penalty for that offence is less than that 15 stipulated in the previous Sub-Paragraph, then the penalty will not be greater than one quarter of the maximum limit prescribed for that offence.

Paragraph 58 - Any person who gives assistance to a conspirator or facilitates the meetings of a group of conspirators or gives them shelter or helps them in any way knowing the aim of the conspiracy is punishable by the penalty prescribed in Paragraph 56.

Paragraph 59 - Any person is exempted from the penalties prescribed in Paragraphs 56, 57 and 58 if he promptly notifies the public authorities of the existence of a criminal conspiracy and of the participants before any offence is committed as a result of that conspiracy and before those authorities have begun to investigate the conspirators.

If the authorities are notified after they have begun their investigations, then he is not exempted from the penalty unless the information leads to the arrest of the conspirators."

iii. Comments

The law includes nothing on the criminalization of the use of services of a victim of trafficking, however, it is worth noting that the approach to this issue remains unsettled in international law or practice. The Protocol does not refer to a third party's knowing or unknowing exploitation of a victim of trafficking, however the European Trafficking Convention, in Article 19,³⁹ requires state parties to consider criminalizing the knowing use of the services of a victim of trafficking, which would make the user an accessory to the crime.

39 Explanatory Report to Article 19: "Several considerations prompted the drafters to include this provision in the Convention. The main one was the desire to discourage the demand for exploitable people that drives trafficking in human beings. The provision targets the client whether of a victim of trafficking for sexual exploitation or of a victim of forced labour or services, slavery or practices similar to slavery, servitude or organ removal. Article 19 is intended not to prevent victims of trafficking from carrying on an occupation or hinder their social rehabilitation but to punish those, who by buying the services exploited, play a part in exploiting the victim. The provision is not concerned with using the services of a prostitute as such...It therefore does not affect the way in which Parties deal with prostitution in their domestic law." Available at <<https://rm.coe.int/168008371d>>. The Working Group on Trafficking in Persons of the Conference of the Parties to the UNTOC adopted the following recommendation in 2010 "States parties should adopt and strengthen practices aimed at discouraging demand for exploitative services, including considering measures to regulate, register and license private recruitment agencies; raising the awareness of employers to ensure their supply chains are free of trafficking in persons; enforcing labour standards through labour inspections and other relevant means; enforcing labour regulations; increasing the protection of the rights of migrant workers; and/or adopting measures to discourage the use of the services of victims of trafficking." Conference of the Parties to the UN Convention against Transnational Organized Crime, Activities of the Working Group on Trafficking in Persons, Report submitted by the Chair of the Working Group (for the fifth session, 18-22 October 2010), UN document CTOC/COP/2010/6 (10 August 2010), paragraph 66

2.4. Criminalization of Organizing Or Directing Persons to Commit Trafficking in Persons

i. International Standards

The Trafficking in Persons Protocol states in Article 5(2)(c):

"2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: [...]

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article."

ii. Iraqi Law

The Iraqi law on Trafficking in Persons Law provides in Article 6:

"First: A person who commits the crime of Human Trafficking under one or more of the following circumstances shall be punished by life imprisonment and penalty not less than 15 million, and not exceeding 25 million, Iraqi dinars;

[...]

Third: If the crime was committed by an organized crime group or of international nature"

iii. Comments

The Trafficking in Persons Law correctly address the criminalization of organizing or directing persons to commit.



2.5. Other Relevant Sources on Criminalization of Trafficking in Persons

i. The Penal Code

As noted in the different sub-section, the Iraqi Law on Trafficking refers to the Iraqi Penal Code when it comes to attempts, accomplices, and conspiracy, defenses of compulsion and necessity. The following related offences are criminalized, giving complementary tools to the judicial systems to combat trafficking in persons:

- Obstruction of justice (Part 2, Chapter 4, Sections 1, 2, 3, 4, 7)
- Falsification of documents and use of those documents (Part 2, Chapter 5, Sections 3 and 4)
- Acts of corruption committed by officials (Part 2, Chapter 6, Sections 1 and 3)
- Offences involving the adoption, sexual intercourse with girls under 18 (Part 2, Chapter 8, Section 5)
- Compelling another person under 18 years old to beg (Chapter 8, Section 8, paragraph 392)
- Sexual offences (Part 2, Chapter 9, Section 1)
- Incitement to prostitution (Part 2, Chapter 9, Section 2)
- Murder, assault leading to death, intentional wounding, beating and physical damage (Part 3, Chapter 1)
- Kidnapping and illegal detention (Part 3, Chapter 2, Section 1)
- Threats to commit felonies against a person (Part 3, Chapter 2, Section 3)
- Unlawful appropriation of documents (Part 3, Chapter 3, Section 2)
- Acts of deception (Part 3, Chapter 4)

ii. The Constitution

It is worth noting that in 2005, Iraq adopted a Constitution⁴⁰ prohibiting trafficking in persons and upholding human rights at stake in situations of trafficking. Indeed, Article 15 guarantees the right to enjoy life, security, and liberty for every individual. It adds that:

“Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.”

Article 29 provides that the economic exploitation of children in all its forms is prohibited, and it lays down the state's obligation to take necessary measures for their protection. All forms of violence and abuse in the family, school, and society are also prohibited. Pursuant to Article 30.1, the state...

“...shall guarantee to the individual and the family—especially children and women— social and health security, the basic requirements for living a free and decent life.”

Finally, the “liberty and dignity of man⁴¹ is to be protected.” Forced labor, slavery, slave trade, trafficking in women or children, and sex trade is prohibited under Article 37.3.

40 Iraqi Constitution available at https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en, unofficial translation

41 sic

iii. Labour Law 2015⁴²

- Article 1(12) defines “forced labour” as any work or service imposed on any person under threat of any sanction, and which this person did not volunteer to perform of his own free will.
- Article 6 states:

“Freedom of work is safeguarded and the right to work may not be restricted or denied. The State adopts the policy of promoting full and productive work and respects its fundamental principles and rights, whether in the Law or in the implementation, which include the following:

 - Freedom of association and the effective recognition of the right to collective bargaining*
 - Elimination of all forms of forced or compulsory labour.*
 - Effective abolition of child labour.*⁴³
 - Elimination of discrimination in employment and occupation”*
- Article 7 sets a minimum age of 15 for employment.
- Article 9-1: This law prohibits forced or compulsory labour in all its forms, including:
 - Slavery and bonded labour;
 - Secrete human trafficking, trafficking of immigrant workers, which is by nature a non-freely chosen work;
 - Domestic work, which includes compulsory factors.
- Article 11-1: The worker may resort to the Labour Court to file a complaint when exposed to any form of forced labour, discrimination or harassment in employment and occupation. 2) Shall be punished by imprisonment for a period not exceeding six months and a fine not exceeding one million dinars or by any of the two sanctions, whoever violates the provisions of the articles contained in this chapter relating to child labour, discrimination, forced labour and sexual harassment, as the case may be.
- Chapter 10 covers more specifically the protection of women workers and Chapter 11 the protection of minor workers. Articles 126 to 135 provide the legal framework for labour inspection.

The Labour law appears to cover forced labour in all its forms and represents a complementary set of rules to prosecute traffickers in Iraq. Whereas it equally protects men and women, the protection of children is insufficient as the law defines minor workers as a person who has reached the age of 15, which is contrary to the requirements set out by the Convention of the Rights of the Child, ratified by Iraq. It is therefore recommended to amend the law, specifically Article 1(20) and Article 7.

iv. Law on Combating Prostitution No. 8 of 1988⁴⁴

- Article 1: The following expressions shall mean:

Prostitution: The practice of fornication or sodomy with more than one person in exchange of payment.

Brokerage: The mediation between two persons with the intention of facilitating the act of prostitution in any way. This includes the incitement even with the consent or request of one of them. It also includes the exploitation for prostitution of a person wither complicit or under duress.

The Brothel: It is a place geared to the act of prostitution, facilitating, publicising, inciting or doing any act that leads to prostitution.”
- Article 2: Prostitution and Brokerage are banned. The Act criminalizes prostitution and brokerage, defined as:

The mediation between two persons with the intention of facilitating the act of prostitution in any way. This includes the incitement even with the consent or request of one of them. It also includes the exploitation for prostitution of a person wither complicit or under duress.”
- Article 4: The prostitute, if her practicing of prostitution is proved, shall be punished by lodging her into one of the reforming houses established for the direction and rehabilitation of women, for a period not less than three months and not to exceed two years.”

⁴² Labour Law available in Arabic at http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=96652 unofficial English translation available at: <http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/96652/114261/F-218842884/IRQ96652%20Eng.pdf>

⁴³ Article 1(20) defines “minor worker” as a person who has reached the age of 15, but not 18 years of age. Article 1(21) defines “child” as a person who has not reached the age of 15”

⁴⁴ Original Arabic version: <http://gipi.org/wp-content/uploads/prostitution-law-8-of-1988-ara.pdf> Unofficial translation, University of Utah: <http://gipi.org/2010/02/20/combating-prostitution-law-no-8-of-1988/>

• Article 5:

- One who kept, in some place, a male or a female of more than eighteen years of age for prostitution or sodomy by deception, coercion, force or threat shall be punished with imprisonment for a period not to exceed ten years.*
- If the age of the victim is less than eighteen years, the penalty shall not exceed fifteen years of imprisonment.*
- The court must decide on a fair compensation for the victim in both cases.”*

• Article 6:

“Every person with direct or indirect relations to a case initiated out of acts of brokering or prostitution or claiming a civil right initiated or resulting accordingly may be considered a party in the case.”

One of the first elements to be noted is that, although the wording of the law suggests that males and females can be victims of forced prostitution (Article 5), Article 4 imposes penalties on female sex workers only. In this sense, it appears that the law is discriminatory. The wording of Article 4 has also to be amended because the mere element of “prostitution” is enough to be convicted but no mention is made of forced prostitution or of other coercive circumstances that would render any conviction invalid. Without a review, this article may theoretically result in the criminalization of victims trafficking on the count of prostitution.

3. LIABILITY OF LEGAL PERSONS

i. International Standards

OHCHR recommendation:

“The nature of trafficking makes it especially important that liability for trafficking offences should extend to both natural and legal persons. Legal persons, in this context, might be commercial companies and corporations operating in a range of sectors such as tourism, entertainment, hospitality, labour recruitment, adoption and the provision of medical services.”⁴⁵

ii. Iraqi Law

Article 9 of the Iraqi Law on Trafficking in Persons states:

“First: A legal person who is proved to be an accomplice in a crime (committed in person, through an accomplice, or to his personal benefit) shall be punished by a fine not less than 5 million Iraqi dinars and not higher than 25 million Iraqi dinars, provided this punishment does not contravene a sentence determined against a person (authorized or responsible for) administering the legal person if this administrator was proven to have participated in the crime.

Second: A court may permanently or temporarily revoke the status, stall the activities, or close the Office of a legal person if it were proven that he has committed a criminal act prohibited by this law.”

The Iraqi Penal Code contains several provisions on the liability of legal persons:

“Part 1, Chapter 4: The criminal

Section 2, The liability of corporate bodies

Paragraph 80 - Corporate bodies other than the government and its official and semiofficial agencies are criminally liable for offences committed by their employees, directors or agents working for them or on their behalf. Such bodies may only be sentenced to a fine, confiscation or such precautionary measures as are prescribed by law for that offence. However, if the law prescribes a specific penalty for that offence other than a fine, then it may be substituted for a fine but that does not prevent the offender himself from being punished by the penalties prescribed by law for that offence. “

iii. Comments

The Law on Trafficking is Persons adequality address the issue of the liability of legal persons.

⁴⁵ Office of the High Commissioner for Human Rights, Human Rights and Human Trafficking, Factsheet no 26, 2014, p.35

4. AGGRAVATING CIRCUMSTANCES

i. International Standards

There is no specific standard in international law concerning the existence of aggravating circumstances, however it is common practice in legal systems.

ii. Iraqi Law

The Iraqi Law on Trafficking in Persons contains several articles on aggravating circumstances, as follows.

• Article 5:

“[...] Second: A person who commits the crime of Human Trafficking by the following means shall be punished by imprisonment not exceeding 15 years and penalty not exceeding 10 million Iraqi dinars:

- a. The use of any form of coercion, including blackmail, threat, and/or confiscation of travel or official documents.*
- b. The use of fraudulent means to deceive or victimize victims.*
- c. Giving or receiving money or privileges in exchange for approval from a person of authority or guardianship over the victim.*

• Article 6:

“First: A person who commits the crime of Human Trafficking under one or more of the following circumstances shall be punished by life imprisonment and penalty not less than 15 million, and not exceeding 25 million, Iraqi dinars:

- a. First: If the victim is under 18 years of age*
- b. Second: if the victim is female, or disabled*
- c. Third: If the crime was committed by an organized crime group or of international nature*
- d. Fourth: The crime was committed by kidnapping or torture*
- e. Fifth: The perpetrator is an immediate or second relative, guardian, or spouse of the victim*
- f. Sixth: The trafficking resulted in terminal illness or permanent disability to the victim*
- g. Seventh: The trafficking affected multiple persons or for a multiple of times*

h. Eighth: The trafficking was carried out by a government employee or a person commissioned to public service

i. Ninth: Exploitation of influence or a victim's weakness or need.”

• Article 7:

“A person who committed one of the following acts shall be punished by imprisonment of not less than 3 years or by a penalty not less than 10 million, and not more than, 20 million, Iraqi dinars, or both penalties:

- a. First: Established or managed an internet website to engage in human trafficking*
- b. Second: Engaged or facilitated a human trafficking contract using the internet”*

• Article 8:

“If the act of Human Trafficking leads to death of the victim, the punishment shall be capital punishment.”

iii. Comments

- The article's indication of aggravating circumstances is positive, as it acknowledges the different levels of seriousness of the crime of trafficking in persons. For example, the article implies consideration for women and girls, children, wounded and sick persons, and persons with a disability.
- Moreover, the article's reference to the implication of “government employee or persons commissioned to public service” is a positive step toward effective counter-trafficking policy at all levels. It excludes, at least on paper, a sense of impunity for government employees, which leans toward more deterrence and decreases the likelihood of an abuse of power.
- References to the internet are further welcome as they reflect the current challenges legal systems face in confronting modern-day methods of trafficking in persons.

5. JURISDICTION

i. International Standards

Article 15 of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto provides: “

- Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when: (a) The offence is committed in the territory of that State Party; or (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.*
- Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when: (a) The offence is committed against a national of that State Party; (b) The offence is committed by a national of that State Party or a state-less person who has his or her habitual residence in its territory; or (c) The offence is: (i) One of those established in accordance with article 5, para-graph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory; (ii) One of those established in accordance with article 6, para-graph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.*
- For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.*
- Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.*

- If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.*
- Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.”*

ii. Iraqi Law

The Law on Trafficking in Persons is silent when it comes to the scope of jurisdiction. However, it is fully addressed in relevant paragraphs of the Iraqi Penal Code. The Iraqi Penal Code contains the following relevant provisions:

“Part 1, Chapter 1, Section 1:

The Legality of crime and punishment

Sub-section 2: Application of the law in respect of place

1. Territorial jurisdiction

Paragraph 6 - *The provisions of this Code are enforceable in respect of offences committed in Iraq. An offence is considered to have been committed in Iraq if a criminal act is committed there or if the consequence of that act is realized or is intended to be realized there. In all circumstances, the law applies to all parties to the offence of which all or part occurs in Iraq even though any of those parties are abroad at the time and regardless of whether he is a principal or accessory to the offence.*

Paragraph 7 - *Iraq's regional jurisdiction includes the territory of the Republic of Iraq and all areas under its control including its coastal waters and airspace as well as any foreign territory occupied by the Iraqi army in so far as any offence affects the security or interests of the army.*

Iraqi ships and aircraft are subject to the territorial jurisdiction of the Republic of Iraq wherever they may be.

Paragraph 8 - This Code is not applicable to offences committed on foreign ships in Iraqi ports or coastal waters unless the offence affects the security of the region or the offender or victim is Iraqi or if assistance is requested from the Iraqi authorities. The Code is not applicable to offences committed on board foreign aircraft in Iraqi airspace unless the aircraft lands in Iraq after the offence has been committed or unless it affects the security of Iraq or the offender or victim is an Iraqi or assistance is requested from the Iraqi authorities.

[...]

3. Personal jurisdiction

Paragraph 10 - Any Iraqi citizen who commits an act abroad and does so as principal or accessory to an offence that is considered a felony or misdemeanor under the provision of this code is punishable in accordance with its provisions if he is now in Iraq and if the offence is punishable under the laws of the land in which it is committed.

This provision is applicable whether or not the offender has obtained Iraqi citizenship after the commission of the offence or whether he had Iraqi citizenship after the offence was committed and subsequently lost that citizenship.

Paragraph 11 - This Code is not applicable to offences that are committed in Iraq by persons who benefit from statutory protection under the terms of international agreements or international or domestic law.

Paragraph 12

- (1) This Code is applicable to any public official or agent of the Republic of Iraq who commits abroad a felony or misdemeanor stipulated by this Code in the course of his duty or as a consequence thereof.
- (2) It is also applicable to Iraqi diplomats who commit abroad a felony or misdemeanor stipulated by this Code while enjoying the protection conferred upon them in accordance with international law.

4. Universal jurisdiction

Paragraph 13 - In circumstances other than those stipulated in paragraphs 9, 10 and 11, the provisions of this Code are applicable to all those who enter Iraq subsequent to committing an offence abroad whether as principals or accessories to the following offences: Destroying or causing damage to international means of communications or trading in women, children, slaves or drugs. (underlining added)

Paragraph 14

- (1) No legal proceedings may be brought against any person who commits an offence outside Iraq except by permission of the Minister of Justice. Such person cannot be tried if a final judgment to acquit or convict him has already been given by a foreign court and any sentence imposed on him as a result of that trial has been served in full or if the relevant proceedings or such sentence has been annulled or quashed in accordance with applicable law and the final sentence or annulment of his trial or quashing of his sentence falls within the jurisdiction of the law of the land in which the judgment was given.
- (2) If the penalty imposed is not served in full or if a verdict of not guilty is given in respect of an offence stipulated in Paragraphs 9 and 12 arising from the fact that the offence is not punishable under the law of that land, then legal proceedings may be brought against the accused in Iraqi courts.

Paragraph 15 - When the sentence imposed on the convicted person has been served, the length of time he has spent in detention or prison abroad for the offence for which he was convicted, will be taken into consideration."

iii. Comments

The Law on Trafficking in Persons is silent when it comes to the scope of jurisdiction. However, it is fully and adequately addressed in the Iraqi Penal Code.



PART III

REVIEW OF THE PROTECTION RESPONSE IN IRAQ: THEORY AND PRACTICE IN THE FIELD

1. IDENTIFICATION

1.1. In Theory

International standards hold that “a failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights,” (guideline 2) therefore, the first step to accessing is identification. Indeed, it is a state’s obligation to identify victims of trafficking accurately and quickly, and to establish the mechanisms and institutions through which to do so correctly, ensuring trafficking victims are treated appropriately — and not confused, as often is the case, with smuggled persons (see page 6 for more information on the difference between smuggling and trafficking in persons).

While victims of trafficking are each entitled to protection under international law, children are granted special measures of protection and support. For instance, there is a growing acceptance that a victim is presumed to be a child if there are reasons for believing so and if there is uncertainty about his or her age, until another determination may be made. This is essential as victims of trafficking in persons often do not maintain possession of their own identification documents. This presumption of age is linked to the presumption of status. That is, a child who may be a victim of trafficking is presumed to be a victim unless or until another determination may be made, conclusively. Incorporating each of these principles, UNICEF guidelines hold that:

- States are to establish effective procedures for the rapid identification of child victims, including procedures to identify child victims at ports of entry and other locations;
- Efforts are to be made to share information between relevant agencies and individuals in order to ensure children are identified and assisted as early as possible; and
- Social welfare, health or education authorities are to contact the relevant law enforcement authority where there is knowledge or suspicion that a child is being exploited or trafficked or is at risk of exploitation or trafficking.

Numerous provisions in international law reiterate this and further delineate a state’s responsibility toward child victims of trafficking. For example, the 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, states in paragraph 65:

“In a case where the age of a victim is uncertain and there are reasons to believe that the victim is a child, a State party may, to the extent possible under its domestic law, treat the victim as a child in accordance with the Convention on the Rights of the Child until his or her age is verified.”

The Convention on the Rights of the Child, the European Trafficking Convention, Article 10, and the Explanatory Report of the Council of Europe to the Convention, paragraph 136, state:

“Where the age of the victim is uncertain and there are reasons to believe that the victim is a child, the presumption shall be that the victim is a child. Pending verification of the victim’s age, the victim will be treated as a child and accorded all stipulated special protection measures.”⁴⁶

Specific requirements or legal and operational gaps concerning special and additional measures for child victims of trafficking will be addressed hereinafter in each sub-section as relevant. Chief among these gaps is the fact that the principle of the “best interest of the child” is not enshrined in Iraqi law at any level.

1.2. Legal and Operational Gaps in Practice

i. General Comments

- As discussed ahead in section 2.2, only one shelter for victims of trafficking exists in Iraq, based in Baghdad (four others exist in the KRI but they are not specifically dedicated to victims of trafficking). While the center has the capacity to accommodate 48 women, only eight (each a migrant worker or ISIL survivor, no IDPs, or anybody coming from the IDP or refugee camps) were present upon a visit in mid-2019. The reason for the low number is at least partially related to the issues of shelter access being conditional on recognition of the case by a judge. The Law on Trafficking in Persons does not require this threshold, nor does international law. While the consultant was unable to obtain this guideline in writing following extensive consultations with government actors, senior government officials stated it originated with the Ministry of Interior in response to the government and, particularly, the shelters’ lack of capacity and resources. If too many victims were recognized and required care, the officials explained, the demand would overwhelm the government.
- Progress in detecting cases is, in the first place, stymied by a lack of trust in the police, often rooted itself in a lack of police agent training on trafficking in persons. Cases are often redirected within the judicial system as cases of rape, forced labor or, more concerning, cases against the victim surrounding prostitution. This lack of capacity acts as a deterrent for victims to report.
- Due to instances of impunity, fear of reprisals, and the lack of protection at times after reporting, during investigations, and after trial, victims are often afraid to report, therefore depressing figures. Existing hotlines for reporting are not used or not in service. In camps, when victims are aware of the IOM hotline to report cases, they are deterred from accessing it due to a lack of phone credit, access to a phone, and a safe space to call.
- Specific issues arise when it comes to children:
 - » They may appear to be 18 or older.
 - » Their ID, birth certificate or passports may have been destroyed, lost, stolen and they face great difficulties to have them replaced.

- » They may be carrying false identity papers that misstate their age.
- » They may lie about their age because told to do by their traffickers or misrepresentation that they will safer by doing so.
- » They may lie because they are afraid of being sent back home (potential family reprisals).

ii. IOM-Specific Gaps

- IOM’s detection rate is low: internal records show that IOM logged only 103 cases between January 2018 and August 2019, each out of camp. This is a concerning fact given credible allegations of trafficking and exploitation in camps, including camps managed by IOM, by state and other actors. This is also concerning given the fact that Iraq counts more than 450,000 internally displaced persons (IDPs) in formal camp locations, and more than 120,000 in informal settlements and collective centers throughout the country.⁴⁷
- For example, in the IOM-managed AAF camp in Falluja, armed, non-state actors are known to “help themselves” to vulnerable women in the camp through a known (but as of mid-2019, unfixed) road-sized gap in the camp fence. Movement in and out of AAF camp is often regulated by security forces, who in some reported cases demanded sex from IDPs before allowing them access in or out of the camp. Several other incidents were reported by NGOs operating in the camp when it came to movements in and out of the camp that was made conditional for something in exchange. Similarly, in Haj Ali camp, which was managed by IOM at the time of the drafting of this report but has since closed, there were allegedly high rates of sexual exploitation and survival sex. The informal site of Haidariya, where IOM provides some services, is regularly the stage of arrests by state security forces with no intervention in-situ or follow-up from IOM staff. There is, for instance, no tracking of who is arrested, when the arrest takes place, or where they are taken. The Protection focal point of Haidariya also never alerted the Protection team in Erbil.

46 UNICEF Guidelines, guideline 3.2

47 Iraq CCCM Cluster https://data2.unhcr.org/en/situations/iraq_cccm

- Some camp and IOM staff in field positions and the head offices in Erbil and Baghdad demonstrated a lack of knowledge of what constitutes trafficking in persons (for example, staff confuse trafficking with smuggling of migrants; others were unaware that child-soldiers, as is prevalent in Najaf, are considered trafficking victims).
- IOM partners, including the Protection Cluster, often confuse migrant smuggling with trafficking in persons and similarly lack interest in trafficking cases. When cases are identified, they are referred to GBV partners; never IOM. This seems to be due to a lack of awareness about trafficking in persons, limited knowledge of the IOM team or the IOM hotline, or the Protection Cluster's apparent lack of trust in the IOM Protection team.

2. OBLIGATION TO REMOVE FROM RISK OF HARM

2.1. In Theory

- A state's first and most urgent obligation in cases of trafficking in persons is to remove victims from any situation which may cause them further harm, including protecting them from future exploitation, re-trafficking, or re-victimization at the hands of the initial perpetrator or anybody else, including first responders and counter-trafficking actors. International law upholds the principle of due diligence on that matter, states have to take all necessary and reasonable measures to this end. In most cases, this requires state actors to:
 1. Physically remove the victim from the risk of harm by placing him/her in a safe place/shelter
 2. Provide immediate medical care
 3. Conduct a risk assessment with regards to potential threats, reprisal or retaliation measures against the victims, his/her relatives, counter-trafficking actors involved in the protection response, and any informants and witnesses involved in the case.

- This is discussed extensively in case law, including in *Rantsev v. Cyprus and Russia*, paragraph 256, argued before the European Court of Human Rights.⁴⁸

States' obligations include protecting the victim's identity and privacy which, if compromised, increases the risk of reprisals against the victim, including from his or her family related to victim shaming, traditions, misperceptions of trafficking victims, and honor crimes. Guideline 6 in the Recommended Principles and Guidelines emphasize this by stating: "There should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible while taking into account the right of any accused person to a fair trial." Complementing this, Article 6 of the Trafficking in Persons Protocol includes that states shall protect the privacy of victims of trafficking "in appropriate cases and to the extent possible under domestic law." Finally, paragraph 10 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation highlights victims have the "right to be treated with humanity and respect for their dignity and human rights — and are entitled to measures that ensure their well-being and avoid revictimization."

This responsibility, as discussed in section 1.1. above, is greater in cases involving children or victims presumed to be children. In such instances, Guideline 8 of the Recommended Principles and Guidelines notes children are entitled to "appropriate assistance and protection with full account being taken of their special rights and needs" given the higher standard of protection and support required to them. This includes the provision of immediate assistance, including security, food, safe shelter, healthcare, counselling, and social services by trained professionals, tailored appropriately to a child's age, sex, ethnic or cultural identity, and any special needs he or she may have.

⁴⁸ "In their written observations, the Cypriot Government confirmed that no measures were taken in the period prior to or following Ms. Rantseva's death to ascertain whether she had been a victim of trafficking in human beings or whether she had been subjected to sexual or other forms of exploitation. However they denied that there had been a violation of Article 4 of the Convention. They conceded that there were positive obligations on the state which required the penalisation and effective prosecution of any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. However, they argued by analogy with Articles 2 and 3 that positive obligations only arose where the authorities knew or ought to have known of a real and immediate risk that an identified individual was being held in such a situation. These positive obligations would only be violated where the authorities subsequently failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

2.2. Legal and Operational Gaps in Practice

- As mentioned in the previous subsection focused on the identification of victims, there is only one shelter in federal Iraq, which is in Baghdad, and three in the KRI, one each in Erbil, Dohuk, and Sulaymaniyah. Notably, the shelters in the KRI are not specifically for victims of trafficking, but serve as temporary accommodations for women and girls who are threatened, have social issues, or are survivors of violence, including gender-based violence, and human trafficking (though usually for foreigners).
- As discussed above in section 1.2, these shelters only accept victims of trafficking fitting one of these profiles — and exclusively women and girls — following a decision from a judge. This process, requiring a preliminary investigation, extends the time between the reporting of a case and the victim's removal from harm.
- Shelters operate as temporary accommodation facilities and, afterwards the shelters defer security to the victim to the family, which is contacted once a victim arrives. The primary risk assessment consists of asking the victim if they are comfortable contacting the family, ostensibly avoiding cases in which the family is involved in the initial trafficking.
- Shelters face a concerning lack of human and financial resources and lack security measures. Employees of the shelters have been threatened, increasing the risk of reprisals for staff, and there are often no female guards present at night to assist a victim in the event of an emergency. This has been reported as crucial by a key informant who claimed that victims should be accompanied during hospital visits at night, that there are no Ministry of Health staff in the shelters, and that there is no coordination with hospitals and emergency services for support emergency medical cases. Separately, food supplies rely solely on donations and are often limited. Finally, shelter staff are often not trained on protection cases generally and trafficking cases more specifically, and no counselling or social services are available to victims. That said, it was reported that UNICEF social workers and lawyers from nearby homeless shelters sometimes visit the centers to support or represent the victims.
- Movement is severely restricted for victims generally, but especially so for victims without documentation, which is often the case.

3. NON-PUNISHMENT AND NON-CRIMINALIZATION OF VICTIMS OF TRAFFICKING

3.1 International Standards

Guideline 2 of the Recommended Principles and Guidelines holds that "trafficked persons [should not be] prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons." Such prosecutions, resulting in detaining, deporting foreign victims, or denying them full rights to participate in legal proceedings or access to justice and effective remedies, constitutes a failure on behalf of the state.

While the Trafficking Protocol does not specifically address prosecution for related offenses, the implementation body recommended that "States parties should ... consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts." This recommendation was endorsed by human rights treaty bodies as well as the UN General Assembly and the Human Rights Council.

3.2 Iraqi Law

The Iraqi Penal Code provides:

... **"Part 1, Chapter 4: The criminal**
 ... **Section 1: Criminal liability and exemptions from it**
 ... **2. Compulsion**
 ... **Paragraph 62** - Any person who is compelled to commit an offence by force or under threat so that he is unable to resist is not criminally liable.
 ... **3. Necessity**
 ... **Paragraph 63** - Any person who commits an offence out of the necessity to protect himself or others or his property or the property of others from a significant or imminent danger and who had not himself deliberately caused that danger and has no power to prevent it by any other means is not criminally liable provided that the act contributing to the offence is proportionate to the danger from which he is protecting himself. Any person who is required by law to confront that danger is not considered to be acting out of necessity."

3.3 Legal and Operational Gaps

While Iraqi law is in line with international standards, it is not always the case in practice, and victims are at times prosecuted under residency law and prostitution law. Lex specialis should apply in relation to the Trafficking in Persons Law.

4. DETENTION OF TRAFFICKED PERSONS

4.1 International Standards

The international definition is: “any person deprived of personal liberty except as a result of conviction for an offence.” Places of detention can refer to prisons, police stations, immigration detention facilities, shelters, child welfare facilities and hospitals. Routine detention—that is, detention applied generally and as a matter of policy, law or practice, and case-by-case detention—is always unlawful and constitutes a violation of the right to freedom of movement and in most, if not all, circumstances the prohibitions on unlawful deprivation of liberty and arbitrary detention. Individual cases of detention shall be subject to the legal principles of necessity, legality, and proportionality (criminal justice imperatives, public order requirements or victim safety needs). Detention is a last resort and is in response to credible and specific threats to an individual victim’s safety. Even then, there is a wide range of protection measures available to a detainee, including judicial oversight, and the right to appeal/challenge the detention.

Children in international law have a higher protection standard, based on the Convention on the Rights of the Child, European Trafficking Convention and Recommended Principles and Guidelines, and UNICEF Guidelines. These stipulate that:

- *“The trafficked child should not be criminalized in any way and should not be liable for prosecution for any status-related offences;*
- *The trafficked child should never be placed in a law enforcement detention facility, such as a police cell, prison or special detention centre for children.*
- *Any decision relating to the detention of children should be made case by case and in their best interests. Any detention of a child victim of trafficking should, in all cases, be for the shortest possible time and subject to independent oversight and review.*
- *Care and support should be made available to trafficked children as a right. It should never be conditional on their cooperation with criminal justice agencies.*

- *Children should not be coerced into receiving care and protection, including medical assistance and testing, unless it can be demonstrated, case by case, that this is in their best interests;*
- *Every child under the jurisdiction or control of a State is entitled to care and protection on an equal basis. This means that non-national child victims of trafficking are to enjoy the same rights as national or resident children.*
- *The views of child victims of trafficking should be respected and given due weight and they should be provided with information about their situation and entitlements;*
- *There should be no arbitrary interference with the child’s privacy. States should ensure that the identity, or details allowing the identification, of a child victim of trafficking are not made public, save in exceptional circumstances.*
- *States should provide for representation of an identified (or presumed) child victim of trafficking by a legal guardian, organization or authority, for example to ensure that the child’s best interests remain the paramount consideration in all actions or decisions; to ensure all necessary assistance, support and protection are provided; to be present during any engagement with criminal justice authorities; to facilitate referral to appropriate services; and to assist in identifying and implementing a durable solution.*
- *Measures should be in place to assist child victims of trafficking to participate, safely and meaningfully, in court processes. These may include regularization of legal status; provision of information, legal assistance and legal representation; and taking steps to minimize any trauma that such participation could cause, for instance by providing alternatives to direct testimony.”*

4.2 Legal and Operational Gaps

OHCHR has identified common grounds for detention in Iraq that violate international norms and standards,⁴⁹ and the consultant has been able to confirm such during field visits and in conversations with key informants. These are:

- *“Victims are often not correctly identified and are detained as irregular/undocumented migrants until they face deportation.*
- *In many cases, even when victims are correctly identified, they are detained as a result of their engagement in illegal activities such as prostitution or unauthorized work.*
- *In other reported cases, victims that are correctly identified and do not face prosecution are placed in a shelter or other welfare facility and prohibited from leaving. The reported justification for this detention is the need to provide shelter and support to the victim, protect victims from further harm, and the need to secure their cooperation in the investigation and prosecution of traffickers.”*

Another major issue in Iraq as of late-2019 is the fate of men, women, and children forcibly recruited by ISIL. While these are victims, they are often considered terrorists and therefore detained and prosecuted as such. One argument is that it is impossible to determine who is a victim and who is not, and any flexibility could create an opportunity for former fighters to claim they were in fact victims and escape justice. These individuals fall exclusively, according to key informants, under the Anti-Terrorism law and are prosecuted by other specialized court.

5. ASSISTANCE AND SUPPORT, INCLUDING MEDICAL ASSISTANCE, INFORMATION, AND INDEPENDENT LEGAL ADVICE — AND IN A LANGUAGE THAT THE VICTIMS UNDERSTAND

5.1 International Standards⁵⁰

International standards concerning assistance and support to victims hold that victims of trafficking:

- Shall be provided with information on their rights so that they can make an informed decision about what to do.
- Have the right to refuse care and support Guideline 6 of the Recommended Principles and Guidelines holds that: “trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases including HIV/AIDS.”
- Have the non-negotiable right to protection and assistance for the duration of their involvement, including medical, counselling, and free independent legal advice, and access to remedy, including real and effective access to compensation for harm and restitution for loss as a result of having been trafficked. Each is not conditional on and is irrespective of his/her capacity or willingness to cooperate with criminal justice authorities.
- Have the right to information on their legal rights, relevant court and administrative proceedings, and a genuine opportunity to consider legal options, including a reflection period to consider whether they wish to cooperate with criminal justice action.
- Have a legitimate interest in legal proceedings against their traffickers, regardless if the victim is unwilling or unable to testify. Should the victim desire to, however, states must make sure victims are able to participate in legal proceedings freely, safely, and based on adequate information. They further have the right to provide evidence in written statements or in person as part of a

49 Office of the High Commissioner for Human Rights, Human Rights and Human Trafficking, Factsheet no 26, 2014, p.18

50 The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

- Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
- Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
- Providing proper assistance to victims throughout the legal process;
- Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
- Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.” Source: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 6.

trial and be called upon to provide a victim statement as part of a sentencing hearing. In civil proceedings against their exploiters, victims of trafficking may be applicants and/or witnesses.

- The right to the protection of privacy and identity in appropriate cases, which considers the right of accused persons to a fair trial.

5.2 Legal and Operational Gaps

- Contrary to international standards, Article 48 of the Penal Code in Iraq requires mandatory reporting of rape, which infringes on a victim's right to privacy and removal from the risk of harm/revictimization, and the right to refuse care and support. This is particularly relevant in cases of rape.
- Access to services is conditional on documentation possession, which will preclude many victims who lose access to their documents in the course of being trafficked.
- Victims have no right to legal assistance, much less free legal services, and receive no information on their rights, at least as a part of standard procedure. There is no existing case of compensation and remedy as of November 2019, and victims are not provided with protection and assistance during investigation and legal proceedings.
- Victims of trafficking do not receive legal support from government or shelters. IOM and some partner IO and INGO may accompany victims to court and provide legal support in complex cases, though this is generally an exception.
- The UNODC Database, SHERLOC, has no case law on trafficking in persons in Iraq, which is also confirmed by the 2019 Iraq Trafficking in Persons Report of the US State Department.

6. REMEDIES

6.1 International Standards

Victims of trafficking are often exploited for little or no money over long periods of time, not including debt bondage or potential fees for transportation/movement. They face a higher risk of injuries or contracting illnesses during exploitation that would require medical care, including MHPSS. As such, OHCHR notes that some countries have expressly granted victims of trafficking the right to private action against their traffickers and have included mandatory restitution to trafficked persons as part of the criminal sentencing of traffickers. Other countries grant victims the right to bring civil action against their traffickers, regardless of their nationality or migration status.

States are responsible for the violation of their international legal obligation, as written in part 1 of the report:

- If the state was not directly involved, but it failed to discharge its obligation to prevent the harm and/or to respond appropriately (for example, failure to investigate and prosecute trafficking; failure to take measures to prevent trafficking).
- Recommended Principles and Guidelines stipulates that “trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies” (guideline 9).
- The state's obligation is three-fold, covering human rights law, law relating to (violence against/special protection for) women, and law on trafficking in persons.
- Furthermore, human rights treaties require states to provide access to remedies for human rights violations. If a treaty provides a right to remedy, failure to provide it constitutes, in and of itself, an additional and separate breach of the law.
- The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 notes that victims of crime (which would include victims of trafficking) are to be treated with compassion and respect for their dignity; that they are entitled to access to justice and fair treatment; that judicial and administrative processes should be responsive to their needs; and that those responsible for the harm, including the state if it can be deemed responsible, should make appropriate restitution to the victim. If compensation is not fully available from the offender, the state should endeavor to provide compensation from other sources when the victim has sustained serious injury (or to the family if the victim has died or become incapacitated). Finally, it encourages the establishment of national funds for compensation to victims.

- Complementing this, the Basic Principles and Guidelines on the Right to a Remedy and Reparation, 2005 (UNGA) ways out rules on remedies and reparation applicable to human rights violations committed by or involving states, to promote justice by redressing violations:

- *States have the general obligation to ensure respect for and to implement human rights law, including an obligation to ensure equal and effective access to justice and availability of remedies.*
- *Victims have the right to a remedy for gross violations of human rights, a term that would incorporate the most serious cases of trafficking, includes the right of access to justice, the right to reparation for harm suffered, and the right of access to information concerning violations and reparation mechanisms. Access to justice is seen as including protection of victims' privacy and safety in the course of any legal proceedings, and well as measures to ensure that victims can exercise their rights to a remedy.*

- The Trafficking Protocol requires state parties to ensure that their domestic legal systems contain measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered (art. 6.6).
- Finally, a state's obligation to provide effective and appropriate remedies to victims of trafficking is upheld repeatedly by the General Assembly and the Human Rights Council and human rights mechanisms.

Further to this, the Special Rapporteur on trafficking in persons has proposed a set of draft basic principles on the right to an effective remedy for trafficked persons:⁵¹

“1. Rights and obligations

1. *Trafficked persons as victims of human rights violations have the right to an effective remedy for harms committed against them.*
2. *All States, including countries of origin, transit and destination, are obliged to provide or facilitate access to remedies that are fair, adequate and appropriate to all trafficked persons within their respective territory and subject to their respective jurisdiction, including non-citizens, for harms committed against them.*
3. *The right to an effective remedy encompasses both a substantive right to reparations and procedural rights necessary to access reparations.*
4. *In substance, trafficked persons should be provided with adequate reparations for the harms suffered, which may include restitution, compensation, recovery, satisfaction, and guarantees of non-repetition.*
5. *Trafficked persons should also be provided with access to a competent and independent authority in order to successfully obtain reparations. This necessitates, at a minimum, the provision of:*
 - a. *existence of and modalities for accessing reparation mechanisms;*
 - b. *Legal, medical, psychological, social, administrative and other assistance necessary in seeking remedies;*
 - c. *A reflection and recovery period, followed by residence status while trafficked persons seek remedies.*

51 “Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo” (A/HRC/17/35), annex I.

2. Realizing the right to a remedy

6. States shall:

- Ensure that adequate procedures are in place to enable quick and accurate identification of trafficked persons and provide adequate training to law enforcement and other agencies that might come in contact with trafficked persons;
- Ensure that trafficked persons are not subjected to discriminatory treatment in law or in practice on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including their age, their status as victims of trafficking, their occupation or types of exploitation to which they have been subjected;
- Give due consideration to individual circumstances of trafficked persons to ensure that remedies are centred on the empowerment of trafficked persons and full respect for their human rights. At a minimum, States should 'do no harm' and ensure that remedial proceedings are not detrimental or prejudicial to the rights of trafficked persons and their psychological and physical safety.

Restitution

7. States shall:

- Place the best interests of trafficked persons at the centre in providing measures of restitution;
- Provide trafficked persons with temporary or permanent residence status as a form of remedy where a safe return to the country of origin cannot be guaranteed, may place them at risk of persecution or further human rights violations, or is otherwise not in their best interests;
- Effectively address the root causes of trafficking in order to ensure that trafficked persons are not returned to the pre-existing situation which places them at risk of being re-trafficked or further human rights violations.

Recovery

8. States shall:

- Provide a non-conditional reflection and recovery period, during which trafficked persons are provided with measures necessary for the physical, psychological and social recovery, including, but are not limited to: appropriate housing, counselling and information about their situations and legal rights; medical, psychological and material assistance; and employment, educational and training opportunities;
- Ensure that trafficked persons' access to assistance and other benefits are under no circumstances dependent upon their cooperation in legal proceedings.

Compensation

9. States shall:

- Ensure that laws, mechanisms and procedures are in place to enable trafficked persons, if they desire, to:
 - Obtain civil damages for trafficking-related offences, including breaches of labour laws;
 - Secure awards or orders from criminal courts for compensation from persons convicted of trafficking-related offences;
 - Gain access to compensation from the State for injuries and damages.
- Address the common obstacles for trafficked persons to obtain compensation for their material and non-material damage. To this end, they should ensure that:
 - All trafficked persons have a legally enforceable right to obtain compensation, irrespective of their immigration status and of whether their perpetrators have been convicted;
 - Trafficked persons are fully informed of their legal rights, including their rights to have access to remedies through judicial, labour and administrative proceedings, promptly and in a language and form they understand;

- Trafficked persons seeking to access remedies are provided with necessary assistance to this end, including social assistance, free and qualified legal aid and representation, and, where necessary, qualified interpreters, regardless of their immigration status;
- Trafficked persons are allowed to lawfully remain in the country in which the remedy is being sought for the duration of any criminal, civil, labour or administrative proceedings, without prejudice to any claim they may have to the right to remain on a more permanent basis as a remedy in itself;
- Laws and procedures are in place to support the seizure of the proceeds of trafficking and confiscation of traffickers' assets, and explicitly indicate that such proceeds and assets are intended in the first instance to compensate trafficked persons and in the second instance for general provision of remedies to trafficked persons;
- Effective measures are in place for the enforcement of reparation judgements including foreign judgements.

- In cases of trafficked women and girls who have been subjected to sexual and gender-based violence, States should take into account potential risks of psychological harm, stigma and communal and family ostracism that judicial proceedings may impose on them and provide measures to afford adequate protection to those women and girls affected, while creating opportunities to seek compensation through non-judicial avenues.

3. Trafficked children

11. States shall:

- Ensure that the best interests of the child are a primary consideration in providing trafficked children with remedies, taking into account the individual circumstances of the child, including his or her age, upbringing, ethnic, cultural and linguistic background and protection needs;
- Respect the child's right to express his or her views freely in all matters affecting the child. To

- this end, States should provide trafficked children with effective access to information on all matters affecting their interests, such as their situation, entitlements, services available and the family reunification and/or repatriation process;
- Take measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with trafficked children on specific rights and obligations in cases involving children."

6.2 Legal and Operational Gaps

No case on trafficking as such exists. On that note, it is worth mentioning that IOM has an ongoing project focused on accessing reparations for survivors of conflict related sexual violence.

7. NO DISTINCTION BETWEEN THE RIGHTS OF NATIONAL AND NON-NATIONAL VICTIMS OF TRAFFICKING AS WELL AS SAFE AND VOLUNTARY RETURN

7.1 International Standards

All state obligations mentioned in this report equally apply to national and foreign victims as developed and discussed in previous sections of this report. Victims of trafficking are vulnerable to higher risks, including:

- Higher or specific risk because of immigration status, for those unlawfully present in a country. Without regularization of their legal/residency status, victims also risk arrest and detention in immigration facilities or shelters, risking deportation, despite a state's obligation not to return victims when they are at serious risk of harm, including from intimidation, retaliation, and re-trafficking.
- An inability to access revenues or sources of subsistence to afford housing and work opportunities.
- Re-trafficking, further exploitation, and a risk of intimidation and reprisals, which creates a fear of participating in legal proceedings against their traffickers.

Given this, international recommendations include:

- Granting victims of trafficking without lawful migration status a temporary residence permit linked to (usually criminal) proceedings against traffickers. Such visas usually require victim cooperation and terminate once legal proceedings are completed and the victim is reasonably safe from harm. Indeed, given a victim's right to remain during legal proceedings, states should ensure that the return of trafficked persons does not jeopardize the initiation and/or successful completion of any legal proceedings, including compensation claims. As OCHR notes, the presence of the trafficked person in the country in which remedies are being sought is often a practical –and sometimes a legal– requirement for that person to secure remedial action. If deportation is to occur, the state should, at the very least, delay it and temporarily regularize the victim's legal status until the victim has been able to participate in the relevant legal proceedings.
- Granting victims of trafficking, without lawful migration status, a temporary residence permit on social or humanitarian grounds that may be related to, for example, respect for the principle of non-refoulement.

7.2 Legal and Operational Gaps

- The main issue surrounding cases with foreign victims in Iraq is that the only assistance they received, according to the available information to date, was aimed at organizing their repatriation. In theory, Iraq would have the responsibility to conduct a risk assessment but, in practice, whenever IOM oversees case management and subsequent repatriation, it does not seem to be the case. As a result, foreign victims being repatriated are completely deprived of their rights to access justice and remedies. Part of this rushed process is related to the victim shelters' low capacity. As staff have explained, all foreigners have been quickly repatriated without any other form of care or assistance. They are in the sense "the priority": as they are leaving the shelter, staff can then take care of the Iraqi victims.
- Victims of trafficking smuggled by their traffickers into Iraq face a greater risk, not to say a systematic risk, of being prosecuted for illegal stay in the country. Similarly, if they came in Iraq legally but were then kept captive by their traffickers and overstayed, victims risk similar legal consequences. In addition, significant fines are imposed on the victims for illegal stay in the country pursuant to the residency law. On that last point, during a workshop with IOM in July 2019, representatives of the Iraqi government committed to ending such measures for victims of trafficking. As of August 2019, the measure was still not

- Providing the "safe and preferably voluntary return" for trafficked persons, implying a range of obligations on origin and destination countries. First, this implies that the repatriating state will conduct pre-return risk assessments, ensuring the victim's return will, in fact, be safe and in line with state parties' obligation "to protect victims of trafficking ... especially women and children, from revictimization," as noted in the Trafficking Protocol. The Trafficking Protocol notes that state parties should conduct return "with due regard for the safety of [the] person and for the status of any [related] legal proceedings," and that the country of origin should accept a trafficked national or resident's return "without undue or unreasonable delay" and "with due regard for the safety of that person." This includes cooperation in the return and verification of the victim's nationality or residence, and the issuance of necessary travel documents, if applicable. Finally, the country of destination shall ensure that such return occurs voluntarily, according to the Trafficking Protocol and the European Trafficking Convention.

implemented. As explained earlier, and as it is recommended by UNHCR, victims should not be prosecuted for offences or crimes related to their situation of trafficking.

- Foreign victims of trafficking should get a chance to seek asylum. Indeed, asylum claims are to be considered regardless of the means of entry into the territory. Furthermore, trafficking in persons could be a sufficient basis of a claim for refugee status in application of the principle of non-refoulement and the 2006 UNHCR Guidelines on international protection.



PART IV

RECOMMENDATIONS

1. RECOMMENDATIONS TO IRAQ

- Iraq is strongly encouraged to fulfil its obligation of due diligence and take all necessary measures to address the vulnerability of victims of trafficking and people at risk. Pursuant to Article 9(4) of the Trafficking in Persons Protocol, the appropriate ministries should take or strengthen measures to alleviate the factors that make persons vulnerable to trafficking. That includes addressing economic and social conditions that are believed to contribute to the desire to migrate (footnote UNCTOC (Article 31.7)). At the moment, trafficking in persons is perceived as a low risk/high-profit crime and failure to investigate, prosecute, and punish this crime highly contribute to its perpetuation. A state's lack of systematic protection of victims and their rights further exacerbates vulnerability and exploitability.
- States are required to criminalize all forms of corruption, promote integrity, and prevent and punish the corruption of public officials. Iraqi law on Trafficking in Persons is silent on that matter and should amend the law accordingly and undertake relevant institutional changes to ensure its enforcement.

Among the recommendations generally suggests by ICAT, the following apply to Iraq:

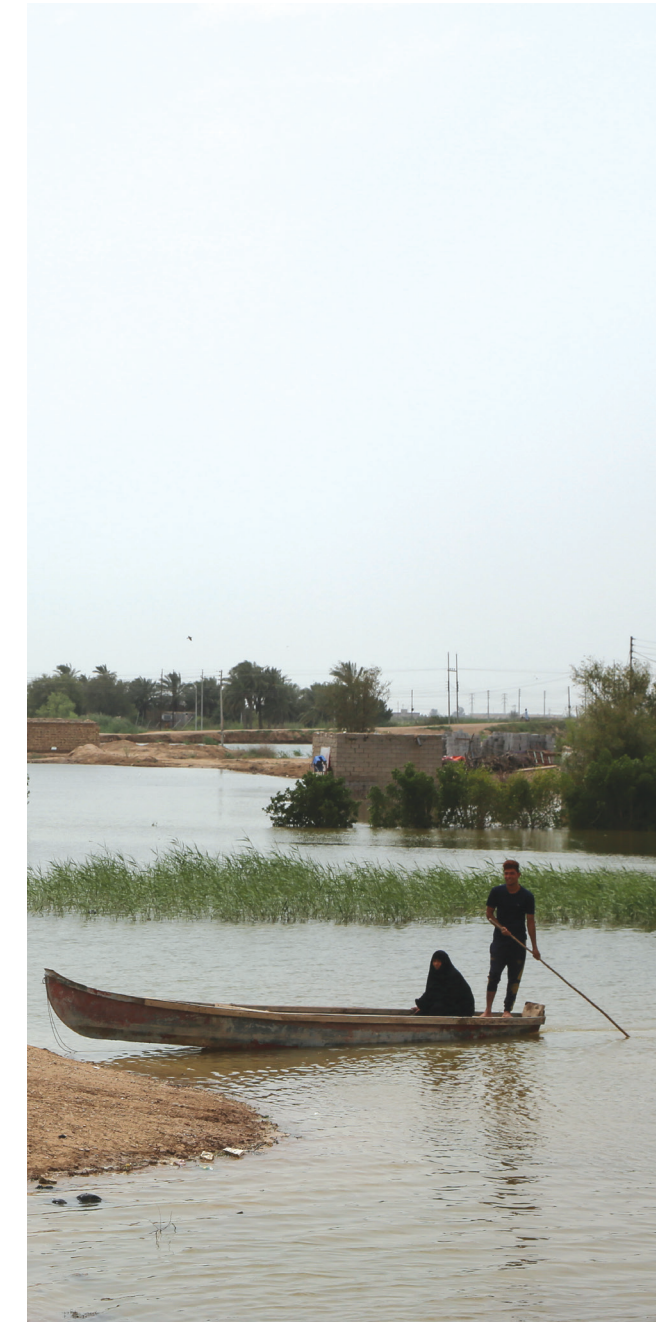
- Trafficking in persons should be included as predicate offence in laws related to organized crime and money-laundering.
- The legal framework enables tracing, seizure, and confiscation of proceeds of trafficking-related crimes and for the repatriation of assets traced to and confiscated within other jurisdictions.
- Training, empowerment, and specialization of criminal justice officials: an effective criminal justice response to trafficking in persons necessarily goes with and requires trained officials. Any training should emphasize the need for a human rights approach, in order to strengthen the capacity of criminal justice officials to protect victims and to respect and promote their rights.

- Criminal justice officials and service providers also need to be organized, supported, and funded in an appropriate manner, for instance by setting up a specialized investigatory and or prosecution unit/branch.
- Integration of a gender perspective: men and boys are often overlooked as victims of trafficking and related exploitation (underreporting, stigmatization, reprisals, prosecution for homosexuality, etc.); criminal justice actors may be reluctant to investigate and prosecute such cases — not even mentioning a mere acknowledgement. Women and girls, on the other hand, are trafficked in ways that are specific to their gender and with consequences that can also be very gender-specific. Failure to properly consider gender may increase the risk of harm and trafficking responses may end up less effective and less deterring.
- Asset confiscation and disposal: trafficking is a highly lucrative and relatively risk-free crime. Obligations of states to seize and confiscate assets of trafficking and to ensure their laws and institutions are adapted. (Recommended Principles and Guidelines (principle 16 and guideline 4.4).
- State agencies should have a clear understanding of their obligations to assist victims to safely return home in a manner that respects their human rights and with appropriate assistance. Iraq's obligations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees should be incorporated into the national law.

Generally, great progress is expected in removing the victims of trafficking from the risk of harm; in avoiding their revictimization and criminalization; in stopping detention and other forms of privation of liberty; in ensuring their access to justice, including for foreign victims; in putting an end to impunity, especially among state agents; and in addressing specific issues with regards to children, especially recruitment of child soldiers by armed groups, including the Popular Mobilization Forces.

With regards to the Iraqi Law on Trafficking in Persons, the following amendments of the law are strongly encouraged:

- The term “transferring” to be added to the list of acts in Article 1.
- The term “abuse of position of vulnerability” to be added to the list of means in Article 1.
- The terms “practices similar to slavery” and “servitude” be added to the list of purposes.
- The definition of victim in Article 1 be amended to be victim-oriented, meaning to remove the potential interpretation that the victim needs to prove physical, psychological, or material damage.
- Amend the law to comply with Article 3(c) and (d) of the Trafficking in Persons Protocol.
- Amend the law to prohibit to the use or facilitation to use services provided by victims of trafficking.
- Relevant ministries should develop public policies, increase funding, and provide adequate and training human resources to ensure proper identification, and protection of the victims of trafficking. Article 13 shall be amended in this sense.
- Amend Article 7 of the Law on Foreigners Residence No. 118 of 1978 to comply with Article 11(2) of the Trafficking in Persons Protocol.
- Amend the Code of Criminal Procedure Code to comply with Articles 13, 15, 18, 19 and 27 of UNTOC Convention.
- Law on Prostitution: Articles 4 and 6 should be amended; as currently worded, they may result in the criminalization of victims of trafficking who are sexually exploited, especially for those cases which may begin as a consensual transaction and evolve into exploitation.



INDEX

Introduction	4
1. Scope and Purpose of the Report	4
2. Methodology	5
3. Disclaimer on the Wording “Victims”	5
Part I — Trafficking in Persons Under International Law: Overview of States’ Obligations	6
1. The Shift to a Human Rights Approach	6
2. Definition of Trafficking in Persons in international Law and Key Elements	6
2.1. The Definition of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	6
2.2. Ratione Personae: The Recognition of All Victims of Trafficking	7
2.3. Ratione Materiae: The Material Elements of the Definition	7
3. Sources of International Law and Other Instruments Relevant to Trafficking in Persons	8
3.1. Treaties	8
3.2. Other sources of International Law	9
3.3. Other Relevant Instruments	9
4. The Relevance of the International Human Rights Law Framework to Address Trafficking in Persons	10
5. Iraq and International Law	12
5.1. Iraq’s Status of Accession/Ratification of Major International Legal Agreements Relating to Trafficking in Persons	12
5.2. Scope of Application of the Law in Peace Time and War Time	13
5.3. Key Principles of Law	13
i. Principle of the Hierarchy of the Law	13
ii. Conflict of Law: Lex Generalis v Lex Specialis	14
Part II — Review of the Criminalization of Trafficking in Persons in the Iraqi Law	16
1. Key Elements of the Definition of Trafficking in Persons	16
1.1. Definition	16
i. International Standards	16
ii. Iraqi Law	16
iii. Comments	16
1.2. Child Trafficking	17
i. International Standards	17
ii. Iraqi Law	17
iii. Comments	17
1.3. Irrelevance of Consent	17

i. International Standards	17
ii. Iraqi Law	17
iii. Comments	17
2. Criminalization of Trafficking in Persons	18
2.1. Establishing Trafficking in Persons as an Offence with Appropriate Penalties	18
i. International Standards	18
ii. Iraqi Law	18
iii. Comments	18
2.2. Criminalization of Attempts	18
i. International Standards	18
ii. Iraqi Law	18
iii. Comments	19
2.3. Criminalization of Accomplices	19
i. International Standards	19
ii. Iraqi Law	19
iii. Comments	21
2.4. Criminalization of Organizing or Directing Persons to Commit Trafficking in Persons	21
i. International Standards	21
ii. Iraqi Law	21
iii. Comments	21
2.5. Other Relevant Sources on Criminalization of Trafficking in Persons	23
i. The Penal Code	23
ii. The Constitution	23
iii. Labour Law 2015	24
iv. Law on Combating Prostitution No. 8 of 1988	24
3. Liability of Legal Persons	25
3.1. International Standards	25
3.2. Iraqi Law	25
3.3. Comments	25
4. Aggravating Circumstances	26
4.1. International Standards	26
4.2. Iraqi Law	26
4.3. Comments	26

5. Jurisdiction 27

 5.1. International Standards 27

 5.2. Iraqi Law 27

 5.3. Comments 28

Part III — Review of the Protection Response in Iraq: Theory and Practice in the Field 30

1. Identification 30

 1.1. In Theory 30

 1.2. Legal and Operational Gaps in Practice 31

 i. General Comments 31

 ii. IOM-Specific Gaps 31

2. Obligation to Remove From Risk of Harm 32

 2.1. In Theory 32

 2.2. Legal and Operational Gaps in Practice 33

3. Non-Punishment and Non-Criminalization of Victims of Trafficking 33

 3.1. International Standards 33

 3.2. Iraqi Law 33

 3.3. Legal and Operational Gaps 34

4. Detention of Trafficked Persons 34

 4.1. International Standards 34

 4.2. Legal and Operational Gaps 35

5. Assistance and Support, Including Medical Assistance, Information, and Independent Legal Advice — and in a Language that the Victims Understand 35

 5.1. International Standards 35

 5.2. Legal and Operational Gaps 36

6. Remedies 36

 6.1. International Standards 36

 6.2. Legal and Operational Gaps 39

7. No Distinction Between the Rights of National and Non-National Victims of Trafficking as well as Safe and Voluntary Return 39

 7.1. International Standards 39

 7.2. Legal and Operational Gaps 40

Part IV — Recommendations 42

1. Recommendations to Iraq 42

2. Recommendations to IOM..... 43



IOM IRAQ

 iraq.iom.int
 iomiraq@iom.int

UNAMI Compound (Diwan 2),
International Zone,
Baghdad/Iraq

   
@IOMIraq



© 2019 International Organization for Migration (IOM)

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior written permission of the publisher.