

CGR POSITION PAPER

# UNTOC REVIEW MECHANISM

## Criminalization and Jurisdiction

Cluster-1: Article 2, 5, 6, 8, 9, 10, 15 & 23 of the Convention including Article 3 & 5 of TIP Protocol

BY AZAM KHAN

12 FEBRUARY 2024



CENTRE for GOVERNANCE RESEARCH  
PAKISTAN

## ABOUT THE CENTRE FOR GOVERNANCE RESEARCH (CGR)

CGR is a forum for studies and debate on strategic and tactical issues related with good governance and the rule of law. It is a non-governmental civil society advocacy Centre dedicated to reforms in the justice and governance sectors.

As an independent think tank, CGR sets its own agenda, publishing and disseminating its findings regularly for national and global audience. Using an interdisciplinary approach, CGR brings together rule of law, justice and governance experts, researchers and internationally renowned professionals to animate its debate and research activities.

CGR aims to stand out as one of rare Pakistani think tanks to position itself at the very heart of debate on governance and justice issues.

CGR focuses on advocacy, research and studies in the following areas:

- Governance and Rule of Law
- Public Policy
- Policing and Justice Sectors
- Serious and Organized Crimes
- Counterterrorism and Counter Extremism (CT and CE)

Meanwhile, the National Initiative against Organized Crime (NIOC) continues as a flagship project from the platform of the Centre for Governance Research (CGR).

**Tariq Khosa**

CEO/Director

\*\*\*

## ACKNOWLEDGMENT

This Paper reflects the views of the civil society on UNTOC Review Process in Pakistan. CGR is grateful to Azam Khan for writing this paper.



**CGR Position Paper  
UNTOC REVIEW MECHANISM**

## **Criminalization and Jurisdiction**

**CLUSTER-1: ARTICLE 2, 5, 6, 8, 9,  
10, 15 & 23 OF THE CONVENTION  
INCLUDING ARTICLE 3 & 5 OF TIP  
PROTOCOL**

**BY AZAM KHAN**

### **Introduction**

While formulating the reply to Self-Assessment Questionnaire pertaining to UNTOC Articles under review including Article 3 of TIP Protocol, the under mentioned deficiencies have been noticed in the domestic legislations, especially dealing with transnational organized crimes, falling within the scope of Article 3 of the Convention, requiring appropriate amendments in the relevant laws, to bring the same more responsive to the requirements of international legal instruments, already ratified by Pakistan.

**Comparative Analysis of Article 3 of UNTOC’s supplementing TIP Protocol viz a viz corresponding provisions of the Prevention of Trafficking in Persons Act, 2018, the domestic law of Pakistan**

UNTOC PROTOCOL AGAINST TRAFFICKING IN PERSONS (Article 3)	PREVENTION OF TRAFFICKING IN PERSONS ACT 2018 (SECTIONS 3 & 7)
<p><b>Article 3. Use of terms</b></p> <p>For the purposes of this Protocol:</p> <p>(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 <u>abduction</u>, of fraud, of deception, of the <u>abuse of power or of a position of vulnerability</u> or of the <u>giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation</u>. Exploitation shall include, at a minimum, the exploitation of the prostitution of others <u>or other forms of sexual exploitation</u>, forced labour or services, slavery or practices similar to slavery, servitude or <u>the removal of organs</u>;</p>	<p><b>Sec.3 Trafficking in persons-</b></p> <p>(1) Any person who recruits’ harbors’ transports, provides or obtains another person’ or attempts to do so’ for compelled labour or commercial sex acts through the use of force’ fraud or coercion, commits an offence of trafficking in persons and shall be punished with imprisonment which may extend to seven years or with fine which may extend to one million rupees or with both.</p> <p>(2) If the offence of trafficking in persons under sub-section (1) is committed against a child or a woman, the person who commits the offence shall be punished with imprisonment which may extend to ten years and which shall not be less than two years or with fine which may extend to onemillion rupees or with both.</p> <p>(3) In this section:</p> <p>(a) "<b>coercion</b>" means use or threat of use of force, or other forms of non-violent use of forceincluding:</p> <p>(i) threat of harm to or physical restraint of any person.</p> <p>(ii) any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint ofany person.</p> <p>(iii) threat due to the vulnerable position of a person; orpsychological pressure; and</p> <p>(b) "<b>Compelled labour</b>" includes involuntary servitude, slavery or practices similar to slavery,or debt bondage and forced labour</p>

<p>Art.3(b) The <b>consent of a victim</b> 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.</p> <p>Art.3(c) The recruitment, transportation, transfer, harbouring or receipt of a <b>child</b> 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;</p>	<p><b>7. Presumption in case of child victim. -</b></p> <p>Where the <b>victim is a child</b>, the prosecution may not prove actual use of force, fraud or coercion and the Court may not consider the <b>consent of the victim</b>, his parent or guardian as a defence,</p>
--	---

The underlined portion of Article 3 of the TIP Protocol, shown in column 1 of the above table is found missing in Section 3 of TIP Act, 2018, reproduced in column 2 of the above table. The deficiencies, identified in the table are explained below.

## 1. Sexual Exploitation

Article 3(a) of the TIP Protocol enumerates various modes of trafficking to achieve different objectives mentioned therein for the purposes of exploitation including “prostitution of other **or other forms of sexual exploitation**”.

Section 3 of Prevention of Trafficking in Persons Act 2018 categorizes the similar activities of trafficking as described in the TIP Protocol but while defining the purpose of sexual exploitation it restricts to “**commercial sex acts**” only, which according to the definition given in rule 2 (vi) of TIP Rules 2020 “means any sex act on account of which anything of value is given to or received by any person”.

It means that the **other forms of sexual**

**exploitation, except commercial sex act, are not covered under TIPA 2018 when no material benefit is found involved.**

## 2. Removal of Organs

Trafficking in person for the removal of organs is one of the forms of exploitation mentioned in Article 3(a) of the TIP Protocol. This kind of exploitation is, however, not mentioned in the definition of trafficking in person, punishable u/s 3 of TIP Act, 2018. Illegal removal of organs including kidneys etc., is a separate offence, punishable under the Transplantation of Human Organs and Tissues Act, 2010 (THOTA), which has different procedural requirements and rules of evidence from TIPA 2018. No doubt, THOTA, 2010 is available on the schedule of FIA for the purposes of investigation but the procedural requirements for initiation of action by FIA and taking cognizance by the court is required to be observed in accordance with the provision of the said law, including Section 14(2), dealing with the cognizance of offences by the court,

which is reproduced below.

*14(2) No Court shall take cognizance of an office under this Act except on a complaint in writing made by, -*

*(a) the Monitoring Authority or its Secretary; or*

*(b) an aggrieved person who has given notice of not less than fifteen days, in such manner as may be prescribed, to the Monitoring Authority, of the alleged offence and of his intention to lodge a complaint.*

It is evident from the above provision that the offence of trafficking involving illegal removal of organs is neither covered under TIPPA 2018 nor can be prosecuted in court by FIA on completion of investigation, without observing the requirements of section 14(2) of the said Act.

### 3. Abuse of Power or of Position of Vulnerability

The definition for the offence of “Trafficking in Persons” given in Section 3(1) of the Prevention of Trafficking in Persons Act, 2018 covers most of the components of the definition given in Article 3(a) of the TIP Protocol. However, one of the modes of exploiting by “abuse of power or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent of a person having control over another person”, as mentioned in the definition given under article 3(a) of the Protocol, is found missing in the definition of the offense of “Trafficking in Persons”, punishable under section 3(1) and (2) of Trafficking in Persons

Act, 2018.

The absence of “abuse of power or of position of vulnerability” from the definition of the offence of trafficking in person in our domestic law may not cover the exploitation of the victim in the hands of LEA’s officers during enquiry or by the management of Shelter Homes etc.

### 4. Abduction

The trafficking in person by committing “abduction”, as mentioned in Article 3(a) of the Protocol is missing from the definition of “Trafficking in Persons” given in section 3 of the TIP Act, 2018, whereas the same was expressly provided along with offence of kidnapping in the repealed law titled as The Prevention and Control of Human Trafficking Ordinance, 2002.

### 5. Presumption – Consent Immaterial

Section 7 of the TIP Act, 2018 titled as presumption in case of child victims, provides that “where the victim is child the prosecution may not prove actual use of force, fraud or coercion and the Court may not consider the consent of the victim, his parent or guardian as a defense”.

Both the above presumptions of Section 7 are separately provided in Article 3(b) and 3(c) of the TIP Protocol, as mentioned in the above table.

It is evident from the text of section 7 of the Act, 2018 that the presumption with reference to the “consent of the victim” is child specific whereas in Article 3(b) of the Protocol, the irrelevancy of the consent is applicable to all the victim of trafficking, irrespective of their age, when obtained by means of coercion, fraud deception, etc.

### Recommendation:

- In view of the above-mentioned facts, it is proposed that the missing ingredients of the offence of “Trafficking in Persons” as mentioned above, may be added in section 3 of TIP Act, 2018, to bring the same at par with Article 3(a) of the TIP Protocol.
- The consent of the victim of Trafficking given or acquired by means of coercion, fraud, deception, etc. may be considered as invalid in all the cases instead of restricting to the child victim only, as provided in section 7 of the Act, 2018.
- The missing ingredient of “giving or receiving of payment or benefits to achieve the consent of a person having control on another person” may be considered as an offence of trafficking so that the requirement of Article 3(a) of the TIP Protocol may be fully met with.

### UNTOC – Article 2(a)

#### Organized Criminal Group (OCG):

The term Organized Criminal Group (OCG), defined under Art 2(a) and the concept of Serious Crime define under Art 2(b) read with Sub-Art 1(b) of Art 3 of UNTOC are not fully covered in the domestic legislation, as evident from the under mentioned analysis:

(a) Though the definition of Organized Criminal Group given in the Prevention of Trafficking in Persons Act, 2018 and The Prevention of Smuggling of Migrants Act, 2018 is similar to the definition of OCG mentioned in the Convention, but both these special laws deal with particular offences of trafficking in persons and smuggling of migrants, having not general application to all categories of Organize Crimes, having transnational implications as describe under Article 3 of the Convention.

(b) The term Gang used for certain number of persons associated for the purpose of habitually committing the offence of theft or robbery (punishable u/s 400 & 401 Pakistan Penal Code (“PPC”)) or conjointly committing or attempting to commit the offence of dacoity (section 391 & 392 PPC), is synonymous to the definition of Organized Criminal Group as defined in the Convention. These provisions of PPC are however specific to above mentioned offences and not generally applicable to other forms of Organized Crimes, whereas 98 predicate offences of PPC are part of Anti Money Laundering Act, 2010.

(c) The offence of criminal conspiracy (section 120A PPC) and in certain circumstances the offence of abetment (section 107,108 PPC) conceptually covers the requirements of Article 5 of the Convention (criminalizing the participation of an organized criminal group). However, the specific objective and purpose of OCG mentioned in Article 5 of the Convention “to commit a serious crime for the purpose relating directly or indirectly to the obtaining of financial or other material benefit...”, is not the mandatory requirement for the offence of criminal conspiracy and abetment, described

under above mentioned provisions of PPC.

### Recommendation:

In view of the above it is proposed that the definition of “Organized Criminal Group” and “Serious Crime” as mentioned at (a) and (b) of Article 2 of UNTOC may be adopted mutatis mutandis, by adding in the general provisions of law (PPC/CrPC), especially having transnational implications within the meaning of Article 3 of the Convention, to meet the requirement of Article 5 of the UNTOC.

### Controlled Delivery:

Controlled Delivery is one of the Special Investigation Technique, which has been defined under clause (i) of Article 2 of UNTOC. This concept of Controlled Delivery is very much existing in our domestic legislation to be used while investigating the offences of Drug Trafficking (CNSA, 1997), Financing of Terrorism (section 19C - ATA, 1997), Money Laundering (section 9A of AMLA, 2010) and Trafficking in Persons (Rule 20 of TIP Rules 2020).

It is however noteworthy, that the application and enforcement of section 19C of ATA, 1997 and 9A of AMLA, 2010 are subject to the rules, which have not been framed so far.

Similarly, the Controlled Delivery as provided under TIP Rules 2020 for effective investigation of human trafficking cases, is not supported by any express provision of Trafficking in Persons Act, 2018.

### Recommendation:

In view of the above it is proposed that necessary Rules may be framed for effective enforcement of the relevant provisions pertaining to Controlled Delivery under ATA 1997 and AMLA, 2010.

Besides, enabling provisions may also be added in Trafficking in Persons Act, 2018 to avoid any complication while enforcing TIP Rules, 2020.

### Jurisdiction on Stateless Persons:

With reference to Article 15 of UNTOC, pertaining to jurisdiction, it has been enquired as to whether a stateless person who has habitually residence in the country can be prosecuted for an offence committed by him outside the territorial jurisdiction of Pakistan. This proposition needs thorough deliberation, as section 2, 3 & 4 of PPC including some other special laws provides extra territorial jurisdiction for prosecution of offences committed outside Pakistan by the citizens of Pakistan only, without mentioning about extra territorial jurisdiction upon stateless person for an offence committed by them beyond the territorial limits of Pakistan.

### Recommendation:

**This position needs clarification and if the domestic law is found silent on this proposition, appropriate legislation would require it to be enacted.**



## About the Author



Azam Khan joined the Federal Investigation Agency (FIA) as a Law Officer in 1981. After serving at different positions, retired as Additional Director General in 2013, after serving 32 years. He was the principal law officer of the FIA and head of FIA Prosecution Service, besides handling Interpol matters and MLA requests. After retirement from the FIA, he served as the Deputy Prosecutor General with the National Accountability Bureau (NAB) in 2014-17. He dealt with MLA requests at NAB. He has a wide experience of assisting the superior judiciary including High Courts and the Supreme Court in MLAs and related matters.



**CENTRE for GOVERNANCE RESEARCH  
PAKISTAN**



[www.cgr.com.pk](http://www.cgr.com.pk)



CgrPakistan



CgrPakistan

**Islamabad office:**

#38-W, Khalid Plaza, 1st. Floor. Jinnah Ave. Blue Area. Islamabad Phones 051-2870852 & 2870853.

**Lahore office:**

22, Tipu Block, New Garden Town, Lahore  
Phone: 042-35831352