

# **Policy Guide** on Criminalizing Trafficking in Persons



## **The Bali Process**

on People Smuggling, Trafficking in Persons and Related Transnational Crime

An introductory guide for policy makers and practitioners on how to implement international legal obligations to criminalize trafficking in persons at the domestic level

**This policy guide** may be used by all Bali Process countries, including those countries that have not signed and/or ratified the United Nations Convention against Transnational Organized Crime (Organized Crime Convention) and two of its supplementary protocols, the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The terms used in this policy guide are consistent with these three international instruments, to the extent possible. However for translation purposes, official translations of the Convention and its Protocols should be consulted as authoritative points of reference for terminology used in this policy guide.



## The Bali Process

The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (the Bali Process) was established in 2002 and is a voluntary and non-binding regional consultative process co-chaired by the Governments of Australia and Indonesia and comprising over 45 member countries and organizations.

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# The Bali Process

# Foreword

**Since its inception in 2002, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process) has effectively raised regional awareness of the consequences of people smuggling, trafficking in persons and related transnational crime, and also developed and implemented strategies and practical cooperation in response. More than 45 member countries and international organizations, as well as a number of observer countries and international agencies, participate in this voluntary forum.**

At the Fifth Bali Process Regional Ministerial Conference in April 2013, Ministers agreed that policy guides be developed to assist policy makers and practitioners to criminalize people smuggling and trafficking in persons. Ministers directed that the Regional Support Office (RSO), in consultation with interested members, develop guides for States to enable a range of domestic agencies to promote a consistent understanding of international legal obligations, and to assist in the development of effective domestic legislation. Further to this direction, the RSO established a drafting committee of experts from Bali Process Member States and international organizations to develop the policy guides.

The policy guides are voluntary, non-binding and intended for use as reference tools by a range of domestic agencies in Bali Process Member States. In order to keep these policy guides short, practical and user-friendly, they focus on how to effectively criminalize migrant smuggling and trafficking in persons in domestic law. Issues of protection and assistance to smuggled and trafficked persons have been addressed within the thematic scope of the guides, but it is expected that these issues may be more comprehensively addressed by future policy guides. In line with the recommendations of the Fifth Ministerial Conference in April 2013, these policy guides are the first set of Bali Process Policy Guides falling within the thematic areas of the Bali Process and on issues of particular concern to Bali Process members.

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## Acronyms and Abbreviations

<b>ASEAN</b>	Association of Southeast Asian Nations
<b>Bali Process</b>	Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime
<b>FATF</b>	Financial Action Task Force
<b>ILO</b>	International Labour Organization
<b>IOM</b>	International Organization for Migration
<b>MLA</b>	Mutual legal assistance
<b>Organized Crime Convention</b>	United Nations Convention against Transnational Organized Crime
<b>RSO</b>	Regional Support Office
<b>Trafficking in Persons Protocol</b>	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
<b>UN</b>	United Nations
<b>UNCAC</b>	United Nations Convention against Corruption
<b>UNODC</b>	United Nations Office on Drugs and Crime

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# Executive Summary

Trafficking in persons – also referred to as human trafficking, trafficking in human beings or people trafficking – is the recruitment, transportation, transfer, harbouring or receipt of a person by deceptive, coercive or other improper means, for the purpose of exploiting that person. Trafficking can occur within a country or between countries.

States need strong laws to combat human traffickers and to protect the victims of this serious crime. There are two key international instruments that establish the international legal framework around trafficking in persons: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking in Persons Protocol), which supplements the overarching United Nations Convention against Transnational Organized Crime (Organized Crime Convention). Trafficking in persons is different from migrant smuggling, which is governed by a separate Protocol under the Organized Crime Convention.

The Trafficking in Persons Protocol requires State Parties to criminalize trafficking in persons. Under Article 3(a) of the Protocol, trafficking in persons has three elements:

- **the act** - that is, the recruitment, transportation, transfer, harbouring or receipt of persons;
- **the means** - that is, 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; and
- **the purpose** of exploitation.

Where the victim is a child, a trafficking crime exists where the ‘act’ is for the purpose of exploitation, without any requirement to prove the ‘means’.

The Trafficking in Persons Protocol also requires that States criminalize **attempts** to commit a trafficking offence (subject to a State’s domestic legal system), participating as an **accomplice** in a trafficking offence, and **organizing or directing** others to commit a trafficking offence.

Criminal operations involving trafficking in persons may be conducted across multiple countries. It is therefore important for States to establish **extraterritorial jurisdiction** – or legal ability to exercise authority beyond normal territorial boundaries – in relation to trafficking in persons offences.

The lifeblood of organized crime, including trafficking in persons ventures, is money. To enable law enforcement authorities to deprive criminal bodies of the proceeds of these crimes, States need strong and separate **anti-money laundering and asset confiscation laws**. States also need **strong international crime cooperation laws**, including **extradition and mutual legal assistance laws**. Effective extradition laws enable law enforcement bodies to bring the offender to the correct jurisdiction for prosecution. Strong mutual legal assistance laws allow investigators and prosecutors to obtain and exchange evidence between countries, such as bank records, phone records and witness statements.

As organized crime syndicates are constantly evolving, it is vital that the international community works together to ensure that laws are aligned to the greatest extent possible in order to prevent criminals exploiting gaps in legal frameworks.

# Section 1

## Introduction to Trafficking in Persons and Key International Legal Obligations



### 1.1. Trafficking in persons: The crime challenge

Trafficking in persons means the recruitment, transportation, transfer, harbouring or receipt of a person by deceptive, coercive or other improper means, for the purpose of exploiting that person. Trafficking can occur within a country or between countries. It is a global crime that affects all countries. However there is a lack of accurate information on the scope and scale of trafficking in persons due to several reasons, including the hidden nature of the problem, the confusion between trafficking and migrant smuggling, the lack of accurate data recording systems, and the lack of information sharing between agencies.

#### So what do we know?

- Trafficking in persons is a global crime from which criminals profit, making billions of dollars at the expense of millions of victims, many of them children, who are robbed of their dignity and freedom.<sup>1</sup>
- Men, women and children are trafficked for the purposes of sexual exploitation as well as labour exploitation in economic sectors and activities such as agriculture, construction, fishing, domestic work, seafood processing, manufacturing, begging, and street selling. Victims may also be trafficked for forced marriage, organ removal or other exploitative purposes.
- According to the biennial United Nations Office on Drugs and Crime (UNODC) Global Report on Trafficking in Persons (2012), at least 136 different nationalities were trafficked and detected in 118 different countries in the reporting period (2007-2010).<sup>2</sup>
- Although more people are becoming aware of trafficking in persons, the crime persists. In many countries, laws to criminalize trafficking in persons are not comprehensive and implementation remains inadequate.
- Few criminals are convicted and the majority of victims never receive assistance.

States must work together to stop trafficking in persons because it is a high profit, low risk crime that deprives millions of victims of their freedom and human rights and can cause grave or irreparable harm. States have obligations to provide assistance and protection to trafficked persons, who should not be penalized for offences committed while being trafficked.

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<sup>1</sup> UNODC Global Report on Trafficking in Persons, 2012, see [http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf); ILO, A Global Alliance against Forced Labour, 2005, see [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_081882.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081882.pdf); Summary of the ILO 2012 Global Estimate of Forced Labour, see [http://www.ilo.org/sapfl/Informationresources/ILOPublications/WCMS\\_181953/lang--en/index.htm](http://www.ilo.org/sapfl/Informationresources/ILOPublications/WCMS_181953/lang--en/index.htm); IOM Global Human Trafficking Database Counter Trafficking Division, see [https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ct/iom\\_ctm\\_database.pdf](https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ct/iom_ctm_database.pdf).

<sup>2</sup> Ibid.

## 1.2. Key international legal instruments

There are two main international instruments directly relevant to trafficking in persons:

### **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol)<sup>3</sup>**

This is the primary and most influential international instrument on trafficking. It entered into force on 25 December 2003.<sup>4</sup>

The Protocol requires States to criminalize trafficking in persons as defined in that instrument.

### **United Nations Convention against Transnational Organized Crime (Organized Crime Convention)**

This is the main international instrument in the fight against transnational organized crime. It entered into force on 29 September 2003.<sup>5</sup>

In order to become party to the Trafficking in Persons Protocol, States must also be party to the Organized Crime Convention.<sup>6</sup> While the Trafficking Protocol is the only specific instrument dealing with trafficking in persons, a body of international human rights and labour treaties form part of the legal framework applicable to trafficking.<sup>7</sup>

## 1.3. Definition of trafficking in persons and criminalizing the offence

### 1.3.1. Meaning of ‘trafficking in persons’

The term ‘trafficking in persons’ is defined by Article 3(a) of the Trafficking in Persons Protocol:

“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.

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<sup>3</sup> The Trafficking in Persons Protocol is not an independent instrument. It deals with issues specific to trafficking in persons as part of the broader framework established by the Organized Crime Convention. State Parties to the Trafficking in Persons Protocol must be a party to the Organized Crime Convention, which is why Section 2 of this guide sets out complementary obligations under the Organized Crime Convention.

<sup>4</sup> As of 1 July 2014, 159 countries have ratified the Trafficking in Persons Protocol. For an up-to-date list of signatories and parties, see <http://www.unodc.org/unodc/treaties/CTOC/>.

<sup>5</sup> As of 1 July 2014, 179 countries have ratified the Organized Crime Convention. For an up-to-date list of signatories and parties, see <http://www.unodc.org/unodc/treaties/CTOC/>.

<sup>6</sup> Note that both the Convention and the Protocol can be ratified at the same time.

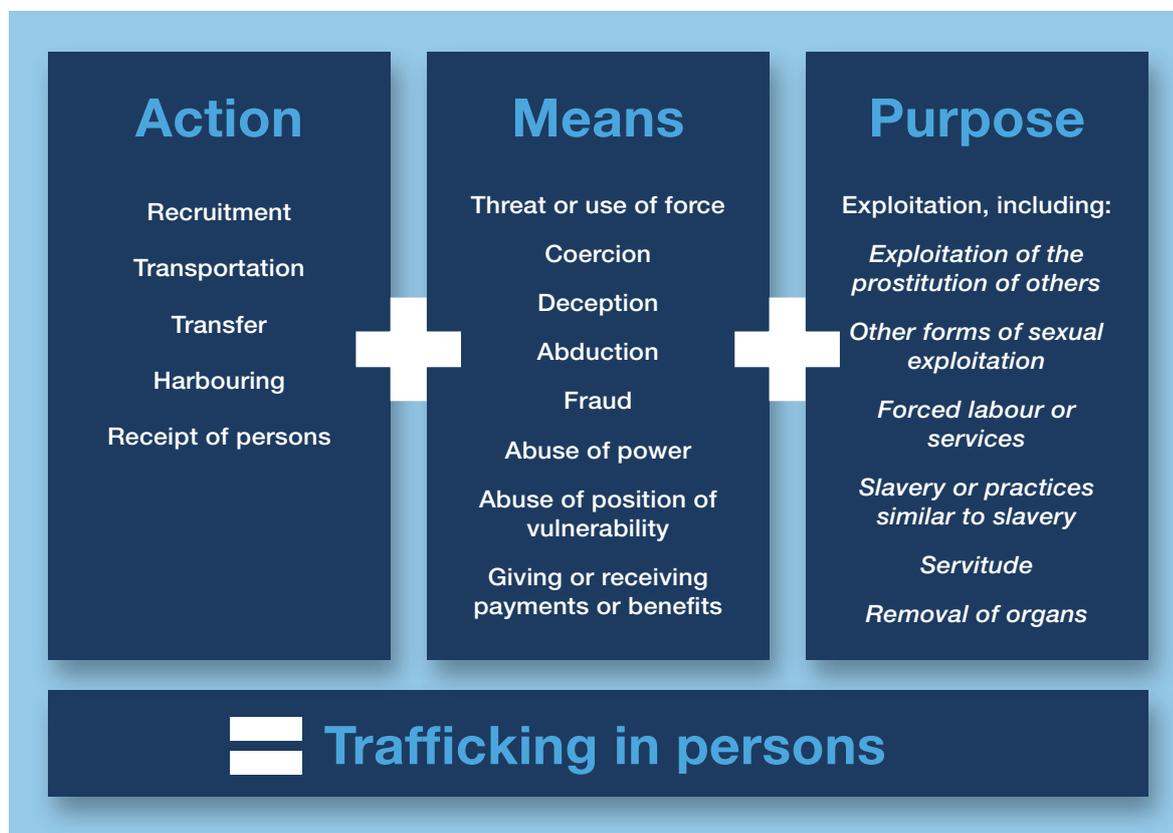
<sup>7</sup> Other treaties relevant to the framework of trafficking include the following:

- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- United Nations Convention on the Elimination of All Forms of Discrimination against Women;
- United Nations Convention on the Rights of the Child, and its Optional Protocols on ‘the sale of children, child prostitution and child pornography’ and ‘the involvement of children in armed conflict’;
- United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and
- A number of ILO conventions on forced, child and compulsory labour.

See the UN Treaty Collection at <https://treaties.un.org/>

Figure 1 below illustrates the three elements that *must* be present for the situation of trafficking in persons (adults) to exist. When any one of the elements from **each of the three columns** is combined and applied to the situation of an adult, that adult is considered to have been *trafficked*. For children under the age of 18, the ‘means’ element is not required, as explained in Section 1.3.3. below.

**Figure 1: Key elements of the international legal definition of trafficking in persons**



According to the Protocol, exploitation needs not to have occurred to prosecute a case of trafficking. Although often difficult to prove, all that is required is that the accused intended to exploit the victim.

### 1.3.2. Consent

Article 3(b) of the Trafficking in Persons Protocol emphasises that the consent of the (adult) trafficked person to the intended exploitation is irrelevant where deceptive, coercive or other improper means have been used.

Therefore, once the elements of the crime of trafficking, including the means (coercion, deception, etc.) are proven, any defence or suggestion that the victim ‘consented’ is irrelevant.

This is because such purported ‘consent’ was obtained through improper means, was not full and free, was given only partially, or was subsequently revoked. A victim’s consent cannot serve as a defence for the perpetrator in court. At the same time, absence of consent is not a prerequisite for the crime of trafficking in persons to be proven.

### 1.3.3. Trafficking in children

The Trafficking in Persons Protocol (Article 3(c)) provides a different definition for trafficking in children as there is no requirement to prove the ‘means’ of trafficking. When the individual is under eighteen years of age (a child), it is only necessary to prove an ‘action’ such as recruitment, transportation or receipt, for the ‘purpose’ of exploitation.

## Tip: Broad definition of trafficking offences

The Trafficking in Persons Protocol includes provisions to protect victims from a broad range of exploitative conduct. At a minimum, *exploitation includes the exploitation of prostitution of others and sexual exploitation, and also forced labour, slavery, servitude, and the removal of organs*. States are able to strengthen and adapt their laws to add purposes of exploitation not listed in Article 3 of the Protocol, as appropriate to its national patterns. For example, trafficking for forced begging and trafficking for criminal activities.

## Tip: Standalone offences for exploitative conduct

The Trafficking in Persons Protocol does not require States to criminalize exploitation in and of itself – for example, forced labour, servitude and slavery-like practices, including debt bondage (a system by which a person is kept in bondage through the enforcement of an unfair debt contract).<sup>8</sup> Such exploitative conduct is prohibited under other related legal regimes, such as human rights conventions, the supplementary slavery convention and International Labour Organization conventions.

Nevertheless, exploitative conduct such as forced labour, servitude and slavery-like practices are serious offences and establishing standalone offences for this conduct provides States with a more rigorous legal framework to prosecute offenders. For example, where some elements of the trafficking offence are difficult to prove (e.g. the movement or facilitation element), the conduct at the destination can still be prosecuted using a separate forced labour or servitude offence.

States should consider establishing **standalone offences for exploitative conduct** in their domestic criminal legislation, *regardless of how the victims arrived in those circumstances*, in addition to offences related to the facilitation of trafficking.

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<sup>8</sup> Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery provides examples of 'slavery-like practices', which include serfdom, debt bondage, servile marriage and the exploitation of children. See the UN Treaty Collection at <https://treaties.un.org/>.

### 1.3.4. Extension of criminal responsibility

Article 5(2) of the Trafficking Protocol *requires* that criminal responsibility be extended to cover:

- **attempts** to commit a trafficking offence (subject to a State's domestic legal system);
- participation as an **accomplice** in a trafficking offence; and
- **organizing or directing** others to commit a trafficking offence.

The Organized Crime Convention (Art 5(1)(a)) also *requires* States to criminalize participation in a criminal group. Countries may implement this by creating an offence of conspiracy, or by creating offences that prohibit association and participation in criminal organizations.

Those involved in transnational organized crime may seek to hide behind the cover of legal persons such as companies, charities, or other association. Therefore, Article 10 of the Organized Crime Convention *requires* States to ensure legal persons are held liable for participation in serious crimes involving an organized criminal group, and for specific offences under the Organized Crime Convention related to laundering proceeds of crime, corruption, and obstruction of justice. It is not mandatory to establish *criminal* liability of legal persons under the Organized Crime Convention, however, States *must* establish some form of liability of legal persons – for example under *civil* or *administrative* regimes.

## **Tip:** Protection, not punishment, of trafficking victims

**Trafficking in persons constitutes a serious abuse of fundamental human rights and freedoms. Most victims of trafficking are traumatized by the physical, psychological, and/or sexual violence to which they have been subjected. States should not punish trafficked people for acts committed under duress or as a result of their being trafficked, but treat them as persons in need of protection. For example, trafficked persons should not be punished for immigration fraud, working unlawfully, or working in the sex industry if this is unlawful in the specific country. Special consideration should be given to the specific situation of trafficked children and other persons with special protection needs.**

States have obligations to protect and assist trafficked persons, including by protecting their internationally recognized human rights (Article 2, Trafficking in Persons Protocol). Article 6 of the Trafficking in Persons Protocol prescribes the important elements of assistance to, and protection of, victims of trafficking in persons that States should consider implementing to provide for the physical, psychological, and social recovery of trafficked victims. Domestic legal systems must also contain measures that offer trafficked persons the possibility of obtaining compensation for damages suffered.

Article 14 of the Protocol provides that nothing in the Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the United Nations Convention and Protocol relating to the Status of Refugees and the principle of *non-refoulement*.

Extending criminal responsibility to all persons who play a role in trafficking in persons is particularly important, given that sophisticated trafficking syndicates operate through a network of different people, who are often located in different jurisdictions. The extension of criminal responsibility also ensures that those who attempt to traffic people can be prosecuted. By way of example, a country may implement the offences of attempt, organizing/directing, and complicity through provisions in specific anti-trafficking laws or by establishing in its criminal code, general provisions of criminal responsibility that apply to all offences in that country.

## **Tip:** Protection for witnesses in trafficking in persons cases

**Under Article 24 of the Organized Crime Convention, each State Party shall provide appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention and, as appropriate, for their relatives and other persons close to them.**

### 1.4. Differences between trafficking in persons and migrant smuggling

Trafficking in persons is different from migrant smuggling as outlined in Table 1 below. It is therefore important to ensure that the definitions of ‘trafficking in persons’ and ‘smuggling of migrants’ are well understood and defined in national legislation.

**Table 1: Key differences between trafficking in persons and migrant smuggling**

	Trafficking in persons	Migrant smuggling
Purpose of the crime	The purpose of trafficking is always exploitation.  Exploitation can occur over an indefinite period of time.	The purpose of smuggling is to obtain a financial or other material benefit by facilitating illegal entry into or illegal residence in another country.
Consent and victimisation	The consent of a trafficked person is not relevant to the crime, because of the coercive, deceptive, or threatening actions of the trafficker.	Migrants have generally consented to being smuggled. <sup>9</sup> As a result, they are not considered to be a ‘victim of migrant smuggling’. Yet, a smuggled migrant may become a victim of other crimes in the course of being smuggled. For example, violence may be used against the migrant, or the migrant’s life may be endangered at the hands of smugglers. <sup>10</sup>
Transnational	Both across and within borders.	Cross border.
Source of profit	Through the exploitation of the trafficked person.	Through obtaining a financial or other material benefit for the facilitation of illegal entry or stay of a person in another State.

In practice, it may be **difficult to distinguish** between trafficking in persons and migrant smuggling. For example, a trafficked person might begin his or her journey as a smuggled migrant. She or he may have contracted an individual or a group to assist in their illegal movement in exchange for a financial payment. However, the smuggled migrant might then be compelled (through the use of coercion, threat or deception) into a state of debt bondage to pay off 'costs' (financial or other) allegedly owed, or into a state of forced labour because of the migrant's illegal status in the destination country. Thus, a smuggled migrant can become a trafficking victim.

## **Tip:** Separate offences for migrant smuggling and trafficking in persons

**It is essential for countries to have separate offences for migrant smuggling and trafficking in persons respectively. This is important because the two offences have different elements that need to be taken into consideration when investigating the crimes, identifying the victims of trafficking in persons or of other human rights violations, and when prosecuting the offenders. Separate offences are particularly important when it comes to international cooperation (mutual legal assistance and extradition) to enable other countries to seek evidence or suspects/offenders that are located in another country (in relation to those specific crimes) (see Section 2).**

### 1.5. Jurisdiction – including extraterritorial jurisdiction

Article 15 of the Organized Crime Convention outlines the jurisdiction (or legal authority) that States can establish over crimes set out in the Convention and the Trafficking Protocol. Under the Organized Crime Convention, it is mandatory that States exercise **territorial jurisdiction** over offences established in accordance with the Trafficking in Persons Protocol. The principle of territorial jurisdiction provides that States can make and enforce laws where the conduct constituting an offence occurs within the physical territory of the State. Territorial jurisdiction also extends to a vessel under the flag of a State or an aircraft registered under the law of a State.

However, territorial jurisdiction is often not enough. In order for States to effectively fight trafficking in persons, they should consider ensuring they have **extraterritorial jurisdiction** over trafficking offences. This is where a State's jurisdiction extends outside of the State's borders. Otherwise, organized criminal groups can exploit gaps in laws between different States to escape prosecution.

<sup>9</sup> Although experts and practitioners see 'consent' as a difference between trafficking and smuggling, it is important to note that the Smuggling of Migrants Protocol definition does not mention consent. Migrant smuggling is the *facilitation* of crossing borders illegally or residing illegally in another country with the aim of making a financial or other material profit.

<sup>10</sup> UNODC Model Law against the Smuggling of Migrants, 2010, see [http://www.unodc.org/documents/human-trafficking/Model\\_Law\\_Smuggling\\_of\\_Migrants\\_10-52715\\_Ebook.pdf](http://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf).

To ensure maximum effectiveness of laws that combat transnational crime, States *may* establish extraterritorial jurisdiction when an offence is committed:

- **against a national** of that State – Article 15(2)(a);
- **by a national** of that State or by a person who is stateless who habitually resides in that State – Article 15(2)(b); or
- **outside the territory of a State** with a view to commission of a serious crime within the territory of that State – Article 15(2)(c).

Under the Organized Crime Convention (Article 15), a State *must* establish jurisdiction if the offender is its own national and is present in its territory, but the State refuses to **extradite** (hand over) the offender to another country to face charges solely because the person is a national. This obligation on States to establish jurisdiction applies regardless of where the offence occurred.

The Convention also provides that a State *may* establish jurisdiction where an offender is present in its territory and the State refuses to extradite the offender for any other reason (i.e. not on the basis of nationality).

These extraterritorial jurisdiction provisions encourage (but do not compel) a State to take action against its own nationals where they commit a trafficking in persons offence in another country. They also allow a State to exercise jurisdiction over persons operating outside its territory who traffic people into its territory.

## Tip: Extraterritorial jurisdiction in trafficking legislation

It is important to make sure that trafficking in persons laws provide for extraterritorial jurisdiction. It is key because the organizers of criminal trafficking operations can be located in many countries – that is, countries which are origin countries, transit countries, destination countries, or other countries. The need for extraterritorial jurisdiction is graphically set out in Figure 2 below.

Figure 2: Need for extraterritorial jurisdiction



If **Country A's** anti-trafficking laws apply extraterritorially, then **Country A** is able to exercise jurisdiction over the offender, who is located in **Country C**.

## **Tip:** Establish transnational and domestic trafficking offences

Trafficking in persons can occur across country borders or within a country's borders. In criminalizing trafficking in persons, States could:

- adopt a single trafficking in persons offence, which covers both transnational and domestic trafficking by ensuring that the offence does not include a requirement for victims to be trafficked across borders; or
- adopt separate offences, one covering transnational trafficking and the other covering domestic trafficking.

### 1.6. Penalties

Trafficking can place vulnerable people in life-threatening circumstances and expose them to inhumane conditions. In order to effectively combat trafficking in persons, States need to ensure that the penalties are proportionate to the severity of the offence, as noted in Article 11 of the Organized Crime Convention. For example, some States have established a maximum penalty of 12 years imprisonment for trafficking offences, while aggravated trafficking offences carry a maximum penalty of 20 years imprisonment and trafficking of children carries, at maximum, 25 years imprisonment.

Although the Trafficking in Persons Protocol does not specifically require aggravating circumstances, this is an option for States to consider in conformity with their domestic laws. **Aggravating circumstances**, in relation to trafficking offences, attract a higher penalty and could include:

- where the offence involves a risk of, or results in serious injury or death of a victim, including death by suicide;
- where the victim is particularly vulnerable - for example, the victim is a child or a person with a disability;
- where the victim was exposed to a life-threatening illness such as HIV/AIDS;
- where the offence involved more than one victim; or
- where the crime was committed as part of an organized criminal group.

## **Tip:** Minimum standards in the Trafficking in Persons Protocol can be strengthened

The Trafficking in Persons Protocol provides minimum standards, which States must implement. However, States can strengthen these minimum standards to improve their capacity to prevent and combat trafficking in persons. Examples include:

- lowering the threshold for the **mental element** of certain offences – requiring that the offender need only be 'reckless' that an individual will be exploited, rather than requiring that the offender have a proven 'intention' to exploit; and
- applying **higher penalties** for offences conducted in aggravating circumstances.

# Section 2

## Key Complementary Obligations Established by the Organized Crime Convention

### 2.1. Integrated approach to effectively criminalize trafficking in persons

Many States have found that they need to take an integrated approach to effectively criminalize trafficking in persons and thereby make sure that they can effectively track down, prosecute, punish, and prevent organized criminal groups from engaging in trafficking in persons operations. An integrated approach to developing effective laws to criminalize trafficking in persons conduct includes the following elements:

- States need to effectively **criminalize activities related to trafficking** in persons as required by Article 5 of the Trafficking in Persons Protocol;
- States need to deprive criminal bodies of the proceeds of these crimes through strong **anti-money laundering** and **asset confiscation laws** as organized crime – including trafficking in persons – is driven by profit;
- States need **strong international cooperation** mechanisms, including laws and agreements – including on **extradition** and **mutual legal assistance** – among others to assist in ensuring that evidence is efficiently made available between governments for the enforcement of anti-trafficking laws; and
- Organizations (including government agencies, civil society, and industry) need to **coordinate** their efforts at the domestic and international levels to operationalize laws effectively.

It is important to consider these complementary obligations under the Organized Crime Convention because in order to become a party to the Trafficking in Persons Protocol, a State must be a party to the Organized Crime Convention and must have a legal framework that complies with both the Convention and the Protocol.

### 2.2. ‘Follow the money’ – a key strategy to fight trafficking in persons

As highlighted in the Organized Crime Convention, the main motive of organized criminal groups is the attainment, directly or indirectly, of financial or other material benefit. Therefore, it is crucial that law enforcement authorities have the capacity to deny organized criminal groups such benefit or gains. It is also important that law enforcement agencies target the profits and finance of organized criminal groups, in order to reduce the incentive in conducting the trafficking in persons operations. In short, they must be able to ‘follow the money’ of trafficking in persons ventures. This helps to prosecute the ‘bosses’ of organized crime, who are more likely to deal with the profits of illegal trafficking activities than conduct the trafficking activity on the ground.

#### 2.2.1. Money laundering offences and other measures

Money laundering involves concealing the identity, source, or destination of, or possessing or using, illegally gained money. In other words, money laundering is dealing with the proceeds of crime. The Organized Crime Convention *requires* States to criminalize the laundering of the proceeds of crime, as stipulated in Article 6(1)(a) and (b). The main requirements are to criminalize the conversion or transfer of property, the concealment or disguise of the true nature, and the acquisition, possession or use of property, knowing that such property is the proceeds of crime. In addition to the Organized Crime Convention, there are a number of international instruments that require States to criminalize and prevent money laundering.<sup>11</sup>

The Organized Crime Convention further obligates States to criminalize the participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of the offences related to money laundering.

The Organized Crime Convention *requires* that money laundering offences apply to the widest range of offences that may generate proceeds of crime – known as ‘**predicate offences**’.<sup>12</sup> In this regard, trafficking in persons should be included as a predicate offence in a State’s money laundering law. The predicate offence (e.g. the trafficking in persons offence) does not need to occur within a State’s territory in order for that State to prosecute a person for money laundering.

**Tip:** Ensure that the money laundering and the predicate offences can be prosecuted separately

**Requiring a conviction for the predicate offence (e.g. the trafficking in persons offence) may prevent convictions for money laundering in cases where a conviction cannot be secured for the predicate offence (e.g. where the suspect has left the jurisdiction or where the predicate offence occurred in another jurisdiction), but where there is clear evidence of a money laundering offence. Therefore, it is important that law enforcement officials have the ability to target the money laundering offence separately to the predicate (trafficking in persons) offence.**

The Organized Crime Convention also provides States with additional measures (mandatory as well as non-mandatory) aimed at preventing money laundering, including assistance to financial institutions to prevent criminal funds from entering the financial system, and detecting and tracing of illicit assets.

Article 7 of the Convention provides that States shall:

- establish a regulatory and supervisory regime for banks and non-bank financial institutions;
- establish the capacity to cooperate and exchange information among law enforcement and relevant stakeholders;
- consider establishing the capacity to detect and monitor the movement of cash across their borders;
- as applicable, utilize relevant regional, inter-regional and multilateral organizations against money laundering; and
- promote international cooperation among law enforcement and financial regulatory authorities.

<sup>11</sup> To name a few, the United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances; United Nations Convention against Corruption; and the Organized Crime Convention discussed here, set out obligations for States to criminalize and prevent money laundering. It is also noteworthy to recall the 40 Recommendations of the Financial Action Task Force (FATF), which set out a comprehensive standard for States to apply a robust anti-money laundering regime. These conventions can be found in the UN Treaty Collection at <https://treaties.un.org/>.

<sup>12</sup> Criminals generate profits from serious and organized crimes, such as trafficking in persons, migrant smuggling, drug trafficking, arms trafficking, terrorism, corrupt practices, and tax evasion. These crimes are called predicate offences in anti-money laundering laws.

## 2.2.2. Criminal asset confiscation

Criminal asset confiscation may also be referred to as asset forfeiture, asset recovery or proceeds of crime action. Apart from establishing a robust anti-money laundering regime, States should have at their disposal the authority to identify, detect, trace, and seize proceeds of crime for the purpose of eventual **confiscation**.<sup>13</sup> This can be achieved through asset confiscation provisions in a State's penal code, its legislation pertaining to money laundering, or a i.e. law on the proceeds of crime.

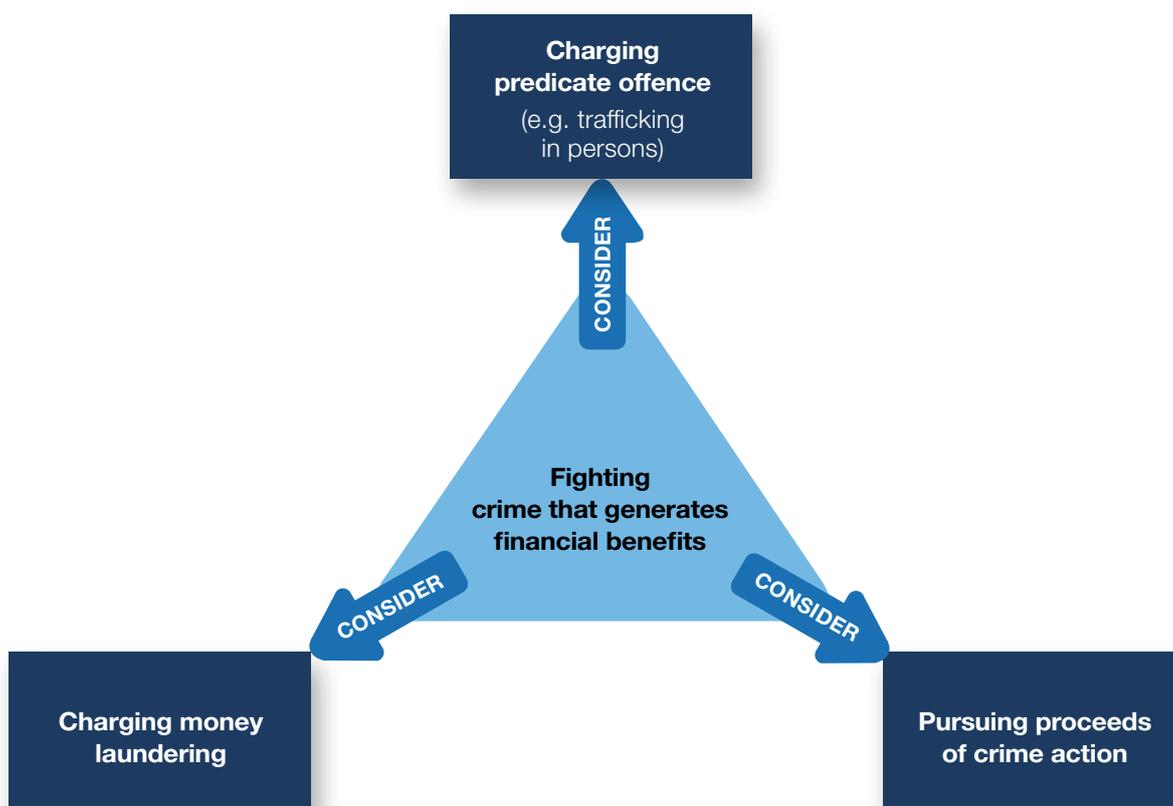
Generally, States can confiscate the proceeds of trafficking in persons in two ways:

- once a criminal conviction is secured (conviction based proceeds of crime laws), or
- in the absence of a criminal conviction, where it's possible to prove that the particular assets are proceeds of trafficking in persons (*non conviction based proceeds of crime laws – also known as civil forfeiture*).

The latter is a useful option for States to target criminals where it is not possible to secure a conviction for the trafficking offence.

The main legislative obligations are for States to create powers to enable seizures and confiscation of proceeds of crime, including the proceeds of trafficking in persons. Proceeds of crime laws allow law enforcement authorities to target the proceeds of all criminal activity, not just those relating to the offence of money laundering. In summary, it is important for law enforcement authorities to investigate all aspects of a crime that generates money as shown in Figure 3 below.

**Figure 3: Multi-action on fighting crime that generates financial benefits**



<sup>13</sup> 'Proceeds of crime' shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence (Article 2(e), Organized Crime Convention).

'Property' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets (Article 2(d), Organized Crime Convention).

'Freezing' or 'seizure' shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority (Article 2(f), Organized Crime Convention).

'Confiscation', which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority (Article 2(g), Organized Crime Convention).

## 2.3. International cooperation requirements under the Organized Crime Convention

States need effective international crime cooperation tools to fight trafficking in persons. Effective mutual legal assistance and extradition laws and agreements or arrangements allow for smooth and timely cooperation with foreign jurisdictions. In prosecuting transnational crimes, States need effective extradition laws to bring the offender to their jurisdiction for prosecution. States also need strong mutual legal assistance laws so that they can obtain evidence from other countries, such as bank records, phone records and witness statements. Other forms of international cooperation include transfer of sentenced prisoners, cooperation for asset confiscation, and cooperation using special investigative techniques, and joint investigations.

International cooperation on combating crime can be both formal and informal.<sup>14</sup> Formal cooperation in criminal investigations and prosecutions includes requests for mutual legal assistance. Informal assistance between police forces or other agencies can be used to obtain information from foreign countries prior to making a mutual legal assistance request. Both forms of international cooperation can be hampered by problems such as diversity of legal systems and law enforcement structures, inadequacy in established methods of communication of basic information and criminal intelligence, cultural and linguistic challenges, and lack of trust. With this in mind, it is important for agencies to make direct and early informal contact on matters of international cooperation.

The Organized Crime Convention and Trafficking in Persons Protocol provide a detailed approach to both formal and informal cooperation. In general, States can use the Organized Crime Convention, which the Trafficking in Persons Protocol supplements, as well as national legislation as the legal basis for international cooperation to execute extradition requests and to seek mutual legal assistance.

### 2.3.1. Extradition

Extradition is a formal process whereby one State (*the requested State*) will surrender a person at the request of another State (*the requesting State*), where the person is accused of or has been sentenced for a crime that is within the jurisdiction – including within the extraterritorial jurisdiction - of the requesting State. A State may request extradition of a person so she or he can face criminal prosecution in that State or serve a criminal sentence in that State in relation to an extraditable offence.

States may seek or provide extradition in relation to trafficking in persons through different types of arrangements, including arrangements based on bilateral or multilateral treaties, as well as arrangements based on domestic law with no treaty foundation. The offence for which extradition is sought is an offence in the domestic law of both the requesting State and the requested State. This is known as the **double criminality requirement** for extradition – sometimes referred to as dual-criminality.

The Organized Crime Convention (Article 16(1)) when read together with the Trafficking in Persons Protocol (Article 1(3)), makes trafficking offences extraditable offences under certain circumstances. Article 16(1) of the Organized Crime Convention defines the scope of the obligations to extradite.

In domestic legislation, States must ensure that offences under the Organized Crime Convention and the offences in the Trafficking in Persons Protocol are extraditable offences. Extradition requests should be in line with applicable international law.

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<sup>14</sup> Formal and informal cooperation are complementary. In some cases informal cooperation will become formal cooperation, but once cooperation is formalized, informal cooperation may still continue to take place. For instance, during the early stages of an investigation, informal law enforcement cooperation can be helpful to efficiently gain investigative leads when there are time constraints. At a later stage, the information obtained informally may need to be re-obtained through formal means to ensure it is admissible in court (UNODC 2011, In-depth training manual on investigating and prosecuting the smuggling of migrants, p.3).

## **Tip:** Ensure domestic extradition legislation supports trafficking in persons legislation

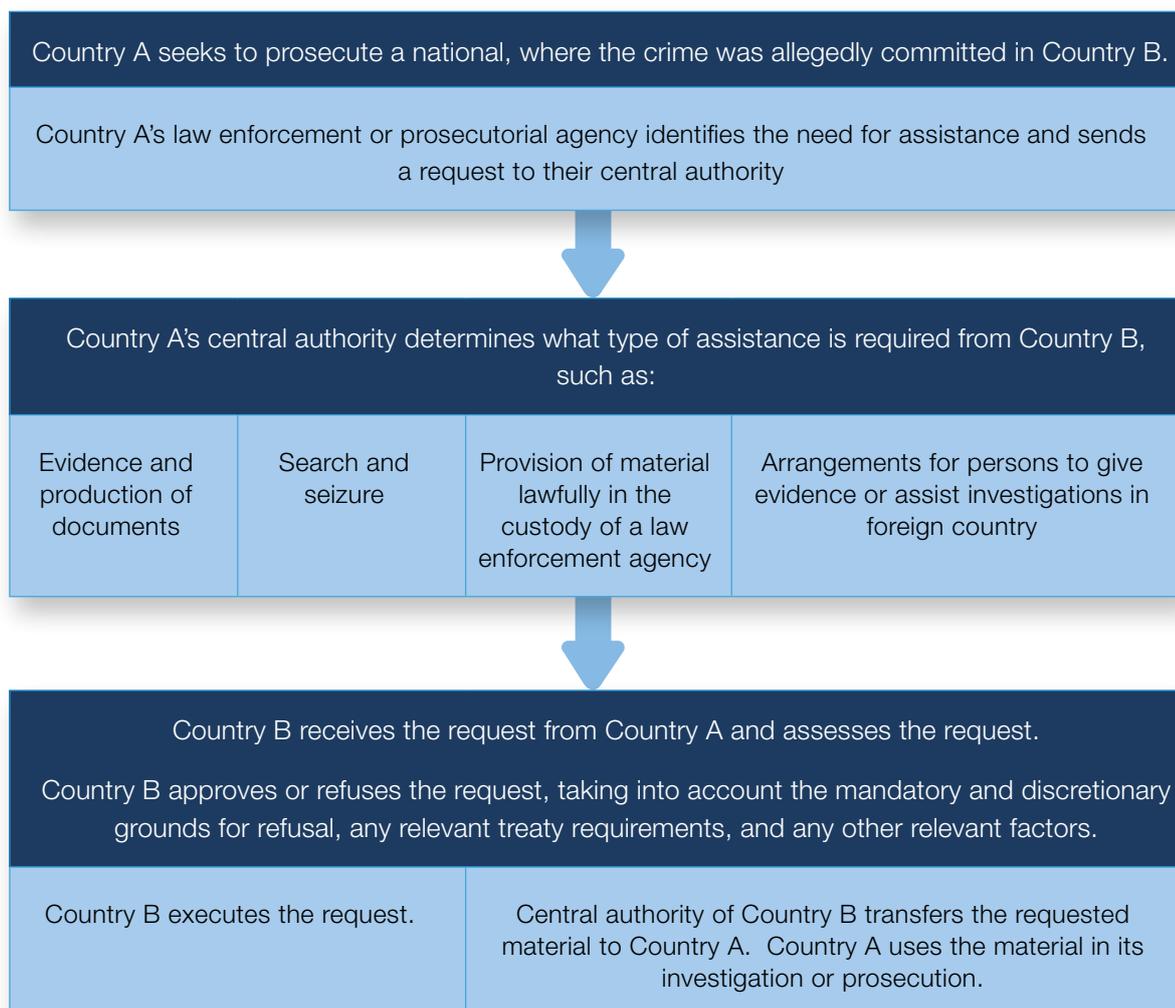
**States may use the Organized Crime Convention as a direct legal basis for requesting and granting extradition. However, where States have not accepted to use the Convention for this purpose and rather require separate legal bases for extradition (e.g. national legislation or a specific extradition treaty), they should ensure that trafficking of persons is included as an extraditable offence. For example, if a State has a 'list' of extradition offences in its extradition legislation, it needs to make sure that the trafficking in persons offences are included in that list. This will ensure compliance with the international crime cooperation obligations in the Organized Crime Convention, which apply to the offences in the Trafficking in Persons Protocol.**

### **2.3.2. Mutual legal assistance**

Mutual legal assistance (MLA) is a process by which States seek and provide formal government-to-government assistance in criminal investigations, prosecutions and related judicial proceedings as outlined in Figure 4. The types of assistance that may be provided through MLA are subject to applicable treaties and domestic law. The Organized Crime Convention sets out the types of MLA that may be requested:

- taking evidence or statements from persons;
- effecting service of judicial documents;
- executing searches and seizures, and freezing of assets;
- examining objects and sites;
- providing information, evidential items and expert evaluations;
- providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- identifying or tracing proceeds of crime, property, instrumentalities or other things for evidential purposes; and
- facilitating the voluntary appearance of persons in the requesting State Party.

**Figure 4: Summary of a mutual legal assistance request process**



**Tip:** Ensure that domestic mutual legal assistance measures support trafficking in persons offences

Article 18(1) of the Organized Crime Convention provides for a comprehensive regime on MLA, encouraging States to cooperate and provide to each other the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention and the Trafficking in Persons Protocol.

For example, while a trafficking in persons case may be prosecuted in a destination country, key evidence may be located in the victim's country of origin. Ensuring that police, prosecutors and courts can cooperate within and across borders – both formally and informally – is vital to the successful prosecution of trafficking in persons and money laundering offences.

## 2.4. Criminalization of corruption

Criminalizing corruption is a key complementary Organized Crime Convention obligation that may assist in preventing acts or offences related to trafficking in persons, such as crimes related to forgery of travel documents by way of bribing border officials, or collusion in trafficking crimes. The Organized Crime Convention provides the necessary legal framework for international cooperation to combat corruption.<sup>15</sup> Article 8 requires States to criminalize corruption.

For further guidance, the United Nations Convention against Corruption (UNCAC)<sup>16</sup> provides a comprehensive international legal framework to combat corruption and notes the links between corruption and organized crime and economic crimes including money laundering.<sup>17</sup>

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<sup>15</sup> General Assembly Resolution 55/25 of 15 November 2000 Organized Crime Convention.

<sup>16</sup> The UNCAC itself expands on the Organized Crime Convention and provides a comprehensive international framework to address corruption.

<sup>17</sup> Preamble, United Nations Convention against Corruption.

# Section 3

## Summary of Tips for Effective Legislation

Summary of tips for effective legislation to criminalize trafficking in persons:

- ✓ Establish a **broad definition** for trafficking in persons offence, including offences for **forced labour, servitude and other slavery-like practices**.
- ✓ Consider establishing a **standalone offence for exploitative conduct**.
- ✓ Ensure that laws provide for the assistance and **protection of trafficked persons**, and do not punish them for offences committed under duress or as a direct result of their being trafficked.
- ✓ Ensure that **witnesses are protected** in trafficking in persons cases.
- ✓ Establish **separate offence provisions for trafficking in persons and migrant smuggling** as the elements of the offences are different.
- ✓ Establish **extraterritorial jurisdiction** so that organizers of transnational trafficking in persons ventures cannot exploit gaps in the laws of different countries.
- ✓ Establish trafficking in persons offences that apply in both **transnational and domestic trafficking contexts**.
- ✓ Be aware that the Trafficking in Persons Protocol provides for **minimum standards** to strengthen domestic law – this could include in relation to **aggravating circumstances**.
- ✓ Include an explicit provision in **anti-money laundering legislation** that a conviction for a predicate offence (e.g. trafficking in persons offence) is not required in order to take action for the money laundering offence.
- ✓ Ensure that **extradition legislation** applies to trafficking in persons offences.
- ✓ Ensure that domestic **mutual legal assistance measures** support trafficking in persons offences.



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# The Bali **Process**



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on People Smuggling, Trafficking in Persons and Related Transnational Crime

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