Comments on the draft general recommendation on trafficking in women and girls in the context of global migration (TWGCGM).
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# Introduction

1. The purpose of this document is to provide comments on the DRAFT General Recommendation on trafficking in women and girls in the context of global migration (TWGCGM) produced by the Committee On The Elimination of Discrimination Against Women (CEDAW). The focus of my comments are towards the victim’s exemption from criminal liability as discussed in paragraph 91. The key recommendation is to provide clearer guidance for a standard No Prosecution Clause (NPC) which exempts criminal, administrative and civil liability of the victim.

# Paragraph 91 Victim’s exemption from criminal liability

1. Paragraph 91 discusses the general exemption of the victim’s criminal and administrative liability. Subparagraph (A) discusses the general concept, (B), the prohibition of the exchange of an exemption for cooperation by providing evidence or testimony and (C), the expungement of recorded offences relevant to the trafficking situation. Paragraph 91 presents the concept of a NPC and expungement but does not recommend steps to achieve or implement this idea.
2. I recommend paragraph 91 subparagraph (A) should detail a NPC and its elements to provide a baseline. The recommended elements of a standard NPC should contain the following:
* No liability for administrative, civil and criminal acts;
* The means for the expungement of criminal conviction or non-prosecution of charges relevant to trafficking;
* The flexibility for the judiciary to consider unique and individual factors; and
* A positive duty for ratifying states to integrate the NPC into domestic legislation and allow the recourse for private individuals to challenge the NPC.
1. The applicability of the NPC would still be reliant on the verification of victim status, along with determining compulsion. This could introduce a safeguard in the form of a cumulative test taking inspiration from *R v N*.[[1]](#footnote-1) The cumulative test assesses the relationship between the irrelevance of consent, the presence of compulsion and the limitations of compulsion (elaborated below). In *R v N,* the United Kingdom (UK) Court of Appeal awarded victim status to a trafficked person, but this did not protect the trafficked person from prosecution as the situation lacked compulsion.[[2]](#footnote-2) The significance of this test negates a presumption that just because victim status is awarded the NPC is automatically granted. This cumulative test could hinder the abuse of the NPC but also creates additional steps which could result in more time required before determining the validity of the case before applying a NPC.
2. The first element of the NPC is no liability for civil and criminal acts. This is due to the term’s ‘breadth and applicability beyond the criminal law sphere, this is particularly important as victims may also commit civil wrongdoings’.[[3]](#footnote-3) The recommended NPC should be broad enough to consider, or at least allow the judiciary to consider all crimes and civil infringements committed by a trafficking victim pending satisfaction of the cumulative test.
3. The second element is the expungement of convictions on a criminal record relevant to a trafficking situation. This takes inspiration from North Carolina (USA), where victims can request for the removal of previous prostitution convictions from a record.[[4]](#footnote-4) The recommended cumulative test can determine the victim’s lack of culpability. In essence this employs the same format to determine the applicability of the NPC and would determine the likelihood of expungement. The key aim here is to promote the rehabilitation of trafficking victims and their reintegration into society.
4. The third element is the flexibility afforded to national legislatures and authorities to assess trafficking situations in accordance with the unique characteristics of their environment. Examples of unique characteristics used for trafficking include witchcraft - referred as *juju* - commonly used by Nigerian syndicates to control victims and hypnosis which is identified as a means of control and explicitly stated in Taiwan’s human trafficking Prevention and Control Act.[[5]](#footnote-5) This flexibility must be a positive duty towards states to take proactive measures to update their practices and interpretations of human trafficking in their national laws to allow flexibility and proactive approaches.
5. The last recommended element is the positive duty for parties to integrate the NPC into domestic legislation and allow private individuals to challenge the NPC in domestic courts. The reason for this is to increase the accessibility of private individuals to challenge the clause and to allow its development through revision. The NPC should prescribe the positive duty to allow private individuals to challenge the use or misuse of the NPC in domestic courts. This element is to explicitly inform individuals of a right available. The importance of this element is to address the state’s obligation to protect, investigate and correctly attribute victimhood status to victims of trafficking. The explicit prescription in the NPC of a review mechanism available to private individuals may increase the reporting of trafficking cases at lower levels and allow judiciaries to further develop domestic legislation and practices.

# Elements of the cumulative test

1. This section elaborates on the elements of the recommended cumulative test. The recommended elements are:
* The irrelevance of consent;
* The presence of compulsion; and
* The limitations of compulsion.

## Element one: the Irrelevance of Consent

1. This element focuses on the irrelevance of consent when the victim is subjected to a trafficking situation. The importance of this element is the prevention of a victim being denied protection or prosecuted due to their perceived consent to commit a crime.[[6]](#footnote-6) Consent is deemed irrelevant under article 3 of the Palermo Protocol if a person is trafficked for the purpose of ‘prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal or organs’.[[7]](#footnote-7) The consent of a child is irrelevant regardless of the presence of the aforementioned purposes.[[8]](#footnote-8) With regard to organ trafficking, recommendations have been presented to unify domestic approaches. The Special Rapporteur for Trafficking in persons - especially women and children (SRTP) recommends all state’s legislations include the term ‘removal of organs’ into national definitions of trafficking in persons as well as to vitiate the notion of consent if consent were obtained in an exploitative manner.[[9]](#footnote-9) The sole reliance on article 3 of the Palermo Protocol to determine the situations where consent is irrelevant presents the potential issue where not all *victims* of human trafficking view themselves as victims.[[10]](#footnote-10) The SRTPhighlights this victim complex is particularly present in organ trafficking where ‘[v]ictims may not perceive themselves as such, in particular if they have broken laws by engaging in an agreement to sell an organ’.[[11]](#footnote-11) The utility of article 3 of the Palermo Protocol can result in the difference between the case being treated as ‘one of pimping and one of trafficking, resulting in higher penalties for the perpetrator and more protections for the object of the crime’.[[12]](#footnote-12) To develop a uniform NPC, the irrelevance of consent is necessary.

## Element two: the Presence of Compulsion

1. The presence of compulsion is a key element which ‘rationalises why trafficked persons ought to be excused’.[[13]](#footnote-13) The trafficking victim often has their free will removed or restricted enough to allow their captor to manipulate them into performing acts they otherwise would not commit. This is important to remember when asking *why* compulsion should be - or is a key - factor for a NPC. For compulsion to be present there needs to be a control mechanism eroding the freedom of choice of the victim. For compulsion to be assessed, global complexities unique to a particular location need to be considered. For example, witchcraft (often referred to as *juju*) is used throughout Africa – notably by Nigerian syndicates – to bind victims and compel them to obey.[[14]](#footnote-14) Uganda has addressed this complexity by prohibiting witchcraft as a mechanism to control victims.[[15]](#footnote-15) I recommend this element is required to be dynamic to address the cultural and social differences globally. The Organisation for Security and Co-operation in Europe (OSCE) highlights ‘being compelled to commit a crime thus includes the full array of factual circumstances in which victims lose the possibility to act with free will; not only under the threat of physical or emotional abuse, but also in the devastatingly prevalent scenarios wherein traffickers exploit victims by abuse of a position of vulnerability’.[[16]](#footnote-16)
2. In *ELS v The Home Office*,a Moldovan national was arrested in the UK after she was kidnapped and trafficked for roughly seven years through Italy, Turkey, Hungary, Romania, Israel and the UK. The trafficked person was accused of possessing false documents and was imprisoned for three months before the UK refouled the victim to Moldova.[[17]](#footnote-17) The UK Court of Appeal discussed the reasoning why compulsion can significantly diminish or effectively extinguish culpability for compelled crimes as ‘no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals’.[[18]](#footnote-18) Compulsion is a factor for consideration in trafficking cases and is necessary for the justification and function of a NPC.

## Element three: the Limitation of Compulsion

1. The limitation of compulsion is imperative as it presents the scenarios which could render a NPC invalid. Compulsion is seen in relation with the immediacy of the threat or the removal of free will.[[19]](#footnote-19) An issue with the limitation of compulsion is where prosecutors argue a lack of compulsion (‘i.e. control falling short of the defence of duress), or that the offence was not closely enough connected with the trafficking situation’.[[20]](#footnote-20) A practiced doctrine to determine the limitation of compulsion is where the conduct of the crime had ‘no realistic alternative (…) but to comply with the dominant force of another individual, or group of individuals’.[[21]](#footnote-21)
1. *R v N* [2012] EWCA Crim 189 Court of Appeal (UK) [↑](#footnote-ref-1)
2. ibid [↑](#footnote-ref-2)
3. Julia Muraszkiewicz, ‘Protecting victims of human trafficking from liability: an evaluation of section 45 of the Modern Slavery Act’ (2019) 83 Journal of Criminal Law 4 [↑](#footnote-ref-3)
4. Chapter 14 NCGSA (North Carolina, USA) § 15A – 145.6 B (2) [↑](#footnote-ref-4)
5. LexisNexis International & Foreign Law Centre *‘*Nigerian Sex Trafficking, Witchcraft, and the Rule of Law’ (LexisNexis International & Foreign Law Centre, 27 November 2012) <<https://www.lexisnexis.com/LegalNewsRoom/international-law/b/issuesspotlight/posts/nigeria-sex-trafficking-human-rights-rule-of-law>> accessed 10 December 2019; Ronald Wong, ‘A Critique of International and Singapore Legal Treatments of Trafficking in Persons’ [2014] Singapore Journal of Legal Studies 179 <https://ssrn.com/abstract=2529057> accessed 16 April 2020 art 2(1)(1) of the Taiwanese Human Trafficking Prevention and Control Act includes “drugs [and] hypnosis” as a means of control [↑](#footnote-ref-5)
6. UNGA, Trafficking in Persons especially Women and Children: Special Rapporteur on Trafficking in Persons, Especially Women and Children (2 August 2013) UN Doc A/68/256p17 para 58 [↑](#footnote-ref-6)
7. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) UN Doc A/55/383 (Palermo Protocol) art 3 (b) [↑](#footnote-ref-7)
8. ibid art 3 (c); Council Framework decision 2002/629/JHA on combating trafficking in human beings [2002], OJ L 203, art 1 (3) [↑](#footnote-ref-8)
9. see UNGA Special Rapporteur report A/68/256 (n 6) para 68 [↑](#footnote-ref-9)
10. see Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo) (n 7) art 3 (a) provides an overview of settings where the consent of a potential trafficking victim is obtained and what should be vitiated. Article 3 (a) is 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. [↑](#footnote-ref-10)
11. see UNGA Special Rapporteur report A/68/256 (n 6) para 52 [↑](#footnote-ref-11)
12. Ryszard Piotowicz, *Routledge Handbook of Human Trafficking* (Routledge International 2017) 192 [↑](#footnote-ref-12)
13. see Muraszkiewicz (n 3) 394 [↑](#footnote-ref-13)
14. see LexisNexis International & Foreign Law Centre *‘*Nigerian Sex Trafficking, Witchcraft, and the Rule of Law’ (n 5) [↑](#footnote-ref-14)
15. Prevention of Trafficking in Persons Act (2009) Uganda, act 7, section 4 (i) [↑](#footnote-ref-15)
16. OSCE, *Policy and Legislative Recommendations towards the Effective Implementation of the Non-Punishment Provision With Regard to Victims of Trafficking* (Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings) (2013) para 12 [↑](#footnote-ref-16)
17. *ELS v The Home Office* (UK), claim no. HQ09X01333 [↑](#footnote-ref-17)
18. *R v L. and other appeals* [2013] EWCA Crim 991; [2014] 1 All ER 113 (UK) [↑](#footnote-ref-18)
19. see OSCE (n 16) para 17 - 19 [↑](#footnote-ref-19)
20. see Piotowicz (n 12) 179 [↑](#footnote-ref-20)
21. see *R v L. and other appeals* (UK)(n 18) [↑](#footnote-ref-21)