

PROSECUTION OF TRAFFICKERS



Tool 5.13 Prosecution of traffickers

Overview

This tool introduces international standards relating to the prosecution of traffickers. It also presents duties and rights of prosecutors and offers some resources for their effective cooperation in prosecuting the crime of trafficking.

Principles of prosecution

Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

(International Association of Prosecutors)

1. Professional conduct

Prosecutors shall:

- At all times maintain the honour and dignity of their profession
- Always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession
- At all times exercise the highest standards of integrity and care
- Keep themselves well-informed and abreast of relevant legal developments
- Strive to be, and to be seen to be, consistent, independent and impartial
- Always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial
- Always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights

2. Independence

- 2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.
- 2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:
 - Transparent
 - Consistent with lawful authority
 - Subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence

- 2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. *Impartiality*

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

- Carry out their functions impartially
- Remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity
- Have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect
- In accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect
- Always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness

4. *Role in criminal proceedings*

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

- Where authorized by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally.
- When supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights; when giving advice, they will take care to remain impartial and objective.
- In the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence; throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence.
- When, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore:

- Preserve professional confidentiality
- In accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights
- And similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible

- Safeguard the rights of the accused in cooperation with the court and other relevant agencies
- Disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial
- Examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained
- Refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights, and particularly methods which constitute torture or cruel treatment
- Seek to ensure that appropriate action is taken against those responsible for using such methods
- In accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate

5. Cooperation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall: cooperate with the police, the courts, the legal profession, defence counsel, public defenders and other Government agencies, whether nationally or internationally; and render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual cooperation.

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by Governments. In general they should be entitled:

- To perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability
- Together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions
- To reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them, and not to have their salaries or other benefits arbitrarily diminished; to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases
- To recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures

- To expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards
- To objective evaluation and decisions in disciplinary hearings
- To form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status; and to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.



The IAP Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors are available at:
www.iap.nl.com

IAP Rules for Prosecutors in Obtaining Mutual Legal Assistance

- Rule 1. The document you send will be open to both judicial and possibly public scrutiny and the contents should be completed with utmost care.
- Rule 2. Only ask another State to do for you what your law enables you to do, and where the request will result in additional evidence of value to the prosecution.
- Rule 3. Check the contents of your request, ensure your name and contact details appear, make sure necessary annexes are attached.



Source: Mutual Legal Assistance, Best Practice Series No. 4 available at:
www.iap.nl.com

Jurisdiction

Prosecutions should take place in the jurisdiction where the majority of the criminality took place or where the majority of the loss took place. In trafficking cases, this is often (but not automatically) the destination location where the exploitation took place. The following factors should be considered in determining jurisdiction.

Existence of legislation

- Does the legislation of the jurisdiction include the offence of trafficking in persons?
- Is the legislation comprehensive and does it include all forms of exploitation, including that in question?

Sentencing powers (see Sentencing, below)

- Sentencing should reflect the gravity of the offence.

Location of the accused

- Is it possible to prosecute in that jurisdiction?
- Are transfer or extradition proceedings possible? The general principle of *aut dedere aut judicare* (extradite or prosecute) applies here.

Division of prosecution

- Cases may be complex and cross borders. Prosecution in more than one jurisdiction is not desirable.
- What measures can realistically and practically be taken to allow a prosecution to take place in one jurisdiction?

Witness attendance

- The attendance of victims as witnesses is often necessary in trafficking cases; ensure that measures are taken to give the best possible support to these witnesses.
- In transnational trafficking cases, witnesses may be required from other jurisdictions. Consider which parts of evidence may be received in other forms such as in writing or via a video link.

Witness assistance/protection (see Chapter 8)

- What assistance can a witness be given in a particular jurisdiction? (this may include simple measures such as providing a witness with a mobile phone and some credit or establishing an e-mail account for them if they know how to use e-mail)
- Does the jurisdiction have a legal framework that allows for witness protection or assistance? If there is no official legal framework, is there a *de facto* witness assistance programme or the possibility of assistance/protection on a case-by-case basis?
- What evidence is there that a stated witness assistance programme is actually effective in practice? Are there any indicators that show it is not?
- Is there a capability of the suspected trafficker(s) intimidating a witness in a particular jurisdiction?
- Are there any general issues, such as existing or emerging conflict, that may affect the ability to protect witnesses?

Delay

Time should not be a leading factor but it should be considering.

- Delays should be minimized. Are there backlogs which would delay the case?
- What is the potential timescale for a case to come to trial in a particular jurisdiction?

Interests of the victim

- Would the interests of the victim be prejudiced by changing jurisdiction?
- Is compensation for victims possible within a jurisdiction?
- What levels of compensation may be expected in different jurisdictions?

Evidential issues

Cases should proceed on the best possible evidence. Admissibility of evidence varies from jurisdiction to jurisdiction.

- Given the evidence available and the rules of admissibility, which jurisdiction would offer the best chance of successful prosecution?

Legal requirements

Decisions on where to hear cases cannot be taken to avoid complying with legal requirements in one or other jurisdiction.

Proceeds of crime

This is not a primary consideration, but factors which should be considered include:

- Where are the assets held?
- Where is there the best chance of securing asset seizure?
- Will the jurisdiction share recovered assets with law enforcement/prosecutors/victims in other jurisdictions?
- Do victims have access to any recovered assets as compensation?

Costs of prosecuting

This should be a consideration when all other factors are equally balanced.



For more information on jurisdiction, refer to the UNODC operational training manual to combat trafficking in persons, forthcoming in 2008, at:

www.unodc.org

Sentencing

Trafficking in persons has been described as a high profit, low risk crime because the penalties imposed on traffickers are lenient relative to the crime that they have committed. States should take the necessary measures to ensure that the offence of trafficking in persons as defined by the Protocol is punishable by effective, proportionate and dissuasive criminal penalties.

Principles of sentencing

Sentencing should be guided by the seriousness of the offence. Seriousness is determined by:

- The culpability of the offender (how much an offender is to blame or is responsible)
 - The offender has intention to cause harm, is reckless as to whether harm is caused, has knowledge of specific risks even though he or she does not intend to cause the harm that results, or is negligent as to the resulting harm.
 - An offender's culpability is high in circumstances where activities are non-consensual, coercive or exploitative, where more harm was caused than was necessary to commit the offence and/or where vulnerable victim(s) have been deliberately targeted.
- The harm caused by the offence (harm to individual victims, the community and other forms)

Individuals may suffer physical and psychological injury, financial loss, detriment to their health etc. Where no such harm has occurred, the court should consider the likelihood of harm occurring and the impact if it had occurred.

The community at large may be harmed by economic loss, damage to public health or interference with economic integrity and the administration of justice.

Another type of harm may be that suffered by the victim's friends, family or community members.

Judges can only make a decision based on the facts before them. If there is no evidence of aggravating or mitigating circumstances, then this will be reflected in the sentence. Prosecutors should put all the facts before the court, taking into consideration all aggravating and mitigating circumstances. The commission of the offence for financial gain will be a common circumstance in trafficking cases, as will that of deliberately targeting vulnerable persons. Other aggravating circumstances which should be taken into consideration include the pregnancy of victims, victims who are children, exposure to serious injury or harm and a large number of victims.

The legal requirement that the prosecution put all information to the court varies in different jurisdictions. Even where there is not a formal requirement to do so, it is good practice for prosecutors to draw aggravating and mitigating factors to the attention of the court to ensure that decisions are fair and that the system is respected for the sentences it delivers.



For more information on sentencing, refer to the UNODC operational training manual to combat trafficking in persons, forthcoming in 2008, at:

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Promising practice

United Nations Interregional Crime and Justice Research Institute

With the aim of strengthening the capacities of Costa Rican public prosecutors in responding to trafficking in persons, the UNICRI action programme against trafficking in minors for sexual purposes set up an information system for the investigation and prosecution of human trafficking cases implemented within the judicial system of Costa Rica, and specifically targeted at the offices of public prosecutors in charge of investigating cases of sexual exploitation of children and trafficking in children for sexual purposes.

That information system connects prosecutors' offices all over Costa Rica via an Intranet. This is an important data collection tool that can assist in building stronger cases and improve investigating skills and strategies. It will also support the Attorney General's Office in drawing up policies against these crimes.



For more information see:

www.unicri.it/wwd/trafficking/minors/activities_costarica.php

Recommended resources

International Association of Prosecutors

IAP has made a variety of resources available online via its website. Among materials relevant to the prosecution of traffickers of people are the IAP Standards of Professional Responsibility (see above), the Model Guidelines for Effective Prosecution of Crimes against Children and resources relating to mutual legal assistance, victims and human rights.



These and other resources are available at:

www.iap.nl.com