

## Commentary on Cambodia Anti-Trafficking Law

### Article 1

This Article explains the general objective of this Law. It calls for the implementation of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (hereafter, “Protocol”), supplementing the United Nations Convention against Transnational Organized Crime (“Convention”). The Protocol was first adopted by the United Nations in Palermo, Italy in 2000 and later entered into force in December, 2003. Cambodia signed the Protocol on December 25, 2003 to become one of the 117 signatories. By implementing this Law, Cambodia has vowed to implement the Protocol.

One reason that Cambodia’s 1996 anti-trafficking law (the Law on Suppression of Kidnapping, Trafficking and Exportation of Human Persons, hereinafter “LSKTEHP”) was widely criticized was that the law and other related laws (especially immigration laws) were used to punish victims of trafficking rather than perpetrators. It has been frequently reported that Cambodian authorities raid brothels under anti-trafficking and exploitation legislations, only to later imprison sex workers for entering the country illegally.<sup>1</sup>

The Protocol, which this Law intends to implement, indicates at the outset that one of its primary purposes is “to protect and assist the victims of such trafficking, with full respect for their human rights” (Article 2, Provision (b)). Moreover, it dedicates Article 6, 7 and 8 to addressing in detail how victims of trafficking should be protected in different circumstances. Thus, by implementing the Protocol, it is crucial

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<sup>1</sup> In one instance, the government raided a Phnom Penh brothel and rescued 14 Vietnamese sex slaves. A local NGO took them in and began providing them with medical, psychological, and legal services, promising them a safe shelter and recourse through Cambodia’s justice system. A few days later they were imprisoned under immigration laws. The judge refused to drop the charges in spite of evidence that they were trafficked against their wills.

In another instance, only two months after the LSHTSE was promulgated, three men giving humanitarian relief to Mantagnards (an ethnic group indigenous to the mountains of Vietnam and Cambodia) fleeing persecution in Vietnam were sentenced to six months in prison under anti-trafficking legislation. It is clear that the purpose of the LSHTSE is not to deter granting relief to asylum seekers.

that, with the exception of extraordinary cases, victims of trafficking and exploitation are not punished for any offences or activities related to their having been trafficked. This includes prostitution and immigration related violations.

This Article also refers to “other international instruments or agreements with regard to human trafficking that the Kingdom of Cambodia has ratified or signed.” These international instruments or agreements, as far as they are relevant for the present purpose, include, but are not limited to, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture), the Convention on the Elimination of All Forms of Discrimination against Women (the Convention for Women), and the Convention on the Rights of the Child (the Convention for Children). Cambodia is also a party to the Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region to which China, Lao, Myanmar, Thailand, and Vietnam are also parties.

In July of 2007, Cambodia’s Constitutional Council ruled that international human rights treaties to which Cambodia is party are incorporated into Cambodian domestic law and hence are directly applicable to domestic court proceedings. Thus, when enforcing this Law, the Cambodian Government should take the aforementioned treaties into account, insofar as those treaties are relevant and contribute to the prevention and suppression of any kind of human trafficking and the protection of trafficking victims.

The scope of human trafficking is discussed in the following articles. In addition, the definition found in Article 3(a) of the Protocol should be consulted, where human trafficking is defined as “the recruitment, transportation, transfer, harboring 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.”

The scope of “exploitation” is discussed in the following articles. In addition, the definition found in Article 3(a) of the Protocol should be consulted. There “exploitation” is meant to include “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The definitions provided by the Protocol are not exhaustive. All the activities addressed in this Law (regardless of whether they are included in the Protocol’ s definitions of trafficking or exploitation) should be regarded as trafficking and exploitation.

## Article 2 and Article 3

These Articles address jurisdictional issues. The language of these Articles, for the most part, is directly derived from the jurisdictional directives of the Convention (Article 15 of the Convention). Thus, in applicable cases, courts should consult the relevant commentaries on the Convention. This shows the Law's commitment to correspond to the international standard in combating trafficking and exploitation and strengthen the enforcement of anti-trafficking actions by adopting a broader jurisdictional boundary. This Law's predecessor, the LSKTEHP, did not address jurisdictional issues in these broad terms, limiting the Cambodian Government's ability to address wide-spread trafficking-related problems inside and across the country's border.

This Law, however, does not adopt all the jurisdictional directives suggested by the Convention. Article 15 of the Convention states that "a State party [to the Convention] may also establish its jurisdiction over... such offense" when the offense involves an organized criminal group and a certain form of transnational money laundering. Such language does not appear in this Law.

Instead, this Law has a different provision in Article 2, which states that "an offense shall be considered to be committed...in Cambodia from the moment when one of the constituent acts (elements) takes place within the territory of...Cambodia." For example, Article 10 of this Law prescribes punishment for a person who unlawfully removes another for the purpose of profit making. Because "purpose" is an element of the crime under Article 10, per Article 2 of this Law, if A unlawfully removes B from Vietnam for the purpose of profit making in Cambodia, Cambodian courts shall have jurisdiction over A, because the "purpose" is to "profit" within the territory of Cambodia. This provision is intended to broaden the jurisdictional scope of the Law while attempting to avoid potential conflicts involving state sovereignty of other countries.

## Article 4

This Article addresses the issue of attempt and complicity. Both the Protocol and the Convention, in their criminalization provisions (Article 5 of the Protocol and the Convention), call for punishment for attempt and complicity.

This Article mandates that both attempt and complicity “shall be punished and liable to the same punishment.” Such an approach places an emphasis on subjective mental culpability. Thus, even if a person’s action did not result in a successful commission of a trafficking or exploitation-related crime, the person should be punished as though the crime was successfully committed if the person intended to commit the crime.

In considering the actor’s subjective mental culpability at the time of attempt, courts should look at why the action in question did not ultimately result in the successful commission of the crime. If the actor voluntarily and completely renounced his plan to commit the crime before any substantial step to the commission of the crime has been taken, he may be presumed not to have the same mental culpability as someone who although intending to carry out the plan to its successful commission, was prevented from doing so by some circumstance. If the actor could not carry out his criminal plan due to external circumstances that made the successful commission of the crime impossible or more difficult, or if the actor did not carry out his criminal plan but rather decided to wait for a “better time,” it should not be presumed that his mental culpability is any less than the successful commissioner.

The focus should be on subjective mental culpability in cases involving complicity as well. Courts should consider whether an alleged accomplice or instigator had a purpose to aid a principal in the commission of a crime or knowledge that his action would likely aid the principal in committing the crime. If the alleged accomplice had neither purpose nor knowledge, it may be presumed that he did not have the required mental culpability to be an accomplice or instigator. Additionally, courts should not consider whether a principal is aware of aid from an alleged accomplice or instigator, neither should they consider whether the aid resulted in a successful commission. The focus should be on the alleged accomplice’s mental state at the moment of aid.

This Article specifically indicates that complicity includes “the form of organizing or directing another to commit any of the felonies or misdemeanors stipulated in this law.” Consistent with the Convention, “organizing” should be interpreted as putting together a group of three or more persons for a period of time with the intent to act in concert to commit a crime or offence established in accordance with this Law.

For the purpose of this Article, complicity is limited to an act of aiding or abetting before or at the moment of a crime. An act of aiding or abetting after a crime has been committed, e.g. harboring a victim, should be distinguished.

The last provision of this Article enables law enforcement to punish and deter impersonal legal entities, e.g. corporations, who are involved in trafficking-related crimes. This is necessary since a guilty corporation cannot be punished by imprisonment, hence imposing fines is necessary to achieve suppression and prevention of trafficking-related crimes among impersonal legal entities.

## **Article 5**

The purpose of this provision is to establish the court’ s discretion in cases where an offense is punishable by both imprisonment and fine. In all such cases, the court may choose to apply a sentence of only imprisonment, only fine, or a combination of both. For further explanation and example of concurrence, see the commentary on Article 6 below.

## **Article 6**

Concurrence of offenses implies the option of multiple punishments for the same criminal act. Concurrent sentencing occurs when multiple sentences are applied simultaneously. If the same act can be attributed multiple punishments (e.g. through multiple statutes addressing the act or through multiple sections of the same law) then the court should apply concurrent sentencing and imposes the greatest of the multiple punishments. However, if the one act contains multiple punishable offences, each penalty may be imposed, given that these penalties are not of the same nature.

Multiple penalties for multiple criminal acts committed by the same principal does not constitute concurrent offenses.

Under this provision, it is possible to serve a prison sentence and pay a fine for the same crime, since the nature of these penalties is not the same. However offending persons may not serve the same type of sentence consecutively for a single offense. For example, if A is fined 100,000 riels and 200,000 riels for the same offense, he should pay 200,000, not 300,000. Alternatively, if A is sentenced to 2 years and 3 years for the same offense, he should serve 3 years, not 5. However, if A is fined 100,000 riels and sentenced to 2 years' incarceration, he may be subject to both penalties.

Consecutive sentencing, in contrast to concurrent sentencing, is when multiple sentences are applied one after the other. Whether sentences are applied concurrently or consecutively depends on the nature of the offenses, the applicable laws, and the court' s discretion. For the purpose of this statute, "several penalties of the same nature" (e.g., multiple incarcerations or multiple fines) may not be pronounced consecutively for the same offense.

## **Article 7**

This Article shows a substantial difference from the LSKTEHP' s usage of compounded sentencing for minors. Whereas the LSKTEHP heightened sentences when the offence was committed against children fifteen years and younger, this Law raises the threshold age to eighteen, in accordance with its obligations under the Convention for Children. This clearly demonstrates Cambodia' s commitment to enforcing its international obligations and to expanding protections for minors. Courts should be mindful of these implications in their rulings.

Courts should also pay special attention to this Article' s "reasonableness" requirement. The Article states that if a person "reasonably" believes the minor' s age to be eighteen years or more, then that person is not necessarily presumed to know the minor' s true age. In interpreting what constitutes a "reasonable belief," it is recommended

that courts apply the “objective” approach. That is, the actor’s own opinion in regards to the reasonableness of his judgment does not exempt him from heavier punishment if the victim does not reasonably appear to be eighteen or over to an average person with average judgment in the actor’s situation. This approach reduces the chance of fraud and abuse of discretion. Also, in considering whether such a belief is reasonable, courts should look at a variety of factors, including (but not limited to) the apparent age of the victim, representations of age made verbally and by documentation, etc.

## Article 8

This Article adopts the term “unlawful removal,” which differs from the LSKTEHP’s “kidnapping” language. The intent is to cast a broader net by adopting a more open-ended term. This, of course, is consistent with other changes adopted in this Law that express the Cambodian Government’s resolution to fight trafficking and exploitation-related crimes more strenuously.

Courts must be careful, however, not to apply this Article either in an overinclusive or underinclusive fashion. The Article uses many broad, unqualified terms such as “force” or “abuse of power,” and these terms need to be more clearly defined for the appropriate application of the Law. When interpreting these terms, courts may refer to the case law of Cambodia and base their interpretation on it in such a way that enables courts to retain consistency and coherency throughout Cambodia’s criminal law jurisprudence. The following is a guideline that courts may refer to.

Because provision 1 of the Article only mentions “current place of residence,” this underinclusive language might provide a loophole for offenders. The American Model Penal Code’s definition of “kidnapping,” addresses not only the victim’s “current place of residence,” but also the victim’s “place of…business, substantial vicinity from the vicinity where he or she is found.” Where, for instance, if a minor is removed from his school for hours before he is returned home later that day, a strict reading of this Article may fail to provide a basis for punishing such an offense; however, the American Model Penal Code would definitely provide a



basis for punishment. In this context, courts should interpret the word “place of residence” broadly to realize the spirit of the Law.

The word “force” has a danger of being interpreted both overinclusively and underinclusively. For example, courts should interpret “force” to exclude mental, psychological, or intellectual force at least in cases involving adult victims. To interpret “force” too broadly as to include these kinds of forces would make the law vulnerable to attempts at fraud and arbitrary line-drawing. On the other hand, when such forces are used against minor victims, courts may take a more flexible approach, since minors are more vulnerable to such forces. Doing so will be consistent with the spirit of the law and the international standard urged by the Convention for Children. Thus, courts must be always mindful of the particular context of each case and apply the law flexibly in a way that best achieves the overall purpose of the Law.

Another factor to consider in defining the term “force” is whether resistance by a victim is required. In some jurisdictions, crimes requiring an element of force (most notably rape) also require resistance by a victim to prove that there was a use of force; in other jurisdictions, the trend is to eliminate such a requirement based on empirical studies that some victims “freeze” when offenders apply force. In the current context of “unlawful removal,” resistance should not be required to prove use of force by the offender, since the purpose of this Law is to place strict burdens on traffickers.

As for threat and deception, courts should consider it immaterial whether a threat or deception by an actor is threatening or deceiving enough to average persons. That is, as long as the actor intended to use such a threat or deception to commit the action of unlawful removal or had knowledge that his threat or deception would be highly likely to be effective against the intended victim, the actor should be punished as he possesses the requisite subjective mental culpability. Thus, for example, if A threatens B, a mentally ill individual, by telling B that he is going to do X to B, and if B is unlawfully removed as a result of the threat, it is immaterial whether an average person thinks being done X onto himself is threatening or not, as long as A knew that the threat is going to have an effect on B.

“Abuse of power” generally involves situations in which government officials use their positions of authority inappropriately. The Law, read as a whole, displays a clear purpose to eradicate government corruption in Cambodia related to human trafficking. Thus, courts should interpret the term “abuse of power” broadly when government officials are involved in trafficking-related crimes.

“Enticement” is defined as “the act or an instance of wrongfully soliciting or luring a person to do something.” Judges should use discretion, according to the particular context of each case, in distinguishing legitimate offers for commercial opportunities from “wrongful” solicitation or allure combined with illegitimate purposes. For instance, if A, an employer, offers B a legitimate job overseas, this should not be considered as a “wrongful removal by enticement” even if B is removed by his place of residence by A’s solicitation, because A’s solicitation is not “wrongful.”

The second provision deals with “taking a minor or a person under general custody or curatorship or legal custody away from the legal custody of the parents, care taker or guardian.” As a general principle of criminal law, the offender must have knowledge of the victim’s age to be charged under this Provision. Here, the “reasonableness test” should apply as in Article 7 if a reasonable person in the actor’s circumstance would believe that the victim was not a minor, courts should take this into consideration. It should be noted that courts may deem consent obtained from a minor or mentally incompetent person to be legally void. When this happens, such consent cannot be used as a legal justification.

Note that this Article only serves a basis for crimes that combine unlawful removal with other illegitimate purposes targeted below. This Article does not prescribe any specific punishment against the offense of unlawful removal itself.

## **Article 9**

This Article sets the baseline for punishment of unlawful removal specified in the second provision of Article 8, and allows for mitigation

or remittal of this punishment under specific circumstances and at the court' s discretion. All three mitigating factors should be satisfied before mitigation or remittal can be considered.

Among the three mitigating factors, the third mitigating factor requires a special attention. It should be interpreted to mean that the offender should not have any purpose to commit the offense of unlawful removal itself, not some other trafficking-related activity done after unlawful removal. For example, if A honestly believed that he was a legal custodian of B, a minor, and thus took B under his custody away from C, who is the actual legal custodian of B, A may be deemed to satisfy this mitigating factor. However, the fact that an actor simply did not know that unlawful removal was a crime (ignorance of law) should not mitigate the punishment for the current Article' s purpose.

Mitigation or remission should be done with the intent to balance justice, proportionality, and deterrence. Additionally, mitigation or remission is only available when the victim is not less than 15 years of age (see Article 9, section 1). This shows the Law' s commitment to stringently punish those who target the young and vulnerable.

## **Article 10**

This Article imposes sharply increased punishment for unlawful removal done for the purpose of committing trafficking-related crimes. The list of trafficking-related crimes is quite comprehensive, which shows Cambodia' s commitment to fight human trafficking across the board. Under this article, unlawful removal with the purpose to commit the crime is sufficient to show guilt (i.e. the trafficking-related crimes listed do not need to actually occur to punish the offender under this Article). Since the punishment called for under this Article is severe, the term "purpose" should be narrowly construed. To act with "purpose" thus means to act with "specific intent" to commit that crime.

For the definitions of the terms used in this Article, courts should first refer to other provisions of this law, and if they are not found within this law, to the definitions promulgated by relevant international

organizations and conventions. If the specific activity that the actor purported to commit does not fall directly in one of the categories described in the Article, courts should exercise their discretion to decide whether punishing the actor under this Article serves the overall policy goal of suppressing human trafficking and sexual exploitation.

Also note that the list of actions that appears in the Article to describe the terms “any form of exploitation” is not comprehensive. If the actor had the purpose to exploit the victim in some other way that is not listed, courts still may punish him under this Article when doing so furthers the general policy of suppressing human trafficking.

The Trafficking Victims Protection Act of the United States contains some useful definitions that courts may refer to. In the Act, the term “commercial sex act” is defined as “any sex act on account of which anything of value is given to or received by any person;” “debt bondage” as “the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined;” “Involuntary Servitude” as “a condition of servitude induced by means of 1) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or 2) the abuse or threatened abuse of the legal process.

This Article also describes three aggravating circumstances: the victim is a minor; the offence is committed by a public official who abuses his/her authority over the victim; or the offence is committed by an organized group. More severe punishment is administered if any one of these three factors is satisfied. The list clearly indicates that the Law is designed with a focus on children, government corruption and organized crimes, according to international treaties to which Cambodia has committed itself. The previous anti-trafficking law did not include government corruption or organized crime as an aggravating circumstance. Also, although the previous law designated an offense against a minor as one of

the aggravating circumstances, the threshold age was fifteen, rather than eighteen as in this Law.

For the purpose of this Law, the term “government officials” includes police officers and any other government employee using the power or influence of their employment to further human trafficking and sexual exploitation. Government officials are presumed to have abused their authority over the victim when they are complicit to the crime.

An “organized group” is defined in accordance with the United Nations Convention Against Transnational Organized Crimes (UNTOC) Article 2(a) to mean “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences...in order to obtain, directly or indirectly, a financial or other material benefit.” A “serious crime” is in turn defined in accordance with Article 2(b) of UNTOC to mean “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”

Lastly, this Article addresses the issue of consent. The Article states that “the consent of the victim to any of the intended purposes set forth in paragraph 1 of this article shall be irrelevant where any of the means set forth in Subparagraph (1) of Article 8 of this Law, i.e., force, threat, deception and enticement, is used. Under this Law, pursuant to Article 8, there are two ways for a person to be a victim of unlawful removal. This Article clearly indicates that when the victim is “unlawfully removed” due to the use of coercive or deceptive means, consent to a trafficking-related crime thereafter is irrelevant. Also, if the consenter is a minor or mentally incompetent, courts may declare such consent legally irrelevant. The irrelevance of consent alludes to the similar provision in Article 3(b) of the Protocol.

## Article 11

This Article addresses the issue of unlawful removal done with the purpose of delivering or transferring the victim across state borders. Note that it is intended to punish all unlawful removal with the purpose of delivering or transferring the victim across state borders *regardless* of whether the delivery or transfer is linked specifically with the trafficking-related activities listed in Article 10. Note also that a cross-border transfer does not have to actually occur to punish the offender under this Article the only requirement is that the offender unlawfully removes someone with the purpose of making a cross-border transfer. Thus, as in Article 10, courts may, in proper circumstances, consider the issue of renunciation by the offender.

One of the main differences of this Law from the LSKTEHP is its focus on combating cross-border trafficking-related crimes. The rationale for putting an emphasis on cross-border trafficking-related crimes is that such crimes are much harder to combat due to its international nature and victims are less likely to be rescued or able to practice effective self-help. Also, victims are likely to suffer more in an unfamiliar environment, which provides moral justification for harsher punishment imposed on cross-border crimes as well.

## Article 12

This Article is designed to punish a person who induces, hires or employs another, by the use of deception, abuse of power, confinement, force, threat or any coercive means, so that the person who is induced, hired or employed can be exploited. “Any form of exploitation” as defined in Article 10 may include, but is not limited to, the exploitation of the prostitution of others, pornography, commercial sex act, forced labor or services, slavery or practices similar to slavery, debt bondage, involuntary servitude, child labor or the removal of organs. For the present purpose, and for the sake of consistency, courts should also consider sexual aggression, marriage against will of the victim and

adoption as forms of exploitation to the extent that they are applicable to a particular given context.

Courts should be mindful that this Article intends to punish the act of exploitation only when it is done *by* the person who induces, hires or employs *against* the person who is induced, hired or employed. That is, the person who is induced, hired or employed should also be the person who is exploited for this Article to be applicable. Thus, if A hires, with the use of deception, B, and A and B together exploit C, a third person, this Article is not applicable to punish either A or B. However, if A hires, with the use of deception, B, and A subsequently exploits B, A is punishable under this Article.

Also, such inducement, hiring or employment must be accompanied by the use of deception, abuse of power, confinement, force, threat or any coercive means and with the purpose to exploit in order to be punishable under this Article. Thus, if A hires B without resorting to any of the illegitimate means listed here and/or any purpose to exploit, but later starts exploiting B, A is not punishable under this Article.

Again, note that the act of exploitation does not need to actually occur to be punishable under this Article. If the actor has induced, hired or employed the victim by a coercive or deceptive mean with purpose to exploit the victim or knowledge that the victim will be very likely to be exploited, the actor can be punished under this Article even if the victim is not actually exploited.

For the purpose of this Article, courts may interpret the term “coercion” to mean, according to the Trafficking Victims Protection Act of the United States, threats of serious harm to or physical restraint against any person; 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 against any person; or the abuse or threatened abuse of the legal process.

## Article 13

This Article speaks of unlawful delivery and receipt of the control over a person. For the purpose of this Law, it is presumed that if delivery or receipt of the control over a person is done with force, threat, deception or enticement, that delivery or receipt is unlawful. However, even if the delivery or receipt of the control is done without force, threat, deception or enticement, this does not necessarily mean that it is lawful. For instance, if A delivers the control of B, who voluntarily sought an opportunity to work as a prostitute and asked A to connect her to a brothel, to C, a brothel owner, for commission, this transfer may be deemed unlawful even in the absence of any force, threat, deception or enticement. Thus, courts should use their discretions when judging whether a particular delivery or receipt is unlawful, taking into account the particular context in which delivery and receipt of the control over a person arose.

Courts should interpret the phrase “anything of value” broadly in general in correspondence to the spirit of this Law, but also with a degree of flexibility according to circumstances of a particular case. For instance, if A, a gang member, delivers the control over B, a sex worker, to C, a brothel owner and gets in exchange information about the police raid scheduled in near future, the information should be considered as “something of value.” The same information, however, would not be qualified as something of value to someone who derives no benefit from it.

The word “control” shall be, again, interpreted broadly in general to correspond to the spirit of the Law. However, the meaning of the word should not be extended to include, for example, “psychological” or “mental” control over a victim. At the same time, it should not be limited to cases where a physical body of a victim is manually handed over from A to B. For instance, if A tells B, a sex worker, to go and wait in front of the station X, and A also tells C, a brothel owner, to pick up B at the station X, delivery and receipt of the control over a person have occurred. Another example of delivery and receipt of the control over a person that does not involve a physical hand-over would be a transfer of rights to control, e.g., a contract document. If A, the owner of brothel X, transfers the contract document that binds B, a sex-worker, to work for A for certain duration, to C, the owner of brothel Y, courts should use their



discretion and consider this as delivery and receipt of the control over a person.

For the definition of the act of “procuring” , see the commentary for Article 25.

## **Article 14**

It is in fact difficult to imagine a case where a person is sold, bought, or exchanged without the purposes listed in Article 15. Thus, this Article should be used as a “fall-back provision” of last resort, in case courts fail to prove the purpose listed in Article 15 for whatever reason.

## **Article 15**

The structure of Article 15 duplicates the structure of Article 10. See the commentary for Article 10 for the guidance.

## **Article 16**

The structure of Article 16 duplicates the structure of Article 11. See the commentary for Article 11 for the guidance.

## **Article 17**

Article 17 is designed to punish a person who transports, for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption, or any form of exploitation, another person who has been unlawfully removed, recruited, sold, bought, exchanged or transported. To be punishable under this Article, the transporter is required to have knowledge that the person or persons he or she transports have been unlawfully removed, recruited, sold, bought, exchanged or transported. Thus, although A, a transporter, transports B for

the purpose of exploitation, if A has no knowledge of B being unlawfully removed, A is not punishable under this Article.

For the correct interpretation of this Article, it is important to understand that the phrase “for the purpose of profit making...or any form of exploitation” modifies the verb “transport” rather than the phrase “unlawfully removed, recruited, sold, bought, exchanged or transported.” Thus, the person being transported does not have to have been unlawfully removed, recruited, sold, bought, exchanged or transported for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation for this Article to be applicable. For example, if B, a victim of a simple unlawful removal that is not combined with the purpose to commit any further crime is transported by A with knowledge or purpose to exploit B thereupon, A is still punishable under this Article.

Although transporting a minor is not an aggravating circumstance in this Article, it is recommended, according to the spirit of this Law and the Convention on the Rights of the Children, that if a transporter transports a minor who has been unlawfully removed for any of the trafficking-related activities listed in this Article, knowing that the victim is a minor who has been unlawfully removed for such purposes, the transporter shall receive the maximum sentence of fifteen years for the non-aggravated offense. This recommendation shall apply to Article 18 as well.

## **Article 18**

This Article addresses the issue of cross-border transportation. Under this Article, a transporter shall be punishable for transporting cross-border anyone who has been unlawfully removed, recruited, sold, bought, exchanged or transported even when such unlawful activities are done without the purpose of committing any of the trafficking-related activities listed in Article 17. The rationale for punishing cross-border crimes, as mentioned in the commentary for Article 11, applies here as well, and thus a person who is responsible for cross-border transportation

is punished, even without the “purpose” requirement, as severely as the offenders under Article 17.

In general, the transport provisions (Articles 11, 16, 17, and 18) should be used to punish human traffickers and not against victims or others seeking to assist victims or asylums. These provisions should not be used as a mechanism for punishing illegal immigration. They should not be construed to punish individuals who give aid to illegal immigrants, unless they are also guilty of trafficking and exploitation as described herein.

## **Article 19**

This Article basically follows the structure of Article 17. However, there are two things to be noted with caution. First, although the Article does not explicitly require an actor’ s knowledge, it should be interpreted to require an actor’ s knowledge nonetheless, in a way that is consistent with Article 17 and 18.

Second, the actor’ s action of receipt, harboring or concealing must be in furtherance of trafficking-related activities listed in this Article to be punishable under this Article. Thus, if A receives B, a trafficking victim, to his house and harbors B to save her from a pimp, A should not be punished under this Article since A’ s act is not in furtherance of any of the trafficking-related activities listed in this Article. The purpose of this provision is to punish aiders and abettors of human trafficking and sexual exploitation. Any other application of this provision is invalid.

## **Article 20**

This Article, like Article 19, also deals with the issue of receiving, harboring or concealing a victim of unlawful removal, recruitment, sale, buying, exchange or transportation. Note that the range of punishment stipulated in this Article is substantially lower compared to Article 19. This is so because this Article only governs cases of unlawful

removal, recruitment, sale, buying, exchange or transportation that are not combined with the purpose to commit trafficking-related activities.

As in Article 19, an actor should be aware that a person he receives, harbors or conceals has been unlawfully removed. It is also important to note that according to Article 5 and Article 6, courts have an authority to impose both imprisonment and a fine simultaneously under this Article. As noted in Article 4, an act of aiding or abetting after an offense has been committed should be distinguished from an act of aiding or abetting before or at the moment of the offense, and therefore this Article prescribes less punishment for receiving, harboring or concealing than the punishment for unlawful removal with purpose.

Lastly, it is recommended that if the offence described in this Article is committed by a public official who abuses his/her authority over the victim or by an organized group, courts imposes the maximum sentence of 5 years for the non-aggravated crime.

## **Article 21**

Article 21 creates two separate degrees of the same crime. The threshold time is one month, which should be defined as “calendar month,” i.e., from a certain date of one month to the same date of the next month. When courts consider sentencing, they should consider mitigation if the victim is returned voluntarily by the offender at a safe place with no harm having been done. This is to promote the safe return of the victim.

## **Article 22**

Article 22 prescribes aggravating circumstances for the crime described in Article 21.

The term “torture” of Subparagraph (1) should be interpreted in accordance with Article 1 of the Convention against Torture to mean “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him

or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Courts should exert their discretions to define the term “barbarous acts.” In general, it is recommended that the term is interpreted to mean acts that undermines the basic human rights and dignity, defined consistent with the international standard.

Death of the victim is only an aggravating circumstance when the death is a result of the confinement, not merely when death follows confinement chronologically. Lastly, a “ransom” should be interpreted broadly to include not just monetary payment, but also anything that can be of substantial value to the offender, as in Article 13.

## **Article 23**

This Article sets forth the definition of prostitution and child prostitution. Prostitution means having sexual intercourse or other sexual conduct of any kind with an unspecified person in exchange for anything of value. “Unspecified person” in this Article applies to prostitutes as well as police decoys.

Sexual intercourse or other sexual conduct includes both heterosexual and homosexual activities.

“Other sexual conduct” in this Article and other Articles includes but is not limited to

(1) aggravated sexual conduct, which means inserting, other than for a valid medical purpose, a foreign object in the vagina, urethra, penis or rectum of a person, thereby causing physical injury to such person;

(2) oral sexual conduct, which means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina;

(3) anal sexual conduct, which means conduct between persons consisting of contact between the penis and anus, or

(4) indecent act as defined in this Commentary of Article 43.

“Foreign object” means any instrument or article which, when inserted in the vagina, urethra, penis or rectum, is capable of causing physical injury.

Child prostitution means a minor’ s act of having sexual intercourse or other sexual conduct with another person in exchange for anything of value.

## **Article 24**

This Article sets forth the punishment for an actor who solicits another in public to prostitute himself or herself. An actor has to willingly solicit another in public in order to be subjected to the punishment. An actor willingly solicits another when he or she purposefully and voluntarily does so. In other words, if A is forced or coerced to solicit another person for the purpose of prostituting himself or herself, A should not be punished under this Article. If A willingly solicited another in a private place for the purpose of prostituting herself, A should not be punished under this Article.

“Public place” in this Article and other Articles in this Law means (a) any place to which the public or any substantial group thereof has access, or (b) any place within the view or hearing of a person who is in a place as defined in (a).

The punishment for soliciting prostitution is punished less severely than procurement of prostitution or management of prostitution because the latter tends to foster sexual exploitation and human trafficking in a more forceful way than the former does and is therefore more blameworthy.

A minor is exempted from punishment under this Article in order to implement the Law's goal to protect minors. It is consistent with the spirit of the the Convention for Children.

## Article 25

This Article sets forth the definition of procuring prostitution. For analytical clarity, Paragraph 1 divides the cases into four categories.

Subsection (1) covers the cases where the actor derives a financial profit from the prostitution of others. In order to do so, he or she has to act other than as a prostitute receiving compensation for personally rendered prostitution services. For example, an owner of a brothel is drawing a financial profit from the prostitution of the brothel's prostitutes. An intermediary who gets a commission from the prostitute's prostitution service is drawing a financial profit from the prostitution of others. But a prostitute who gets paid by his/her client is not subjected to the punishment in this Subsection. Financial profit means anything of value to the actor who derives such profit.

In order for an actor to be covered by this Subsection, he or she must act purposefully with regard to the prostitution of others from which he or she draws a financial benefit. For example, a brothel's cashier who receives a salary from the brothel and does not have the purpose that the prostitutes in the brothel engage in prostitution should not be punished under this Subsection.

Subsection (2) covers the cases where the actor assists or protects the prostitution of others. For example, if A introduced a prostitute B to a customer C for the purpose that B prostitute herself to C, A would be assisting the prostitution of B. If a manager of a brothel hired security guards to protect prostitutes in the brothel from harassment, the manager would be protecting prostitution of others. If A informed a brothel owner of an upcoming police raid so that the owner can cover up the prostitution in the brothel, A would be protecting prostitution of others.

This Subsection requires that actors act with the purpose of assisting and protecting others' prostitution. For example, the fact that a prostitute's parents cooked meals for her by itself does not establish that they assisted her prostitution. Similarly, the fact that a police officer stopped a patron of a prostitute from assaulting the prostitute he patronized by itself does not establish that the police officer protected the prostitute's prostitution.

Subsection (3) covers the cases where the actor recruits, induces or trains a person with a view to practice prostitution. For example, if A asked B to work for A's brothel for a monthly pay of 300 dollars, A's act would constitute recruitment with a view to practice prostitution. If A taught B how to work in a brothel and deal with prostitution patrons, A's act would constitute training with a view to practice prostitution. If A induces B to work in A's brothel as a prostitute by offering money to B, A's act of inducement is procurement of prostitution. In order to be covered by this Subsection, an actor has to have the purpose for another person to practice prostitution in his or her act of recruiting, inducement or training.

Subsection (4) covers the cases where the actor pressures a person to become a prostitute. The nature of the pressure and the means through which an actor exercises pressure should be considered in determining whether a case is covered by this Subsection.

In order to be covered by this Subsection, a person must have exercised pressure upon another person for the purpose of the latter becoming a prostitute. For example, if a parent did not work to provide for his family, his/her failure to work by itself did not constitute exercising pressure upon his/her child to become a prostitute to support the family.

In contemplation of Article 27's heightened punishment for violence or coercion in the procurement of prostitution, "pressure" in this Article means something other than physical force, pressure or restraint. It includes financial or psychological pressure. For example, if A threatened to withdraw support from his daughter B if B did not prostitute herself, A would have exercised pressure upon B to become a prostitute. The court should exercise discretion and refer to the Commentary of Article 7



regarding the definition of “force” in judging what constitutes pressure in this Article.

It does not require that an actor who exercises pressure either know or believe the person who is pressured was not a prostitute before. Whether or not the person who was pressured yielded or consented to that pressure should be immaterial to the charge of procurement of prostitution under this Subsection. The mental culpability of the actor who exercised pressure is the key to the offense set forth in this Subsection. (CA Law)

Paragraph 2 sets forth three types of acts that are equivalent to the act of procuring prostitution.

Subsection (1) covers the cases where the actor serves as an intermediary. In order to be covered by this Subsection, the person who serves as an intermediary must have a purpose that his actions as an intermediary would promote or facilitate prostitution as a result of the association between the person who engages in prostitution and the person who exploits or remunerates the prostitution of others.

For example, if A introduces B to C for the purpose that B pay C to engage in sexual activities, A’ s act of introduction is covered by this Subsection. If B is a prostitute, C runs a brothel, and A introduces B to C in the hope that B can work at C’ s brothel, A’ s act of introduction is covered by this Subsection because C is a person who exploits or remunerates the prostitutions of others. If B is a prostitute, C runs a brothel and A introduces B to C knowing that C might be willing to hire B as C’ s babysitter, A’ s act as intermediary is not covered by this Subsection.

Subsection (2) covers the cases where the actor covers up or facilitates the covering up of resources knowing that such resources were obtained from procurement of prostitution.

A person facilitates or covers up resources knowing that such resources were obtained from procurement of prostitution when:

1. Knowing that the property involved in one or more financial transactions represents the proceeds of procurement of prostitution,

he or she conducts one or more such financial transactions which in fact involve the proceeds of specified procurement of prostitution:

- a) With intent to promote the carrying on of procurement of prostitution; or
  - b) Knowing that the transaction or transactions in whole or in part are designed to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of procurement of prostitution; or
2. Knowing that one or more monetary instruments represent the proceeds of procurement of prostitution, he or she transports, transmits, or transfers or attempts to transport, transmit or transfer, on one or more occasions monetary instruments which in fact represent the proceeds of specified procurement of prostitution from a place to another
- a) With intent to promote the carrying on of procurement of prostitution; or
  - b) Knowing that such transportation, transmittal or transfer is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of procurement of prostitution
3. He or she conducts one or more financial transactions involving property represented to be the proceeds of specified procurement of prostitution, or represented to be property used to conduct or facilitate specified procurement of prostitution with intent to
- a) Promote the carrying on of specified procurement of prostitution; or
  - b) Conceal or disguise the nature, the location, the source, the ownership or the control of property believed to be the proceeds of specified criminal conduct.

Proceeds of procurement of prostitution are not limited to cash or money, but includes anything that results or accrues from the procurement.

“Monetary instrument” in this Article means coin and currency of Cambodia or of any other country; personal checks; bank checks; traveler’s checks; money orders; and investment securities and negotiable instruments, in bearer form or otherwise, in such form that title thereto passes on

delivery, except that “monetary instrument” shall not include payments to attorneys for legal services. (NY Penal Law 470)

“Financial transaction” in this Article means a transaction involving:

- (a) the movement of funds by wire or other means; or
- (b) one or more monetary instruments; or
- (c) the transfer of title to any real property, vehicle, vessel or aircraft; or
- (d) the use of a financial institution.

“Represented” in this Article means any representation made by a law enforcement officer, or by another person at the direction of, or with the approval of, such law enforcement officer.

“Law enforcement officer” in this Article means any public servant who is authorized to conduct an investigation, prosecute or make an arrest for a criminal offense.

This Subsection echoes Article 6 of United Nations Convention against Transnational Organized Crime (UNTOC), which urges the party states to criminalize the laundering of proceeds of crime. Subsection 1a(ii) of UNTOC Article 6 covers concealment and disguise of the proceeds from crime. Similarly, this Subsection covers the cases where the actor covers up resources knowing that such resources were obtained from procurement.

Subsection (3) covers the cases where the actor hinders the effort of a public agency or a private organization for the benefit of persons engaging in prostitution or being in danger of prostitution. Such effort is specified as the act of prevention, assistance or re-education.

In order to be covered by this Subsection, a person who hinders the effort of a public agency or a private organization has to have the purpose to facilitate or promote prostitution. Any act that incidentally hinders the act of prevention, assistance or re-education for the benefit of persons engaging in prostitution or being in danger of prostitution by

itself, without the requisite mental state, does not constitute procurement of prostitution under this Subsection.

## Article 26

This Article sets forth the punishment for a person who commits procurement of prostitution as defined in Article 25.

## Article 27

The Article sets forth heightened punishment for five types of aggravated procurement of prostitution. A person who commits one of the five types of aggravated procurement of prostitution shall be punished with imprisonment for 5 to 10 years rather than 2 to 5 years as set forth in Article 26.

Subsection (1) covers the cases where the actor procures prostitution of his or her ascendant or descendant. It is immaterial whether the procurer is a legitimate or illegitimate, natural or adoptive ascendant or descendant of the prostitute.

Subsection (2) further specifies that a procurer who abuses his or her authority over the prostitute commits aggravated procurement of prostitution. It applies to the cases where government officials abuse their authority over prostitution victims.

Subsection (3) heightens the punishment for a procurer of prostitution who uses violence or coercion against the prostitute. For example, if A as a brothel owner beats up prostitutes who work for his brothel if they are not willing to serve certain clients, A's use of violence will be covered by this Subsection. If A as a brothel owner threatens to rape or kill prostitutes working for his brothel if they do not comply with A's orders, A's coercion against the prostitutes is covered under this Subsection.

In contemplation of Article 25 which punishes actors who induce or exercise pressure upon another person to practice prostitution, coercion in this Subsection means a threat, express or implied, which places a person in reasonable fear of immediate death, physical injury or rape to himself, herself or another person, or in reasonable fear that he, she or another person will immediately be kidnapped. (NY Penal Law 130.05) Economic or mental pressure alone do not constitute coercion. For example, if a brothel owner A threatened to imprison a prostitute if the prostitute does not serve certain clients, A would be using coercion against the prostitute.

Subsection (4) and (5) heightens the punishment for procurement of prostitution that is committed by an organized group or by several persons. They echo the purpose of UNTOC to prevent and combat transnational organized crime. In order to be covered by Subsection (4) and (5), an organized group or several persons have to have a common purpose or knowledge in procuring prostitution. Mere involvement of more than one person in procurement of prostitution without the requisite mental state is not within contemplation of Subsection (4) or (5). For example, if A wrote a letter to ask B to work for A' s brothel, and C delivered the letter to B without knowledge of the letter' s content, the recruitment of B was committed by A himself rather than several persons.

## **Article 28**

This Article sets forth the punishment for procurement of prostitution when the prostitute is a minor.

## **Article 29**

This Article heightens the punishment for procurement of prostitution when the procurer used torture or barbarous act to commit such offense. Torture and barbarous act is defined in Article 1 of the Convention against Torture as explained in Article 22 of this commentary.

## Article 30

This Article covers the cases where the actor is directly or through an intermediary involved in the management, exploitation, operation or financing of an establishment of prostitution. Actors covered under this Article will be punished with imprisonment for 2 to 5 years.

For example, if A lets his brother B run a brothel for A, both A and B are involved in the management of an establishment of prostitution. If A uses part of the proceeds from a brothel to fund his real estate business, he will be exploiting an establishment of prostitution. If A makes loans to a brothel, A will be financing an establishment of prostitution.

## Article 31

This Article sets forth the punishment for an actor who manages an establishment and accepts or tolerates prostitution associated with the establishment or its annexes. Subsection (1) covers the cases where the actor who manages an establishment accepts or tolerates another person's prostitution inside the establishment or its annexes. Subsection (2) covers the case where the actor who manages an establishment accepts or tolerates that another person seeks clients with a view to do prostitution inside the establishment or its annexes.

To be subjected to punishment under this Article, the actor must know that the other person 1) engages in prostitution or seeks clients with a view to do prostitution 2) inside the establishment or its annexes 3) that is under the actor's management. For example, if a landlord A does not know his tenant B engages in prostitution in A's building, A is not subject to punishment under this Article.

## Article 32

This Article sets forth the punishment for an actor who sells or makes available to another person premises not utilized by the public with the knowledge that that person will use such premises for prostitution. For

example, if A sells or rents an apartment to B, knowing that B is a prostitute and will practice prostitution inside the apartment, A will be punished by imprisonment of 2 to 5 years under this Article.

### **Article 33**

This Article heightens the punishment for the acts covered under Article 30, 31 and 32 when they are committed with regard to child prostitution. The definition of child prostitution is provided in Article 23. For example, if A manages an establishment of prostitution where child prostitution is practiced, A' s act of management comes under this Article. If A as a landlord tolerates child prostitution in his apartment, his act of toleration will also be covered by this Article.

### **Article 34**

This Article sets forth the punishment for purchase of child prostitution.

Paragraph 1 defines the purchase of child prostitution as the act of having sexual intercourse or other sexual conduct with a minor who is 15 years of age or above by providing, or promising to provide anything of value to the minor, an intermediary, a parent, a guardian or any other person who keeps the child under his or her supervision or control.

For example, if A had sex with a minor by paying an intermediary B who had supervision or control over the minor, A would have committed the purchase of child prostitution. If A had sex with a minor by promising to pay the minor' s guardian, A would have committed the purchase of child prostitution. If A committed an indecent act with a minor by promising to work for the minor' s parents for a week, A would have committed purchase of child prostitution because he provided something of value to the minor' s guardians.

Paragraph 2 heightens the punishment for the actor who commits purchase of child prostitution by having sexual intercourse or other sexual conduct with a minor under the age of 15 years.

This Article along with Article 28 and Article 33 evidences this Law' s strong commitment to suppressing child prostitution and enforcing the Protocol.

## Article 35

This Article covers the cases where the actor solicits another for child prostitution or advertises child prostitution, for the purpose of acting as intermediary of the child prostitution. For example, if A solicits B for child prostitution in order to act as the intermediary of B' s prostitution, A' s act of solicitation is covered under this Article.

Paragraph 2 heightens punishment for the actor who commits the offense set forth in Paragraph 1 as a business. An actor solicits another for child prostitution or advertises as a business when he or she does so with the purpose to derive benefit from such solicitation or advertising in a recurring pattern. For example, if A solicits B for child prostitution and holds himself out as an agency that specializes in the business of being an intermediary for prostitution, A shall be punished with imprisonment for 5 to 10 years.

## Article 36

This Article sets forth punishment for the actor who provides a money loan or anything of value to another person on the condition that a minor engage in child prostitution. "Anything of value" should be interpreted broadly in order to cover all forms of conditional payment or offering in connection with child prostitution.<sup>2</sup> For example, if A provides a television to B on the condition that B' s minor daughter prostitute herself, A will be punished with imprisonment for 5 to 10 years. If A offers to work for B for a month on the condition that B' s minor daughter prostitute herself, A is also covered under this Article and should be imprisoned for 5 to 10 years. It is immaterial whether the minor actually engaged in child prostitution as a result of the actor' s loan or payment.

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<sup>2</sup> See Article 13, *Infra*.



It is also immaterial whether the person who was provided with money loan or anything of value accepted the loan or the thing of value.

Paragraph 2 complements Paragraph 1 by covering cases where the actor provides something of value to a minor on the condition that the minor engages in prostitution. For example, if A provides candy to a minor on the condition that the minor prostitute himself or herself, A' s act will be covered by this Paragraph.

## **Article 37**

Paragraph 1 covers the cases where the actor makes a contract, verbal or written, with another in which a minor is obliged to engage in child prostitution business. Paragraph 2 covers the cases where the actor makes a contract with a minor in which the minor is obliged to engage in child prostitution business. For example, if A makes a contract with B in which B' s minor daughters are obliged to engage in prostitution business, A and B should be punished with imprisonment for 5 years to 10 years under Paragraph 1. If A makes a contract with C, who is a minor, for C to engage in prostitution business, A will be punished with imprisonment for 5 to 10 years under Paragraph 2.

The “contracts” mentioned here and in Article 45 are contracts in name only. Any agreement, verbal or written, to commit an illegal activity (including any form of human trafficking or sexual exploitation) is invalid and unenforceable per se.

## **Article 38**

This Article sets forth the definition of pornography. A piece of material is pornography if (a) a reasonable person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes actual or simulated: sexual intercourse, sexual bestiality, masturbation, sadism, masochism, excretion, lewd exhibition of the genitals and other

sexual act or performance, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Material means anything tangible which is capable of being used or adapted to arouse prurient interest through the medium of reading or observation.

## **Article 39**

The purpose of this article is to shield the public from unwanted displays of offensive pornographic images.

This Article sets forth punishment for the actor who distributes or promotes pornography in a public place.

Paragraph 1 sets forth the punishment for the actor who distributes, sells, leases, displays, projects or presents pornography in a public place.

In order to be covered by this Article, the actor has to have knowledge that 1) the material he distributes, sells, leases, displays, projects or presents is pornography and 2) the place where such acts take place is a public place, or a reasonable person in the actor's position should have acquired such knowledge.

For example, if a vendor sells a magazine on the street without knowledge that it contains one page of pornography, he or she is not subjected to punishment under this Paragraph.

An actor sells or leases pornography in a public place when he or she sells or leases pornography in such a way that the public or a substantial group thereof will be or should be reasonably aware of the sale or lease or can take advantage of the sale or lease as a service. For example, if A exchanged pornography with B for money in a public place in a stealthy way without letting anyone around them know about it, A's sale of pornography is not covered by this Paragraph. If A opens a pornography video store on Main Street to which the public has access, he is selling pornography in a public place.

Paragraph 2 sets forth the punishment for an actor who possesses, transports, imports, or exports pornography for the purpose of use in commission of the offense set forth in Paragraph 1. In order for an actor to be punished under this Paragraph, he or she must know or should have known that what he possesses, transports, imports or exports is pornography and will be used in the manner described in paragraph 1.

An actor who possesses pornography for the purpose of use in commission of the offense set forth in Paragraph 1 in another jurisdiction, even if such act as set forth in Paragraph 1 is not an offense in that jurisdiction, is punishable under this Paragraph. Similarly, one who possesses pornography in another jurisdiction for the purpose of use in the commission of the offense set forth in Paragraph 1 in this jurisdiction is punishable under this Paragraph.

Paragraph 3 heightens the punishment of an actor who produces pornography for the purpose of use in the commission of any offense stipulated in Paragraphs 1 and 2. An actor produces pornography if he or she is primarily responsible for the production of pornography.

The penalties ascribed in paragraph 1 apply even if the pornography is distributed free of charge.

## **Article 40**

This Article sets forth the definition of child pornography. Child pornography is a piece of material that 1) is within the definition of Article 38 and 2) has a minor as one of the participants in the act of sexual intercourse, sexual bestiality, masturbation, sadism, masochism, excretion, lewd exhibition of the genitals and other sexual acts or performances.

## **Article 41**

This Article parallels the structure of Article 39, except that Paragraph 3 sets forth the punishment for an actor who produces child pornography. In order to be covered by this Paragraph, an actor must have

the knowledge that what he distributes, sells, leases, displays, projects, presents, possesses, transports, imports, exports or produces is child pornography. For example, if a person accidentally inserts a picture of child pornography into his or her book, he or she is not producing pornography. It is not necessary for an actor to be covered by this Paragraph that he or she has the purpose to commit an offense in Paragraph 1 and 2.

## **Article 42**

This Article sets forth the punishment for an actor who has sexual intercourse with another person of the age of less than fifteen years. Sexual intercourse in this Article means

(1) sexual intercourse in its ordinary meaning, which occurs on any penetration;

(2) anal sexual conduct, oral sexual conduct and aggravated sexual conduct as discussed in the commentary for Article 23.

## **Article 43**

This Article stipulates that an actor who commits an indecent act against another person of the age of less than 15 years shall be punished with imprisonment for 1 to 3 years and a fine of 2,000,000 to 6,000,000 riels.

“Sexual part” in this Article means intimate part of a person’s body. “Touching” in this Article includes both direct touching and touching through clothing.

This article doubles the penalty for repeat offenders, i.e. if a person convicted under this provision is later convicted under the same provision (or if one is convicted of multiple counts under the same provision), that person should be punished with imprisonment for 2 to 6 years and a fine of 4,000,000 to 12,000,000 riels.

## Article 44

This Article exempts a person under the age of 15 years from punishment of the offenses stipulated in Article 42 and 43.

## Article 45

This article nullifies any agreement to traffic or exploit persons for forced labor, sexual servitude, or any other purpose. The language in this article is intentionally broad and is meant to invalidate any agreement across the spectrum of trafficking, including every offense mentioned in the entirety of this statute. Any agreement purposed to commit any of these offenses is null, void, and unenforceable by any party to the agreement.

The second paragraph of this article stipulates that a loan made in connection with trafficking and exploitation is unenforceable. Any loan made in connection with these offenses is invalid per se, regardless of whether the lender was a private individual or a financial institution. The purpose of this provision is to encourage lenders to verify that loans they disperse are not used to finance trafficking or sexual exploitation.

The “contracts” mentioned here and in Article 37 should be interpreted broadly. Any agreement, verbal or written, to commit an illegal activity (including any form of human trafficking or sexual exploitation) is invalid and unenforceable per se.

## Article 46

This article attempts to prevent individuals from profiting from human trafficking and sexual exploitation. It requires full restitution of any enrichment derived from sexual exploitation or human trafficking. It is designed to remove financial incentives to human trafficking and exploitation and as such this provision requires anyone who knowingly profits from human trafficking or sexual exploitation (other than victims of those crimes) to restore all profits to the victims. Accrued interests

should be calculated by the court, and should be adjusted for inflation. This article does not cover cases where one is enriched but is unaware of the source of the enrichment.

The third paragraph of this article explains that if one agrees to loan money for the purpose of furthering human trafficking or sexual exploitation, that person may not legally enforce repayment of the loan. The purpose of this provision is to discourage lenders from funding trafficking and exploitation.

This provision should not be used to deprive victims of trafficking and exploitation of any funds they receive from their victimization.

#### **Article 47**

This article gives victims the right to claim property confiscated in connection with their victimization as compensation and restitution. The purpose of this provision is to provide a mechanism for partially compensating victims.

The term “property” shall be defined in accordance with Article 2(d) of the UNTOC to 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.”

For the purposes of this statute, “confiscation” shall be defined in accordance with Article 2(g) of the UNTOC to mean “the permanent deprivation of property by order of a court or other competent authority” and to “include forfeiture where applicable.”

#### **Article 48**

The purpose of this provision is to provide courts with more tools to deter human trafficking and sexual exploitation. This article allows for confiscation of property related to offenses covered in this Law, forced closures of implicated businesses, restriction of civil rights, and restrictions on mobility. These penalties should be used at the court’s

discretion and should only be applied to perpetrators of these crimes, and not their victims. This provision is not intended to be used to confiscate property not belonging to the perpetrators of the crimes.

This article differs from the confiscation provisions of the LSKTEHP, which stated that any property used in connection with the offense would be confiscated for the government. The purpose of the change is to point out that confiscation is optional (a tool used at the court's discretion to enhance justice and equity) and articles confiscated do not necessarily become government property (e.g., they may be returned to rightful owners, or used to compensate victims as per Article 47 of this statute).

The additional penalty mentioned in section 6 is not intended to be used against victims of trafficking or exploitation.

## **Article 49**

The purpose of this article is to shield victims of trafficking and exploitation from unnecessary embarrassment and ostracization and to encourage them to cooperate with investigations and prosecutions against perpetrators of human trafficking and sexual exploitation.

This Article provides that mass media shall not publish, broadcast or disseminate any information which can lead to public knowledge of identities of victims in the offenses stipulated in this Law. This Article is consistent with the Law's overall objective to protect victims of sex exploitation and human trafficking offenses. In order not to suppress press' freedom to publish or disseminate legitimate information, only information that can reasonably lead to public knowledge of identities of victims shall not be published, broadcasted or disseminated.

## **Article 50**

If provisions of this statute conflict with a treaty or convention, the latter shall prevail, as per Cambodia' s Constitutional Council' s July 2007 decision.

**Article 51:**

This provision refers to the penal code that is currently (as of July 15, 2008) being drafted, and not the provisional penal code that was in place at the time of this Law' s promulgation.