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Keynote Address

**2012 Human Dimension Seminar:
Rule of Law Framework for Combating Trafficking in Human Beings**

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Excellencies,
Ladies and Gentlemen,
Colleagues,

Let me start by thanking Ambassador Lenarčič, the Anti-Trafficking Unit of ODIHR as well as the Irish Chairmanship for inviting me to address you today. I am really delighted to see such a rich and interesting agenda for the next three days, focusing on such an integral issue as the rule of law.

The rule of law is of course a multifaceted concept which extends beyond the legal framework or the criminal justice system and includes a host of normative, historical and cultural factors which can ideally work together to mutually reinforce a democratic and fair society. Thus my remarks today will take as a starting point the cornerstone of the international law on trafficking in human beings, the Palermo Protocol, and examine the full context in which it is being considered, interpreted and applied. These social, cultural and historical contexts are in a way as important as the legal provisions themselves because of the real impact they have on the kind of justice being delivered to victims. Human rights and the rights of victims are at the very centre of the OSCE approach to combating trafficking, and I will also reiterate some important principles with regards to victim participation and protection in the criminal justice process.

The nature of the challenge

Prosecution and punishment form an essential part of the action to prevent and combat trafficking. Unfortunately, the law enforcement and criminal justice response is still very weak. Too often, trafficking cases, especially for labour exploitation, are not qualified as such; criminal networks are not disrupted; perpetrators go unpunished; and victims are not identified nor redressed.

This is evidenced in the extremely low rate of investigations and convictions across the world for human trafficking charges.¹ The limited data available, for example the 3,619 trafficking convictions recorded globally in 2010 by the U.S. *Trafficking in Persons Report*,² are not at all commensurate with the ILO minimum estimates of 12.3 million in forced labour worldwide, out of which at least several hundreds of thousands are trafficked into or within the OSCE region. The modest results of anti-trafficking action are even more disappointing, taking into account that trafficking in human beings is mostly a business of organized crime and an inexhaustible source of illicit profits which are linked to and fuel other organized criminal activities, including drug trafficking and money laundering, thrive on corruption and enable organized crime to acquire political influence, and therefore severely undermine the rule of law, and economic and democratic development. To give you a sense of the scale of these illicit profits, the ILO estimates indicate at least USD 32 billion annually. Trafficking profits are constantly reinvested in all kinds of other criminal activities, as well as laundered and infiltrated into legitimate economic sectors.³

Against this background, the crime of trafficking in human beings, which has been introduced in the penal codes of most countries in compliance with the U.N. Palermo Protocol, is rarely applied. Rather, we are faced with mounting cases of document fraud, prostitution, smuggling and other lesser offences which fail to capture the full spectrum of criminality at stake as well as the gravity

¹ United States Department of State, *Trafficking in Persons Report* (Washington, 2011): includes the following figures for 2010: 6,017 prosecutions globally for trafficking in persons and 3,619 convictions.

² U.S. Department of State, *Trafficking in Persons Report*, 10th Edition (June 2010).

³ Shelley, L., *Human Trafficking: A Global Perspective* (Cambridge University Press: New York, 2010); Council of Europe (CoE), European Committee on Crime Problems (CDPC) and Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), *Proceeds from Trafficking in Human Beings and Illegal Migration/Human Smuggling* (2005).

of the impact. The consequences are very serious. Not only do traffickers and the organized criminal networks behind them remain unpunished, but trafficked persons also do not receive assistance and support, and do not have access to legal remedies, including the payback of wages and compensation. On the contrary, they are very often treated as criminals and immediately deported.

Why is this? Do the difficulties in implementation derive from the Palermo Protocol? For example, law enforcement, prosecutors and judges often argue that the crime is too difficult to prove, and that the definition is not broad enough to comprise all the multifaceted forms of trafficking.

Therefore, the crucial question is: to what extent is the Palermo Protocol still useful to counteract trafficking?

My answer is: the Palermo Protocol is a valid and useful tool to combat trafficking, provided that it is interpreted and implemented correctly. I will argue that the reason for the difficulties lie not in the Protocol itself, but in the cultural background of practitioners, in a sort of cultural lens through which the provisions in the Protocol – and especially the definition – are interpreted and implemented. Unfortunately such a lens, instead of highlighting their vision, very often makes practitioners completely blind. Therefore, part of the problem concerns not the legal framework, but rather the culture of prosecutors and judges who handle trafficking cases.

Issues relating to the interpretation of the definition

What are the challenges in practice, concerning the interpretation of the definition of trafficking provided by the Palermo Protocol?

One challenge is related to the so-called “transfer paradigm”. In other words, practitioners tend to think that a case of trafficking exists only when there is the transfer of the person. Border crossing is not necessarily a component of the crime. Still, many think that the victim must have been transferred from one country to another or at least from one place to another, in order to identify a case of trafficking.

This interpretation does not allow to identify a trafficking case when there is no obvious connection between a first phase in which the migrant worker has entered the destination country autonomously, and the second phase, in which the worker has been victimized and exploited in the country of destination. Furthermore, this interpretation does not necessarily cover the situation in which the worker has been smuggled by a criminal group, and another criminal group has subsequently placed the same person in a certain job and exploited her or him in slavery-like conditions. In practice, because the link between the two criminal groups cannot be easily proved, the first part of the trafficking chain is usually ignored, and only a minor violation of labour laws is found. As a consequence, the worker is deprived of the assistance to which she or he is entitled as a victim of trafficking, and the only result of the institutional response is her or his deportation.

Therefore, this interpretation clearly fails to strengthen anti-trafficking action. As a matter of fact, it only tackles cases in which one single criminal group runs the entire trafficking chain from recruitment to final exploitation. However, this *modus operandi* is no longer widespread, and rather constitutes an exception. As mentioned above, what we are increasingly confronted with are highly specialized networks that are mobile and operate across national boundaries. Therefore the real challenge is to identify the whole criminal network running a trafficking process.

From a legal point of view, and as a judge, I am convinced that the narrow interpretation of the Palermo Protocol which is still predominant in courtrooms is not correct.

The so-called “transfer paradigm” is not at all consistent with an updated interpretation of the definition. The movement of the person is not necessarily required by the definition. Article 3 of the Protocol, when it lists the acts which form part of the definition of trafficking, also includes the terms “harbouring” and “receipt”. The latter – “receipt” – is considered by the ILO Expert Group as comprising “receiving persons into employment or for the purpose of employment, including forced labour”.⁴

According to the above mentioned interpretation of the term “receipt”, endorsed by ILO experts, unscrupulous or criminal employers who use trafficked persons and knowingly exploit them in forced labour, and the intermediaries who facilitate the placement of workers in a certain employment, are criminally liable, regardless of whether the person has been transferred or not. Importantly, this interpretation covers all cases of trafficking in human beings in which the migrant worker has crossed the border voluntarily and autonomously, although paying a high fee, and has subsequently been exploited and victimized when she or he is in the destination country. On the specific issue of receipt, it may also be necessary for governments and parliaments to review the implementing legislation on trafficking in human beings to ensure that it is appropriately included in the national law. The focus should be clearly on the exploitation of the victim and not the transfer.

Another critical element relating to the interpretation of the definition concerns the notion of the abuse of a position of vulnerability. Although many efforts have been made, especially by international organizations, to identify valid indicators in order to distinguish a case of trafficking from a case of smuggling or illegal migration, NGOs denounce that national case-law mainly requires evidence related to violence and/or total deprivation of freedom of movement. In other words, the actual implementation of the definition tends to limit the notion of trafficking to its most serious forms based on the use of extreme violence.

However, these cases of trafficking, which still exist especially in the field of sexual exploitation and can even amount to torture, are no longer widespread. On the contrary, the new *modus operandi* of traffickers is increasingly based on more subtle forms of coercion, such as psychological dependency, that can be found for example in cases of domestic servitude. Another common means of coercion, especially in the field of labour exploitation, is the withholding/non payment of wages. In this case, workers are induced to stay in their exploitative situation even when they are not paid for months, as they are afraid of losing everything if they leave.

Therefore, it is necessary to read again the definition and the *Travaux Préparatoires* of the Palermo Protocol to better understand the deep meaning of the notion of abuse of a position of vulnerability. This notion was included in the definition in the final phase of the negotiations, as a consequence of an agreement between countries of origin and countries of destination. The effort was – and still is – to strike a balance between, on the one hand, the need to keep a clear distinction between trafficking and smuggling and, on the other hand, the need to protect people who fall victim to trafficking because of their social vulnerability.

Why is the definition of trafficking usually interpreted according to narrow criteria? First of all, trafficking is often seen through the “migration lens”, that is to say an approach focused on the alleged “threat” deriving from “illegal migration”. As a consequence, the migrant worker subjected to exploitation is not seen as a presumed victim of trafficking in human beings but as an irregular migrant to be deported.

⁴ ILO, *Human Trafficking and Forced Labour Exploitation, Guidelines for Legislation and Law Enforcement* (Geneva, 2005).

In Europe, there is a worrying trend towards criminalization of migration with increasing use of criminal sanctions or administrative detention in the area of border control and immigration.⁵ Such a tendency is detrimental to countering trafficking, and hinders the identification and protection of trafficked persons and their access to justice. Trafficked persons are afraid of reporting the abuse suffered to the competent authorities, and believe that they have no viable option but to continue to submit to their exploiters. As a result, thousands of persons continue to have their human rights severely violated, and criminals go unpunished.

There is an additional problem, relating to something less obvious, which nevertheless prevents practitioners from correctly interpreting and implementing the definition of trafficking. I call it the “old slavery lens”, which prevents law enforcement professionals, prosecutors and judges from identifying modern-day slavery and from understanding that its features are significantly different today, even though they still amount to the control of a person over another person.

Nowadays victims of slavery-like practices, trafficking and forced labour are usually not locked up in a workplace or in an apartment or a brothel, although such extreme forms still exist both in the field of labour and sexual exploitation. The victim is usually put in a situation of debt bondage and/or multiple dependencies. Therefore, modern-day slavery still consists of ownership, which implies control of the exploiter over the worker; however, the situation of the person who has been subjugated is not characterized by lack of freedom of movement, but rather by the lack of viable alternatives.

Placing victims at the centre of the criminal justice response

The Palermo Protocol paved the way towards a better understanding of the protection of victims as an integral part of the struggle against trafficking. Although very late in the negotiations, victim protection was indeed included among the purposes of the Palermo Protocol. Other instruments, in particular the Council of Europe Convention on Action against Trafficking in Human Beings, went much further in the protection of the human rights of victims. This Convention is the first international human rights instrument dealing with trafficking in human beings (THB). It affirms that THB is a violation of human rights and an offence to the human dignity and integrity of the person. It also includes minimum standards for the protection of and assistance to victims regardless of their willingness to co-operate with the authorities. The 2003 OSCE Action Plan and all the OSCE commitments in this field clearly reflect a human rights-centred approach.

The case law of the European Court of Human Rights (ECHR) has established the general framework in which to place the protection of the rights of trafficking victims. In a number of innovative decisions, including notably the *Siliadin* and *Rantsev* cases, the Court has incrementally acknowledged that victims have their own right to an investigation, which must be impartial, quick, effective and adequate. This case law is particularly important because it implies that the victim should be seen as a major actor in the criminal proceedings, whose role cannot be limited to the role of a witness, and whose interests and rights cannot be entirely represented by the prosecution. The same idea of the fair trial as a confrontation between the prosecution and the defendant should become more complex, and include the victim as a co-protagonist. The rights of victims at trial have also been recently confirmed in the 2011 EU Directive on Trafficking in Human Beings. Victims' rights must be addressed with equal seriousness and given equal protection in the criminal justice process.

⁵ Council of Europe Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications* (2009).

Despite this progress in the recognition of victims' rights, unfortunately the reality of the criminal justice experience for victims remains ambiguous. Unfortunately, victims often bear secondary victimization during their participation in the process. Worse yet is evidence of victims being punished either for actions which are a direct result of their victimization, or for their participation as low-level recruiters. This is why my Office this year will work further on the principle of non-punishment of victims which must be explicitly recognized by participating States in the legislation and policy relating to victims of trafficking.

Victims of THB should be entitled to full compensation for the harm and damages suffered. This includes for the immediate physical and psychological impacts but also the longer term consequences on their ability to earn livelihoods and achieve social inclusion. In practice, this means that victims need access to legal assistance at an early stage in order to participate in legal processes and claim reparations, both in the spheres of criminal justice and civil remedies. The ultimate goal for victims of trafficking should be social inclusion.

Making the most of complementary frameworks

I have now described to you what I see as some of the practical ways in which the legal framework on trafficking in human beings can be strengthened by addressing the cultural background of practitioners and by reinforcing the rights and role of victims in the criminal justice process. In addition, I would add that we can do a lot to strengthen the rule of law on trafficking in human beings by ensuring consistency with relevant, complementary legal frameworks – namely – international human rights law and norms on immigration, asylum, child protection, gender, and the labour market.

Needless to say, anti-trafficking policy is closely connected to migration issues. Trafficked persons often start off as migrants in search of opportunities for decent work and a better life to improve their difficult living conditions and those of their family. Evidence-based studies show how laws, policies and mechanisms established to prevent irregular migration may contribute to fuelling organized crime networks engaged in smuggling of migrants and trafficking in human beings.⁶ An example of this relates to migration regulations which link the issuance of a visa or a permit to an individual employer. This policy leaves the employee at the mercy of the employer, increases the vulnerability of migrant workers, and establishes a favourable environment for abusive, exploitative or even criminal employers, who can threaten to fire them and denounce them for deportation if they do not agree to the terms of work. The fewer options available to migrants to change employer or seek support in cases of abuse or exploitative practices, the more vulnerable they are to being exploited.

The primacy of human rights in establishing a rule of law framework also requires establishing a framework that recognizes the right to seek and enjoy asylum. Though not all victims of trafficking are in need of international protection, refugees, asylum seekers and stateless persons are likely to be considerably more vulnerable for recruitment by traffickers because of growing links between smuggling rings and trafficking networks.

The implementation of effective legislative frameworks also requires appropriate co-operation mechanisms between all relevant actors, including asylum authorities, to be in place. With increased mixed migration flows of refugees, economic migrants, and victims of trafficking, it is not possible to separate victims into neat and distinct channels. In this complex migratory context, the early identification of victims and persons at risk of trafficking, and their referral to protection and

⁶ See for example United Nations, *Human Rights of Migrants*, Report of the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante, A/65/222 (2010).

assistance, require a holistic approach where the various protection regimes, temporary reflection and recovery period, residence permits for victim witnesses, asylum, humanitarian and other residence status, all complement and support each other to provide effective and comprehensive protection to victims.

The principle of non-refoulement is of particular importance when dealing with the return of victims, as noted in the current work of OSCE/ODIHR on the Guide to Human Rights in the Return of Trafficked Persons. In practical terms, due process in this context requires that pre-return assessments are carried out in all cases involving the return of a victim or person at risk of trafficking. In addition to considering the voluntariness and safety of return, such return assessments must be based on well-established international and regional standards, including the right not to be subjected to death, persecution, torture, cruel or other inhuman and degrading treatment or punishment.

On the particular issue of torture and its link to trafficking in human beings, my Office is in the process of finalizing new research which has previously been overlooked. The Occasional Paper aims to examine how and when trafficking in human beings can amount to torture and other forms of ill-treatment, as well as to provide the conceptual framework to understand what trafficking cases entail in terms of physical and psychological effects on trafficked persons, and the legal and clinical implications that flow from this characterization, including in terms of legal entitlements.

Labour market policies are another key area of complementarity to anti-trafficking policies. The role of recruitment agencies cannot be underestimated; reports indicate that they are often facilitating exploitative, abusive and fraudulent practices that either directly lead to trafficking or increase the vulnerability of workers to exploitation

Lastly, child protection and gender discrimination are important areas of mutual concern for trafficking victims. Child victims of trafficking are often found among vulnerable groups such as unaccompanied and separated, asylum-seeking and refugee children, and victims of ethnic/racial/national minorities. There is thus a need to continue strengthening child protection systems in line with the principle of best interest determination in each individual case. Likewise, one way of addressing women's vulnerability to trafficking is to examine gender discrimination and gender-based violence which are often critical to subjugating women in the first place. This is why our *Alliance* Conference this year – on 11-12 October – will examine the link between trafficking and discrimination on any grounds, and specifically how empowerment of vulnerable people is an important strategy for prevention.

Conclusions

To sum up the key message of my contribution, in my view it is time for States to establish tools to regularly assess the human rights impact of their anti-trafficking policies. The aim is to prevent collateral damage and maximize the impact of anti-trafficking action in terms of protection of the rights of trafficked persons.

It was already in 2002 that the OSCE participating States committed to respect the dignity and human rights of victims at all times.⁷ Then in 2003, the OSCE Action Plan further recommended that participating States ensure that laws and other measures adopted for preventing and combating human trafficking “do not have an adverse impact on the rights and dignity of persons, including

⁷ OSCE Ministerial Council, *Declaration on Trafficking in Human Beings*, MC(10).JOUR/2 Annex 2 (Porto, 7 December 2002)

their freedom of movement”. This is at the core of the OSCE human rights-based approach to anti-trafficking action. Such an approach calls for governments and parliaments to take the lead in their national jurisdictions to ensure that legislation and policy are not negatively impacting on the protection of rights of trafficked persons and other affected groups. To this end, States should establish tools to ensure for example that victims are not punished as a result of their trafficking experience, and they are protected by the principle of *non-refoulement*.

Civil society and international organizations can support States in this process; NGOs in particular can also contribute to promoting participation and empowerment of those affected by THB in the evaluation of related policies. National Referral Mechanisms can also be useful in this assessment process. Personally, I would like to pledge that with my country visits and ongoing co-operation and dialogue with participating States, I stand ready to support them in assessing the human rights impact of THB policies and enhancing their effectiveness.

The Vilnius Declaration on Combating All Forms of Human Trafficking reconfirmed the political commitment of participating States to fight against trafficking as an integral part of the OSCE’s efforts towards a common and comprehensive security which includes full respect of human rights.⁸ This Human Dimension Seminar centred on the multifaceted concept of rule of law and on a human rights approach to anti-trafficking action is a concrete follow-up to the strategic indications of the Vilnius Declaration.

⁸ OSCE Ministerial Council, *Declaration on Combating all Forms of Human Trafficking*, MC.DD/27/11/Rev.1 (Vilnius, 7 December 2011).