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International Labour Organization

Brussels, 9 June 2010

Dear Sir or Madam,

We are writing to you in our capacities as the Regional Representative for Europe of the United Nations High Commissioner for Human Rights, the Director of the Bureau for Europe of UNHCR, the Director of the UNICEF Brussels Office, Relations with the EU Institutions, the Head of the UNODC Liaison Office with the EU Institutions, the Director of the International Labour Organisation (ILO) Office for the European Union and the Benelux countries, and the Officer in Charge of the UNIFEM Brussels Office respectively regarding the proposal for a Directive on preventing and combating trafficking in human beings, and protecting victims released by the European Commission on 29 March 2010 (COM(2010)095), which, once adopted, would repeal the 2002 Framework Decision on combating trafficking in human beings.

We value the efforts and the interest of EU Member States in combating trafficking in persons, a crime which entails serious violations of the human rights of its victims. In this context, we welcome the proposal for a Directive on preventing and combating trafficking, and in particular the objective of protecting, assisting and supporting victims. This Directive would represent an important development which would help ensure that the rights of victims of trafficking are effectively addressed in binding European Union rules.

**Legal basis**

As stated in the proposal, the legal basis for the proposed Directive as named in the proposal is derived from Articles 82(2) and 83(1) of the Treaty on Functioning of the European Union (TFEU) on Judicial Cooperation in Criminal Matters. However, in our view, a reference should

also be made to Article 79(2)(d) TFEU, which requires the adoption of measures *inter alia* in the area of 'combating trafficking in persons, in particular women and children'. Given that the explanatory memorandum of this Directive proposal refers specifically to protective measures, including for women and children, it may be helpful to cite this in the proposal to reflect the fact that combating trafficking entails not only criminal law measures, but also protection and safeguards for victims.

Likewise, we recommend a reference to Article 82(1)(c) TFEU on 'training of the judiciary and judicial staff'. This would reflect the positive development made by the proposal through the mention of training needs for 'any officials likely to come into contact with victims or potential victims of trafficking in human beings [...] to identify and deal with such victims' (Recital 15), and the promotion of 'regular training for officials likely to come into contact with victims and potential victims, including front-line police officers, border guards, labour inspectors, health care personnel and consular staff' (Article 15 (3)).

### **Consistency with other EU policies**

In order to provide a more complete picture of the relevant pieces of EU policies related to trafficking, and to avoid conflicts in laws we recommend that cross-references be made to the Action Oriented Paper (AOP) on strengthening the EU external dimension on action against trafficking in human beings (Council 6865/10), the proposal for a Directive on Combating Sexual Abuse, Sexual Exploitation of Children & Child Pornography (COM(2010)94), and the proposal for an Action Plan on Unaccompanied Minors (2010 – 2014) (COM (2010)213).

### **Principle of *non-refoulement***

We consider it essential to reiterate in the proposed Directive the fundamental principle of *non-refoulement*, which binds the European Union and all Member States under the terms not only of the 1951 Convention, but also the European Union Charter of Fundamental Rights and other relevant treaties. We specifically draw attention to Article 19 of the EU Charter on protection in the event of removal, expulsion or extradition, which re-affirms the principle of *non-refoulement* i.e. ensuring that nobody is sent back to persecution, and we call for an explicit reference in the preamble of the Directive to the fundamental principle of *non-refoulement*, and the fact that this Directive should apply without prejudice to the 1951 Geneva Convention.

The assessment of the protection needs of trafficked persons will determine the protection response and the best solution available for each case. Depending on the case and the prevailing circumstances in the country of origin, voluntary repatriation could be one of the solutions, but should not be seen as the only one. Recognition of refugee status or subsidiary protection as per Article 15 of the EU Qualification Directive could be an important component of protection response for certain trafficked persons.

### **Particularly vulnerable persons**

We welcome the definition provided in the Preamble for the concept of “particularly vulnerable persons” but encourage Council and Parliament to adopt an equality and women’s empowerment-based approach, in particular by including vulnerability on grounds of gender in this definition. We also call for the extension of gender-sensitive rights-based standards of assistance and support to persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, and encourage Member States to provide for special assistance and support to address the specific needs of particularly vulnerable persons.

Most provisions in the proposal are of a generic nature, addressing the male and female experience of trafficking in the same way, whereas men and women, boys and girls experience trafficking differently. Women and girls tend to suffer a disproportionately heavy impact, whereas trafficked men find it difficult to access existing programmes for victim assistance. We therefore call on gender equality and women's empowerment perspectives to be incorporated in the formulation and implementation of legislation and programmes by policy makers, state and non state service providers and law enforcers, and for gender sensitive training to be institutionalized for these stakeholders.

### **Non-Prosecution of Victims**

With regards the non-prosecution of victims of human trafficking (Article 7), we express our serious concerns that the proposed provision only refers to the "possibility of not prosecuting or imposing penalties". We use this opportunity to recall the OHCHR *Principles and Guidelines on Human Rights and Human Trafficking*: "Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons."

We are also concerned that the protection afforded to victims has been limited by proposing to change the wording in Article 7 from "unlawful" to "criminal", which further limits protection from prosecution to criminal activities only while unlawful activities, such as immigration violations, would not be exempt from prosecution.

### **Victim assistance and support**

We welcome the new provisions on assistance and support afforded to victims of human trafficking "for an appropriate time after criminal proceedings" (Article 10), and we strongly support the proposal to not make assistance conditional on the victim's willingness to act as a witness. We also welcome the provision of assistance and support in a language which victims can understand. In the context of trafficking related procedures, where so much depends on the testimony of an individual, effective communication with the victim, in a language s/he understands, is essential.

### **Legal assistance**

In our view, the right to legal assistance is an essential safeguard, especially in complex European procedures. Victims of trafficking are often unable to articulate cogently the elements relevant to their account without the assistance of a qualified legal counselor. Moreover, free quality legal assistance provided as soon as the person has been identified as a victim of human trafficking, is in the interest of States, as it can help to ensure that protection needs are identified early and accurately and secure voluntary participation in criminal investigation and proceedings.

### **Victim Protection**

We welcome the expressed intention for this Directive to address victim protection as well as to fight trafficking, which represents a positive development with regards the 2002 Framework Decision. A holistic approach to trafficking encompassing the so-called 3 "P"s (Prevention, Prosecution, Protection) strengthened by monitoring is necessary to address the humanitarian consequences of the crime of trafficking. However, we regret the limitations brought forward by this proposal on protection measures, which are only afforded in the framework of criminal investigation and proceedings (Article 11), despite the

announced objective to “establish specific protective measures for any victim of trafficking in human beings” (Recital 10).

We welcome the references in the Directive to the UN Convention on the Rights of the Child, the improved protections afforded to child victims of trafficking, and the primacy accorded to the best interest of the child.

### **Prevention**

We welcome the new provisions to address prevention, particularly the “demand dimensions” of trafficking (Article 15). We encourage the inclusion of provisions related to gender-sensitive education curricula, which promote gender equality in all spheres of life. Only long term measures can contribute to mindset and behavior change, and reduce the demand for services of trafficked persons. We call for the proposal to address the promotion and protection of economic rights and security, especially of women, as this is a key driver of migration and cause of vulnerability to trafficking.

We further encourage coherence between criminal and labour law to reduce the demand for goods and services resulting from forced labour. Governments should seek to strike a balance between sanctions against unscrupulous employers and preventive action to bring business into compliance.

To further support the prevention of human trafficking, we also recommend creating an accessible reporting system for (potential) victims and those with information on human trafficking, such as a hotline/helpline, including with a child-friendly approach. This reporting system would provide a point of entry for victims to access assistance and support services.

Recognizing that the discussion on criminalizing demand for adult prostitution has been contentious, EU legislation already sanctions employers who use trafficked labour (Directive 2009/52/EC Article 9(1)(d)), and the proposal for a Directive on Combating the Sexual Abuse, Sexual Exploitation of Children and Child Pornography (COM(2010)64) criminalizes the use of child prostitutes. We would therefore encourage the Council and Parliament to call for the establishment of criminal penalties for knowingly using services of trafficking victims (Article 15(4)), consistent with other EU policies.

### **Data collection and monitoring**

The need to collect better quality data on human trafficking is regularly stressed by all stakeholders, as is the lack of comparable data. We would therefore strongly recommend that the Directive require systematic and harmonized data collection by Member States based on the definition of trafficking provided in this Directive.

We welcome the proposal to establish National Rapporteurs or equivalent mechanisms (Article 16). These National Rapporteurs will have an important role in monitoring the implementation of this Directive by Member States, collecting data in a harmonized manner in EU Member States, analyzing human trafficking trends at the national level, assessing progress on preventing and combating human trafficking as well as protecting victims of trafficking, and ensuring the collection of data on a harmonized basis.

We recommend that expertise on gender equality and women’s empowerment in human trafficking be a criterion in the selection process of National Rapporteurs and/or an equal number of women with such expertise be represented on any equivalent mechanism that may be set up.

In addition to national monitoring and reporting mechanisms, we consider that the European Union would benefit from the appointment of an EU Anti-Trafficking Rapporteur, in order to support a coherent approach across Member States, allow for effective and visible action against human trafficking at EU level, and provide for a monitoring and reporting system to the EU institutions.

We very much hope that these suggestions will be of help to the Council of the European Union, the European Parliament and the European Commission as they continue addressing the challenges faced by human trafficking. We would like to express our readiness and willingness to continue our collaboration with the European Union institutions in the further development of a response to trafficking in human beings within our respective areas of expertise.

Yours sincerely,



Jan Jařab  
Regional Representative  
for Europe of the UN  
High Commissioner for  
Human Rights



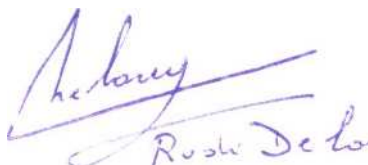
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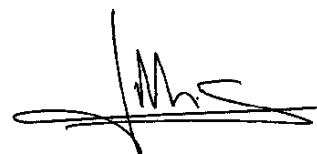
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