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***The origins and standards of combating trafficking in persons
in international law***

(Geneza i standardy zwalczania handlu ludźmi w prawie międzynarodowym)

Summary

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The dissertation aims to support the thesis that international standards to combat trafficking in persons allow for the effective response against contemporary instances of this crime and its different manifestations. In other words, in my research, I am going to seek an answer to the following question: is existing legal framework to combat trafficking in persons sufficient, or maybe a different approach should be adopted in order to cope effectively with exploitation of human beings worldwide? At the same time, it raises a question about the relation between the notion of trafficking in persons and other notions present in international legal system, such as: „slavery,” „servitude,” „enslavement,” „forced or compulsory labour.” The underlying premise of this work is that the definition of trafficking in persons is a broad concept that can encompass many existent forms of exploitation of human beings, often termed as "contemporary forms of slavery."

International standards of combating trafficking in persons will be analyzed in broad terms, including prosecution of perpetrators, protection and assistance for victims, as well as prevention mechanisms.¹ This approach is fully justified, as it reflects objectives of most contemporary anti-trafficking instruments. The work is based mainly on normative analysis, supplemented by application of historical and comparative research methods. To the extent necessary to achieve objectives of the research, some criminological and victimological aspects have been considered.

The dissertation consists of three main parts, each containing three chapters. The first part is devoted to the history of legal instruments that influenced the evolution of the notion of trafficking in persons throughout the 20th century, leading eventually to the creation of its definition. The second part deals with contemporary standards for combating trafficking in persons, with special emphasis on the definition of this crime. The third part focuses on the analysis of the jurisprudence of international and national courts applying the said standards and the judicial dialog between them.

The definition of trafficking in persons is a relatively new concept – it appeared for the first time in 2000 in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United

¹ According to the so-called "3P" paradigm, i.e. prosecution, protection, and prevention. The Fourth "P" – partnership/promotion of cooperation – serves as a complementary means to achieve progress in the anti-trafficking efforts.

Nations Convention Against Transnational Organized Crime (hereinafter referred to as Palermo Protocol). According to art. 3 of this treaty, "trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force, or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs." Since its adoption, the Palermo Protocol has been ratified by 170 states. Many of them have introduced the definition of trafficking in persons, or at least some of its elements, into their domestic legal systems. In the following years, the definition was repeated in many international documents (Council of Europe Convention on Action against Trafficking in Human Beings, EU Directive 36/2011, ASEAN Convention). Such strong support for this relatively new concept raises many questions. The definition of trafficking in persons did not appear in a vacuum – prohibition of slavery, servitude, enslavement, practices similar to slavery had long been established in international law when the Protocol was adopted. Relationship of trafficking in persons definition with other similar notions is an important issue that raises many doubts and requires closer attention. Therefore in my research I would also like to focus on the integration of the new definition into existing international framework to combat different forms of exploitation.

Chapter one is devoted to anti-slavery conventions. It begins with a brief description of the historical development of anti-slavery instruments in international law, followed by detailed analysis of the 1926 Slavery Convention, as the definition contained therein is still in force, also as a part customary international law and has been applied in the jurisprudence of both international and national courts. It is also considered as a point of reference for the purpose of the interpretation of trafficking in persons definition. However, the vagueness of the slavery definition led to further developments in this area and to the adoption of the second crucial instrument in this field – Supplementary convention on the abolition of slavery of 1956. This treaty enumerates and defines practices similar to slavery such as: debt bondage, serfdom

or forced marriages. The chapter concludes with remarks about the unfinished process of abolition of slavery, which is one of the reasons its contemporary forms are still flourishing.

The second chapter analyzes treaties concerning international labour standards. There are number of ILO instruments that have influenced the development of trafficking in persons definition – those pertaining to forced or compulsory labour (Conventions nr 29 and 105), child labour (Conventions nr 138 and 182) and protection of migrant workers (Conventions nr 97 and 143). These treaties show how the work of ILO has contributed to the conceptualization of the definition of trafficking in persons. Owing to the efforts of this organization, the notion of trafficking in persons for purposes other than forced prostitution has been developed.

The third chapter is devoted to the special group of international treaties that emerged from anti-prostitution movements created in the second half of the 19th century. For many years these instruments shaped the understanding of trafficking in persons in a very narrow way – mainly as applicable only to actions of "procurement of women for immoral purpose." Between 1904 and 1933 four treaties were adopted: "White Slave Traffic" Conventions from 1904 and 1910, Convention for the Suppression of the Traffic in Women and Children (1921) and International Convention for the Suppression of the Traffic in Women of the Full Age (1933). The normative analysis of these instruments will indicate how the understanding of trafficking has gradually evolved. It is important to note that some of the features of these early treaties has found their place in the Palermo Protocol – for example, the distinction between child victims and those of age. Historical developments described in this chapter have led to the adoption of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which has been analyzed in detail. Its provisions have upheld a conceptual link between trafficking in persons and prostitution for many years. The document reflected abolitionist tendencies towards prostitution and therefore did not gain recognition in some states. Despite its low ratification rate, for many years it has influenced perception of trafficking as "procuring, enticing or leading away, for purposes of prostitution." As this convention is still in force, a question regarding its relationship with the Palermo Protocol arises.

Suppression of transnational criminal activities has become one of the main challenges for the international community. The globalized world creates countless opportunities. In the past decades the opening up of world markets has facilitated the movement of capital, goods, services and people. Among actors who have benefited from these developments are also those engaging in illicit activity, such as corruption, trafficking in drugs and arms, or trade in human beings. Unfortunately, new methods of communication, faster means of transportation and increasing global competition have rendered the exploitation of human beings easier and more profitable. This was one of the main reasons states decided to engage in negotiations of a treaty concerning trafficking in persons. Before adoption of the Palermo Protocol, different actors had attributed different meaning to this term, often the one best suited to their agenda. The lack of definition led to uncoordinated and sometimes even contradictory actions of national authorities that hampered effective cross-border cooperation between states.

Chapter four sets out the main characteristics of the UN Convention against transnational organized crime (UNTOC) which is a parent treaty of the Palermo Protocol. Both instruments are part of the so-called "crime control treaties." Multilateral suppression conventions impose obligations upon states to criminalize a broad range of criminal activities and to provide different forms of cooperation (such as extradition or mutual legal assistance) with regard to these crimes. For many years these instruments were seen as a subset of international criminal law. In recent years however, this system of law has received greater attention as a separate area – transnational criminal law.

The purpose of the Protocol stated in art. 2 is often referred to as "4P" paradigm: prevention, protection, prosecution and promotion of cooperation. Unfortunately, not all of those objectives received equal attention from the drafters of this instrument – while provisions dealing with prosecution and cooperation among states are quite well developed, those concerning assistance and protection of trafficked persons are not satisfactory. In the course of analysis of Trafficking Protocol, it is important to take into account its relationship with the parent convention – provisions of UNTOC apply *mutatis mutandis* to the protocols and therefore its general rules constitute a part of anti-trafficking framework. According to the art. 3 of UNTOC Convention, it is applied to the prevention, investigation and

prosecution of certain offences that are "transnational in nature and involve an organized criminal group." This provision has led to uncertainty regarding the scope of application of this instrument and caused strong criticism. Nonetheless, to get the whole picture, it is necessary to invoke art. 34 of UNTOC, according to which the offences established in accordance with this Convention and its Protocols "shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group." Therefore, the Protocol is not only a mean to combat trans-boundary instances of trafficking in persons, but it also serves as a tool to harmonize criminal law of state-parties, requiring criminalization of this crime in their domestic legal systems. In fact, obligation to criminalize trafficking is the central and mandatory obligation of all states that ratified that treaty.²

Chapter five is devoted to a detailed normative analysis of the trafficking in persons definition. It consists of three elements (the act, the means and the purpose of exploitation). It was designed to embrace all persons engaging in trafficking process and, simultaneously, to recognize that trafficking occurs in various forms (most importantly, that it is not limited to the exploitation of prostitution as it was perceived for almost a century). The definition of trafficking in children consists of only two elements, as it is not required for any of the means to be employed by trafficker.³ Therefore, whichever of the listed actions undertaken with the intent to exploit a person under the age of eighteen should qualify as trafficking within the meaning in the Protocol. It also states that the consent of a victim is irrelevant because the second element of the definition serves to vitiate any assent given, which is explicitly stated in art. 3(b). The normative analysis of the definition as a whole, as well as its separate elements, supports the argument that this 3-element structure can encompass a very broad range of exploitative practices.

The sixth chapter is devoted to anti-trafficking instruments adopted after the Palermo Protocol within the framework of selected four regional organizations: Council of Europe (CoE), European Union (EU), South Asian Association for Regional

² UN OHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (New York and Geneva: 2010), p. 186.

³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing UN Convention against Transnational Organized Crime, 2237 UNTS 319, art. 3(c) and (d).

Cooperation (SAARC) and Association of Southeast Asian Nations (ASEAN). The analysis of the regional arrangements concentrates on the differences regarding definition of trafficking in persons and newly developed measures that haven't been included in Palermo Protocol, such as non-punishment clause or reflection period for victims. The analysis of CoE Convention on action against trafficking in human beings is especially important, as it is directly connected with the topic of the following chapter, to the extent helping to establish the scope of states' positive obligation arising out of art. 4 of the ECHR.

Chapter seven seeks to answer the question about the relation between trafficking in persons with art. 4 of the ECHR prohibiting slavery, servitude and forced labour. Although there are only few cases where the Court found direct breach of art. 4, most of them involve instances of trafficking in persons. After groundbreaking judgment in the case of *Ransev v. Cyprus and Russia*, it is clear that trafficking itself, within the meaning of Palermo Protocol and CoE Convention, falls within the scope of art. 4 of the ECHR. Although the Court did not engage in the detailed analysis of the meaning of prohibited acts, it elaborated on the positive obligations of states. Other judgments analyzed in chapter seven give rise to reflections concerning different aspects related to trafficking: possibility of victims' applying for a refugee status, and possibility of qualifying this crime as torture or other form of inhumane act within the meaning in art. 3 of ECHR.

Chapter eight analyzes trafficking in persons in the context of international criminal law. Trafficking in persons as such is not included in ICC statute, nevertheless it is present in a somewhat vaguely constructed definition of "enslavement" as one of the acts constituting crimes against humanity. The meaning of *actus reus* of enslavement has been extensively dealt with by ICTY in *Foča* case, which served as a starting point for the analysis of the possibility of the ICC to prosecute and convict those guilty of trafficking in persons. In this judgment, both Trial and Appeal Chambers engaged in a detailed analysis of the notion of enslavement in customary international law, in which they used indicators based on elements of the trafficking definition. Recent ICC judgments concerning "sexual slavery" seem to follow a similar pattern.⁴

⁴ *Prosecutor v. Katanga* (ICC-01/04-01/07), *Prosecutor v. Bemba Gombo* (ICC-01/05-01/08)

The last chapter is devoted to the analysis of the jurisprudence of the domestic courts. It shows how states have implemented trafficking in persons definition and what practical problems the courts dealing with it have encountered. Five judgments of the highest judicial bodies were chosen, as it is the role of the supreme courts to link international standards and domestic judicial practice. Analysis of domestic jurisprudence was made possible by UNODC trafficking in persons case law database, which is an important tool for the research in this area, and was used not only in the course of preparation of this chapter, but for other parts of this dissertation as well.

Although the number of instruments dealing with trafficking in persons may seem somewhat excessive, unlike earlier efforts to eradicate contemporary forms of slavery, international standards of combating trafficking seem more coherent. The definition of this crime as contained in Palermo Protocol has gained widespread recognition by states, international tribunals and organisations. The conclusion of the dissertation differs with regard to different aspect of combating of trafficking in persons – prosecution, protection of victims and prevention, which are accordingly addressed below. The international standards for the criminal justice response to that crime seem sufficient, as long as they are properly implemented in domestic legal systems. This aspect is also closely related to the question of cooperation of states, which needs to be further developed in order to respond effectively to transnational instances of trafficking in persons. There has been a significant improvement regarding protection of victims,. The initial focus placed on prosecution has been widened to include a more victim-centred approach. This development is a vital one, as trafficking is not only a crime, but a serious human rights violation which has been acknowledged *inter alia* in ECHR jurisprudence. It is reflected in the content of international instruments such as CoE Convention and Directive 36/2011/EU, both of which have adopted much higher standards of victims' protection and assistance than Palermo Protocol. Implementation of the relevant provisions is strongly supported by bodies such as GRETA or institutions like UNODC, providing its expertise to state-parties. Recommendations regarding anti-trafficking measures are recently included by Human Rights Committee in its concluding observations addressed to state parties to ICCPR. In the light of the above, it seems that the last area – prevention – is the most neglected one. From the very

beginning of the drafting process of Palermo Protocol, states were focused on criminal justice response. Some critics even claimed that the intention behind the adoption of this treaty was solely to prevent transnational crime and strengthen border measures against irregular migrants. Without diminishing the role of law enforcement agencies in combating trafficking in persons, it is crucial to address the underlying causes of this phenomenon. Exploitation is a structural problem, but the root causes of it are often neglected in the trafficking discourse. Eradication of poverty, promotion of decent work conditions, gender equality and access to social services and justice are vital elements of anti-trafficking efforts, which have recently been stressed during the observance of the first World Day of Social Justice in 2014. Eradication of trafficking has also been included in the newly adopted Sustainable Development agenda for 2030, in 3 out of 17 goals. These developments allow for the hope that further anti-trafficking activities will be perceived in a broader context, not restricted solely to the criminal aspects.

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