Speech by Dutch National Rapporteur
on Trafficking in Human Beings and Sexual Violence against Children
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The Prominent Role of Judges in Interpreting the International Definition of Human Trafficking

Good afternoon, ladies and gentlemen. It is an honour to be in the company of such remarkable people and I would like to thank the organization for inviting me to speak today.

The international definition of human trafficking of the UN's Trafficking Protocol was drafted sixteen years ago, and it still causes controversy today. Many scholars and organizations have paid attention to the difficulties that the definition presents for the scope of human trafficking. But little attention has been paid to the *national* interpretations and applications of the Protocol's definition. National courts and their judges are crucial in interpreting the international definition of human trafficking, and cannot be overlooked.

That's what my colleague and I find in our article. We specifically look at the role of Dutch courts in outlining the definition of human trafficking. We firstly take a closer look at transnational criminal law to improve the understanding of the interaction between *international* definitions and *national* judges. We

secondly look at how Dutch judges interpreted two elements of the definition: ‘abuse of a position of vulnerability’ and ‘purpose of exploitation’.

Within international law, human trafficking is seen as a transnational crime. Transnational crimes are dealt with in transnational criminal law. This type of law entails that both international *and* national actors have a responsibility in realizing an effective approach of crimes like human trafficking. On the one hand, the international level prescribes the definition of human trafficking. On the other hand, national legislatures must take steps to criminalise human trafficking and judges subsequently interpret and apply the international definition.

So the definition of human trafficking takes center stage. The more vague, the more ways domestic courts have to interpret and determine the scope of the definition. The current definition of human trafficking is considerably open. You can see this as problematic, because it causes little legal certainty. But, you can also see this in a more positive light: it can be an invitation to domestic courts to expand on the precise meaning of human trafficking in their respective local contexts.

So how did Dutch courts deal with this invitation? In the Netherlands, human trafficking for the purposes of sexual exploitation was already an offence under Dutch criminal law when the protocol was drafted. After its drafting, Dutch legislators widened the range of human trafficking and aligned it with international law. Currently, human trafficking is a criminal offence under Article 273f of the Dutch Criminal Code and reads almost exactly the same as the Protocol Definition, namely: human trafficking involves (1) an action (2) by certain means and with a specific intention (the criminal intent) (3) the

purpose of exploitation.

Dutch Supreme Court has shed more light on how components of the human trafficking definition *should* be interpreted. For instance, 'abuse of a position of vulnerability', according to the Protocol, is understood 'as referring to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved'. This means that in every individual case, it has to be established whether there *was* a position of vulnerability, and, if so, whether the suspect (intentionally) *abused* that position. This however raises a question: what kind of intentional involvement is required to *prove* the accused's abuse of an established vulnerability?

In 2009, Dutch Supreme Court ruled that the conscious use of someone's vulnerable position *already* constitutes abuse of that position. This is the *'use equals abuse'* doctrine. To provide an illustration of this, think of an illegal immigrant who begs a restaurant owner for a job. According to the Supreme Court, employing an illegal immigrant despite knowing about his vulnerable position, is already enough to prove that the restaurant owner abused the vulnerable position.

Not all countries would rule the same. Some would decide that the restaurant owner didn't persuade the illegal immigrant to come work for them, but merely responded to the illegal immigrant's request. The scope of abuse of a vulnerable position is therefore quite wide: some countries have a lower threshold than others. In the Netherlands, a lower form of criminal intent is enough to establish abuse of a vulnerable position.

So what about the purpose of exploitation? How can we establish that a person specifically intended to exploit another person? Suspects generally

remain silent about their intentions, and in those cases, the court is compelled to establish intent on the basis of available evidence. But how can this evidence be established? Dutch Supreme court does not differentiate between the various forms of exploitations listed in the Palermo Protocol and the definitions of them that already exist at the international level or in national law itself, but formulated a number of factors that should apply in *assessing* the different forms of exploitation. Some of the factors that can be assessed are the nature and duration of the work, the limitations posed onto the individual concerned, and the economic advantage accruing to the employer. Not all of these factors have to apply, but these factors can be weighed against each other. For example, in some situations an employer might enjoy a major financial advantage but imposes relatively few limitations on the victim. In other cases, it might not be the profit that stands out, but the amount of hours worked and the limitations that the situation imposed on the employee. In 2015, Dutch Supreme Court even added that the weighing can be different when the victim is a minor, and that lower courts must consider this as an important factor.

So our article demonstrates this: domestic courts *have* room to interpret and apply the definition of human trafficking in their own contexts. The interaction between international and national law in cases involving transnational criminal law, as is the case with regard to human trafficking, is an interaction of mutual dependence. Scholars, in my opinion, have focused too much on the international definition of human trafficking, and not on how human trafficking is viewed in countries themselves.

Whether you agree with the point of view that every country's courts should decide for themselves how to further interpret the international definition of

human trafficking, or whether you agree with the point of view that this defeats the purpose of developing a universal understanding of human trafficking, one thing is clear: we need to be place more emphasis on the role of national judges, and on courts' *national* interpretations of international definitions of human trafficking.

Thank you for your attention.