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**Preliminary Comments on the draft Amendments to Several Legislative
Acts of the Azerbaijan Republic related to Fighting Against Human
Trafficking.**

**based on an English translation
provided by the OSCE Office in Baku**

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Preliminary Comments on the Law of the Republic of Azerbaijan on the draft Amendments to Several Legislative Acts of the Azerbaijan Republic related to Fighting Against Human Trafficking.¹

Based on the request of the Government of the Republic of Azerbaijan made to the OSCE Office in Baku, for comments to the draft Law on Amendments to Several Legislative Acts of the Azerbaijan Republic related to Fighting Against Human Trafficking, and further, in response to the OSCE Office in Baku request for assistance from the OSCE ODIHR in this regard, the OSCE ODIHR and the OSCE Office in Baku are pleased to provide their preliminary comments on the aforementioned Draft Law;

These preliminary comments do not equate to a full and comprehensive review, rather they have been drafted to serve as considerations which should be taken into account in light of international standards in the field of trafficking to which the Republic of Azerbaijan has committed;

In this regard, the OSCE ODIHR and the OSCE Office in Baku would like to make mention that the preliminary comments contained herein are without prejudice to any further recommendations and comments that both aforementioned institutions may wish to make on the draft Law on Amendments to Several Legislative Acts of the Azerbaijan Republic related to Fighting Against Human Trafficking, in the future;

Therefore, the OSCE ODIHR and the OSCE Office in Baku wish to submit the following preliminary comments to the Government of the Republic of Azerbaijan;

¹ Based on the translation of the Law on Amendments to Several Legislative Acts of the Azerbaijan Republic related to Fighting Against Human Trafficking , draft 2004 , as provided by the OSCE Office in Baku.

1. Executive Summary of Preliminary Comments:

It is recommended that;

- 1.1 the issue of **consent** should be dealt with within the definition of the crime of trafficking;
- 1.2 the **non-punishment of victims of trafficking** in human beings for unlawful acts committed as a direct result of their situation as a victim is considered, extending to civil, administrative or criminal acts;
- 1.3 the **definition** of the crime of trafficking in the Criminal Code of Azerbaijan is consistent with that of Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000;
- 1.4 **aggravating circumstances** in which trafficking occurs are clearly identified and accordingly sanctioned, in particular, as regards the complicity of public officials by act or omission;
- 1.5 **trafficking in children** be clearly in compliance with Article 3(c) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000, with children understood as any person under the age of 18 years;
- 1.6 **separate offences** to trafficking should be provided for in the Criminal Code of Azerbaijan, amongst others for, mental abuse, debt bondage, torture, cruel, inhumane and degrading treatment;
- 1.7 the definition of **forced labour** should be clarified, and compliance with relevant international standards should be ensured;

2. Article 59.4

- 2.1** This article of the draft Law on Amendments to Several Legislative Acts of the Azerbaijan Republic related to Fighting Against Human Trafficking (hereinafter also referred to as “Draft Law”) turns its attention to the question of behaviour of the victim of trafficking as not having effect on the culpability and prosecution of a person suspected of engaging in trafficking human beings. It is strongly recommended however, that this article be deleted and in accordance with Article 3(b) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (hereinafter, “Palermo Protocol”), the issue of “consent” of the victim of trafficking in human beings should be addressed expressly. As stated in point 3.3 below, it is recommended for Article 145-1 of the Draft to address this issue and clearly state that the consent of the victims of trafficking in human beings shall have no bearing whatsoever on the culpability and prosecution of the suspected trafficker where the means (of deception, force, fraud etc.) have been applied by the trafficker.
- 2.2** Further to the question of consent of the victim of trafficking in human beings, is the issue of non-punishment of the victims of trafficking in human beings for any acts committed as a direct result of their situation as victims of trafficking. Indeed the issue is believed to be of such significance that we propose the drafting of a non-punishment clause, amending provisions of relevant acts of the Republic of Azerbaijan. It would be appropriate for the non-punishment to be included in or follow Article 145-1 of the Draft Law. It is proposed for this non-punishment clause to expressly stipulate that “a victim of trafficking in human beings shall be exempted from liability for criminal liability for the offences committed by him/her being a direct consequence of his/her status as a victim of trafficking”.² As discussed in point 7.1 below, it is noted that Article 36.0.9 of the Draft Law, exempts victims of trafficking from certain administrative offences. This is a welcome provision, nevertheless, it is highly recommended that such non-punishment of victims of trafficking be extended to include any unlawful acts—criminal, civil or administrative, in as far as they directly result from the situation of being a victim of trafficking in human beings.

3. Article 145-1 on Human Trafficking

It is to be commended that this article has been drafted in the spirit of the definition of trafficking in persons, as provided in Article 3(a) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,

² As recommended by: Point 1.8 Ch III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003. and Guideline 4.5 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Economic and Social Council, New York, 2002 Document Reference No: E/2202/68/Add.1. See also: Article 165(4) of the Criminal Code of the Republic of Moldova, entry into force, June 12, 2003.

2000 (hereinafter, “Palermo Protocol”).³ However, the structure and form of the article, although in line with that of the ACC, is not conducive to a clear understanding of the constitutive elements of the crime of trafficking.

It is therefore, highly recommended that the Article transposes more precisely the definition of the Palermo Protocol, including all essential elements of the crime of trafficking. At the very least, we recommend that following be considered:

- 3.1** In line with our understanding of Article 145-1.1, it is clear that the legislator intends to criminalize the trafficking of persons carried out through the use of any means whatsoever. It should therefore be considered to add the words “by any means” to the definition. Article 145-1.1 would then read “...concealing, or purchasing person *by any means* for exploitation purposes- ...”⁴
- 3.2** The range of actions involved in trafficking, as listed in Article 145-1.1 should be extended to include “recruitment”, “harbouring” and “receipt” of persons.⁵ It should be noted that one of the key undertakings in combating trafficking is action at the phase of “recruitment”. The Government of Azerbaijan may in the future, like to choose to review current laws and administrative controls over the legal conditions relating to the licensing and operations of businesses that may serve as a cover for trafficking such as, marriage bureaux, employment agencies, travel agencies, hotels and escort services. Such review is recommended by; Guideline 4.2 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking.⁶ Therefore, acknowledging “recruitment” as a component of trafficking at this fundamental phase is considered appropriate.
- 3.3** With reference to point 2.1 above, it is noted that Article 145-1, in its entirety does not appear to address the issue of consent. It is therefore highly recommended that, in conformity with Article 3(b) of the Palermo Protocol, this article expressly state the irrelevance of the consent of the victims, when the trafficker has used any of the means listed in Article 145-1 to impose on the will of the victim (that is, deception, fraud, coercion, etc.). Further, it is proposed that the language of Article 3(b) of the Palermo Protocol be transposed as closely as possible, therefore, the paragraph on consent in Article 145-1 may read: “...*The consent of the victims of trafficking in persons to the intended exploitation set forth in this Article 145-1, shall be irrelevant where any of the means set forth in this Article 145-1 have been used;*”

³ The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, as signed by the Republic of Azerbaijan on 12 December, 2000 and ratified on 30 October 2003. Source: http://www.unodc.org/unodc/crime_cicp_signatures_trafficking.html

⁴ see also: Jordan, A., *The Annotated Guide to the Complete UN Trafficking Protocol*, International Human Rights Law Group, Washington, 2002. p 7.

⁵ For example, as in : Article 127 of Russian Federal Law No 162-FZ on Introducing Changes and Amendments to the Criminal Code of the Russian Federation, in force on 16 December 2003, “*Rossiskaya Gazeta*” 12.16.2003, pp10-12.

⁶ United Nations Economic and Social Council, New York, 2002 Document Reference No: E/2202/68/Add.1

- 3.4** Most recent European developments in standards regarding the crime of trafficking have shown that aggravating circumstances are considered as committed: by endangering the life of the victim; against a child; by a public official in the exercise of his/her duties or committed; or, by a criminal organization.⁷
- 3.5** Further to the above, it is recognized as extremely pertinent to criminalize corruption within the context of trafficking, as foreseen in the current draft paragraphs 145-1.2.1 and 145-1.2.3.⁸ It is however suggested that firstly, the gravity of a public official's implication in the crime of trafficking be reflected by considering such involvement as an aggravating circumstance and therefore, carrying a heavier penalty.⁹ For this reason, it may be considered to move both paragraphs 145-1.2.1 and 145-1.2.3, under Article 145-1.3, which foresees such aggravating circumstances and imposes the highest possible sentence for this crime. Secondly, it is suggested that active or passive corruption should be criminalized.¹⁰ Although it is understood that paragraph 145-1.2.1 makes this attempt, further precision is proposed to be considered. Therefore, intentional "omissions" of a public official, or the "refraining from acting in the exercise of his or her official duties" which lead to trafficking in persons should be expressly stated by the provisions of this article, as required by Article 8 (1) (a) of the United Nations Convention Against Transnational Organized Crime, 2000 (hereinafter "Organized Crime Convention"). It should be noted at this junction, that the recommendation to criminalize active and passive corruption of public officials, applies also to Article 145-2 on disclosure of classified information on a human trafficking victim, discussed below.
- 3.6** It is commendable that the draft law undertakes to specifically criminalise the act of trafficking in children. In order to truly reflect the gravity of the crime of trafficking in children a separate article on trafficking in children may be drafted and included either following Article 145-1 of the draft law or, included in Chapter 22 of the Criminal Code of the Azerbaijan Republic (hereinafter, "ACC")¹¹, on Crimes Against Minors and Family Relations.¹² A separate article on trafficking in children would need to contain a definition consistent with that of Article 145-1. Such provision should also reflect higher punishment for the

⁷ Article 24, of the Revised Draft of the Council of Europe Convention on Action Against Trafficking in Human Beings, CAHTEH (2004) INFO 4.

⁸ As required by Article 8 and 9 of the United Nations Convention Against Transnational Organized Crime, 2000. As signed by the Republic of Azerbaijan on 12 December, 2000 and ratified on 30 October, 2003. Source: http://www.unodc.org/unodc/crime_cicp_signatures_convention.html

⁹ Point 1.4, Chapter III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003.

¹⁰ Point 1.7, Chapter III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003.

¹¹ Translation of the Criminal Code of the Azerbaijan of 1 June 2000 [Law No 787-IQ on the entry into force of the Criminal Code dated, 30 December 1999] provided by the OSCE Office in Baku.

¹² For example see: Article 206 on Trafficking in Children, Chapter VII Crimes Against Family and Juveniles, Criminal Code of the Republic of Moldova, in force, June 12, 2003.

crime of trafficking in children, and define children as any person under 18 years of age¹³ and further, clearly stipulate that consent of the child to being trafficked may never be achieved, regardless of the means used.¹⁴

- 3.7** Further to point 3.6 above, at minimum, it is proposed that, any form of trafficking in children and not solely for the purpose of “prostitution and/or other sexual practices or other forms of sexual exploitation” as specified in paragraph 145-1.3.4, be considered as an aggravating circumstance warranting the highest possible penalty under the law¹⁵. Therefore, Article 145-1.2.11 ought to be added to paragraph 145-1.3.4, which would then state that the trafficking of children for any purpose whatsoever, shall be punishable by twelve to fifteen years of imprisonment. It should be understood that a “child” is defined as any person under the age of 18 years.¹⁶ If this is not the case, a definition should be inserted. Most importantly, as stated in point 3.6 above, and in accordance with Article 3(c) of the Palermo Protocol, the recruitment, transportation, transfer, harbouring or receipt of children shall amount to trafficking even if none of the means (such as deception, threat or use of force etc.) set out in Article 145-1 are used. It is recommended for this to be expressly stated in the Draft Law.
- 3.8** Additionally, it is proposed to review the ACC, in order to ensure that separate offences such as, threats, mental abuse, unlawful detention, debt bondage, forced marriage, forced abortion, torture, cruel, inhumane and degrading treatment¹⁷, liability for not paying wages, confiscation and destruction of travel documents, forced abortions, etc are established. The ensuring that such separate offences are established would permit bringing charges against perpetrators for violations in addition to the charge of trafficking in persons.
- 3.9** As regards the “Note” which follows Article 145-1, it is highly recommended that the terms “exploitation of the prostitution of others” and “sexual exploitation” be defined expressly and in the context of trafficking. The Palermo Protocol does not endeavour to define these terms, and it was left to the domestic law of each state to do so, by the framers of the Palermo Protocol.¹⁸ This is particularly important as the terms are used throughout the Draft Law, will ultimately be

¹³ Article 1, United Nations Convention on the Rights of the Child, 1990. as ratified by the Republic of Azerbaijan.

¹⁴ Article 3(c) Palermo Protocol.

¹⁵ Point 1.4, Chapter III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003.

¹⁶ Article 1, United Nations Convention on the Rights of the Child, 1990. as ratified by the Republic of Azerbaijan.

¹⁷ Article 3, European Convention on Human Rights, as amended by Protocol No.11, 1998, ETS No.5; also; Article 2 and 4, United Nations Convention Against Torture, 1984; and; Article 23, International Covenant on Civil and Political Rights, 1966.

¹⁸ UN Interpretive Note: “...The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol, which is therefore, *without prejudice* to how State Parties address prostitution in their respective domestic laws” [Italics added] See also: Jordan, A., *The Annotated Guide to the Complete UN Trafficking Protocol*, International Human Rights Law Group, Washington, 2002. p 8

transposed into any specific Law on Combating Trafficking in Human Beings, that the Republic of Azerbaijan chooses to adopt.¹⁹ It would also be recommended, with due consideration of the structure of the ACC generally, that consideration is given to including the definition of exploitation (including the terms discussed herein) within article 145-1 itself, and not as a “Note”.

- 3.10** Further to point 3.9 above the following definitions are proposed: *“sexual exploitation- means the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subject to a threat, coercion, abduction, force, abuse of authority, debt bondage or fraud”* and; *“exploitation of the prostitution of others- means the obtaining by a person of any financial or other benefit from the sexual exploitation of another person”*
- 3.11** Finally, it is highly recommended to reconsider the structure of the article and placing of certain elements of the crime of trafficking in forms such as “note”, the creation of the clear distinction between tiers of punishment, as well as, a clear demarcation of what constitutes aggravating circumstances.

4. Article 145-2 on Disclosure of classified information on a human trafficking victim.

- 4.1** Notwithstanding the “note” defining “classified information” this concept is unclear and may serve to restrict exchange of information about the phenomenon of trafficking or freedom of the media to report on the same. It is recommended that the provision should rather focus on ensuring that the identity of the victims of trafficking in human beings or their relatives (or any person who works to combat trafficking) is kept confidential, as well as any information about the victim that may serve to establish his/her identity. That is the article is proposed to penalize the exposing of a victims identity above all.
- 4.2** Further, in line with the proposal made by point 3.5 above, Article 145-2, should criminalize the disclosure of information on a human trafficking victim by and act or intentional “omission” or “failure to act” of a public official.
- 4.3** Without having engaged in a full review of the protection measures available to victims of trafficking in human beings within the legal framework of the Azerbaijan Republic, it is pivotal to note, the sanctions foreseen by Article 145-2, must be taken within the broader context of victim and victim-witness protection measures. That is, consideration must be given not only to punishing the person who discloses information on the victim of trafficking, but equally importantly, the kind of protection that such an exposed victim would subsequently be offered, should his or her identity be disclosed, for instance, change of identity, relocation,

¹⁹ As already drafted by the Government of Azerbaijan.

etc.²⁰ provided from the moment of identification as a victim, through the entire criminal proceeding and subsequent thereto, if required.

- 4.4** The importance of protecting the private life and identity of the victim²¹ highlighted by this provision makes obvious that consideration should be given to introducing specific provisions on the requirement of respecting and protecting these rights from the moment of identification of the victim. Such provisions may be introduced in a law on Combating Trafficking in Human Beings as well as laws on victim-witness protection.

5. Article 145-3 on Use of Slave Labour

- 5.1** International law defines “forced labour” (also known as “compulsory labour”)²² and “slavery”²³ as well as, “slave like practices²⁴”. The definition of forced labour according to Article 2(1) of the International Labour Organization Forced Labour Convention No.29, 1930 is “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” It is therefore apparent that Article 145-3 has the intention of criminalizing “forced labour”. It is recommended that the article be renamed as “forced labour”. The argument for recommending such consistency in terminology goes to the core of combating trafficking in human beings, in particular considering the trans-national nature of the crime of trafficking, a trans-national understanding of the terms (and constituting elements of the crime) is essential for the securing of effective prosecutions.
- 5.2** The addition of the words “use of” in Article 145-3 appear to introduce both uncertainty as to the definition of forced labour as well as its constituent elements. It is proposed that it shall suffice for the article to state that the act of forcing, or making it impossible for a person to reject, or threatening a person to provide work or a service involuntarily amounts to forced labour. It is not necessary for the perpetrator to additionally “use” the products of the forced labour, as may be implied from the current wording of the article. Consequently, it is recommended for these words to be deleted.
- 5.3** Finally, it is recommended that unless already defined in provisions of the other acts of the Republic of Azerbaijan, the concept of “close relatives” be precisely defined herein – should the decision be made to include this expression in the final wording of Article 145-3.

6. Article 150-1 on Transiting Passengers Without Documents

²⁰ See also: Jordan, A., *The Annotated Guide to the Complete UN Trafficking Protocol*, International Human Rights Law Group, Washington, 2002. p 19.

²¹ Article 8, European Convention on Human Rights, as amended by Protocol No.11, 1998, ETS No.5

²² Article 2(1) of the International Labour Organization Forced Labour Convention No.29, 1930

²³ Article 1(1) of the Slavery Convention, 1926.

²⁴ Article 1 of the Supplementary Convention of the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery, 1956.

6.1 It is welcomed that the Draft Law foresees the liability of carriers to ensure that passengers are carrying the appropriate documents to enter the country of destination or transit. It is proposed for this provision to additionally impose on carriers the obligation of informing passengers of the crime of trafficking, and the human rights violations, risks and punishments that it entails. Such an obligation and requirement on carriers is considered a best practice.²⁵ The form of communicating this information (whether in writing, orally, etc) is a matter that may be dealt with by secondary legislation. However, the positive obligation to inform – is proposed to be introduced into this article.

7. Article 367.0.9

7.1 It is welcomed that the Draft Law addresses the issue of non-punishment regarding, administrative offences committed by a victim of trafficking in human beings. Nevertheless, further to the proposal made in point 2.2 above, non-punishment should extend to all unlawful acts, whether criminal, civil or administrative, committed by the victim of trafficking in human beings directly resulting from his/her status as a victim.

²⁵ As provided in the Anti-trafficking legislation of Panama, US State Department, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2004 (TIP)*, Office to Monitor and Combat Trafficking in Persons, June 14, 2004, Washington D.C. p 33