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**Committee on Migration, Refugees and Displaced Persons
of the Parliamentary Assembly of the Council of Europe**

Speech by Michael O'Flaherty
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Good morning Mr Chairperson, honourable members of the Committee. It is a great pleasure. This is my first appearance before this Committee.

I look forward to our dialogue and I am committed to continuing it throughout the six years of my mandate. The cooperation of the Commissioner and the Parliamentary Assembly is essential to the way I do my job.

I will be speaking now in a broader form and more concisely at the plenary later this afternoon.

This is a particularly disturbing time in terms of how we engage issues of migration and our borders. It is a dangerous moment.

We see a close nexus of populism and the ever more restrictive management of our borders.

We are seeing a moment where human life is threatened by other interests, where it is trumped by other interests, where there are efforts to make illegality respectable, where previously unthinkable things like pushbacks are being promoted as legitimate policy options.

In addressing you on these issues, I draw on my work as Commissioner. I've been Commissioner for six months today, but migration has arguably been the top topic.

I've just come back from the border between Finland and Russia. The week before I was on the border between Poland and Belarus. I have been engaging with the governments of Cyprus and the United Kingdom on migration issues. And as you have heard from the Chair, I also made migration a priority in my eight years as Director of the EU Agency for Fundamental Rights.

Drawing from all of that, let me introduce my remarks this morning with five areas of intervention, five ways in which we can put human rights back at the heart of migration and border policies.

I'd like to start with the two reports you are currently considering.

First, the topic of curbing smuggling. The most fundamental issue in dealing with smugglers, who must be brought to justice to the full extent of the law, their behaviour is despicable and deplorable, but in dealing with them, the first point must be to respond to the root cause of smuggling: promoting safe and legal pathways into our countries. Not open doors, but carefully controlled doors, safe doors that give people the opportunity to seek protection.

Second, another essential dimension in dealing with smuggling is to be careful with whom we deal in our cooperation with third countries. This area of externalisation of our migration policies, including for the purpose of curbing smuggling, is fraught with risk. Just think of the situation EU member states have been brought into in terms of engagement with countries such as Libya and Tunisia.

Third, in terms of my headline reactions to this issue, let us be very careful that in criminalising smuggling, we don't criminalise humanitarian action. There is discussion going on at the moment about a new instrument, I don't take a view on whether it is necessary or not, but I do take a firm view that it must honour the definition of smuggling to be found in the relevant United Nations treaty, the so-called Palermo Protocol, which identifies the need for a for-profit motive in the definition of smuggling. This is essential if we are to avoid criminalising legitimate humanitarian action.

Turning to the second report that you have before you on missing migrants, I think this is an excellent initiative. It is so important, both as a matter of decency and as a matter of law, to trace the missing, to find out what happened. It is a requirement under Article 2 of the European Convention on Human Rights, but it is also a requirement of basic human dignity to know what happened to people, to let their families, their relatives know that they are dead and where their death occurred. But for all the importance of the breadth of the issue, my focus this morning is exclusively on the prevention of disappearances. What is the primary way to prevent disappearances? Again, it is providing safe and legal routes into our countries.

In terms of the more immediate risk to people, we have got to do a much better job with search and rescue. It is highly unsatisfactory. It is illegal and it is immoral that there is inadequate search and rescue capacity in the Mediterranean. Whether it is a land border or a sea border, rescuing people at risk of death is a fundamental moral and legal imperative.

Moving on to other areas of migration management, there is of course the matter of what happens when people arrive. When they arrive on our shores or at our border, it is essential that we give these people a meaningful, a real opportunity to apply for international protection. That means they've got to know that they can apply. They've got to be shown how to apply. And then, if they choose to apply, it has to be done with fair procedures. Very importantly, even in the current context, the procedures must be individualised. You cannot tell if a human being is in need of protection by applying some generalised group approach. You don't know the specifics. You don't know the particular context of the particular person. Delivering international protection requires an individualised process of consideration of the claim.

Let me say a word here on the topic of pushbacks. There is a flavour for pushbacks at the moment. There are a number of Council of Europe member states that are actively seeking to legalise pushbacks and make them standard policy. Let me be clear: a pushback is illegal. It is a violation of the principle of non-refoulement and other obligations under international human rights treaties.

I am not saying that return is not sometimes justified. If somebody does not qualify for international protection, then their return is legitimate. Obviously, we prefer voluntary return, but forced return done under dignified conditions is an appropriate response in those cases where somebody does not qualify for protection.

My fourth point is that while people's claim for international protection are under consideration, they need to live in conditions fit for a human. There have been many improvements. I remember going to

certain borders back in 2015 seeing children living in cages, literally in cages, worse than a zoo. We don't see as much today and that is welcome. There have been improvements, but there are still deeply challenging reception conditions in many countries.

The point here is that they do not have to be so challenging. Very often they are challenging because we're making mistakes ourselves. We are congregating the reception conditions in single places, which puts a huge strain on resources. We are not distributing asylum seekers across our country to better meet their needs. We are putting them all in inhospitable, hard-to-reach conditions, which in turn trigger problems. Some of the challenging reception conditions we are facing, frankly, are our own fault.

When it comes to reception conditions, detention must not be the default option. Detention must be the last resort when nothing else is considered to be effective and appropriate.

The last of my five points, honourable members of this Committee, has to do with the merit of putting in place at our borders a mechanism that will allow us to deal with so many of the unnecessary problems and distractions that we face. That is the establishment of independent human rights monitoring mechanisms at our borders, where they do not already exist.

It can be done by an ombudsman, it can be done by a human rights commission. The model can be very specific to the country, but where this methodology has been tested it has been found to be useful. There has been a reduction in the number of incidents or alleged incidents and an overall sense that the border is working better. I strongly encourage the introduction of such mechanisms where they do not currently exist.

Honourable members of this Committee, in conclusion, my call this morning is no more and no less than respect for the law.

There are voices saying that our law is no longer fit for purpose. I reject that. Our law on borders and migration has stood the test of time and has guided action through numerous migration crises, far greater than any in Europe, across the world over decades.

What is more, in Europe we all have the capacity to do things right in full compliance with the law.

What is more, security and human rights are not a zero-sum game: more human rights, less border security and vice versa. That is nonsense.

Human rights respectful border policies and migration strategies lead to better outcomes.

We also need to be consistent in our discussion of the rule of law. It is very commonplace at the moment to speak strongly in support of the rule of law. But how is it possible that at the same time some of us say, "Well, let's violate the law at our borders". Why is violating the law at the border any less corrosive of the rule of law than violating the rule of law in the courtroom?

Finally, dear members of this Committee, do we really want to trade our values for some other objectives? Is that not exactly what our adversaries want and how they will measure their own success?

Thank you