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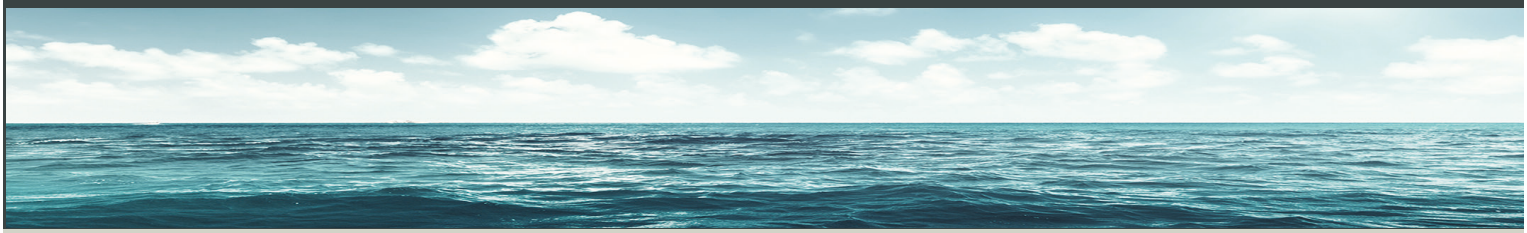

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Julia Planitzer
Helmut Sax

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A COMMENTARY ON THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS

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Edited by Julia Planitzer and Helmut Sax

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FOREWORD

The Council of Europe Convention on Action against Trafficking in Human Beings was opened for signature on 16 May 2005, five years after the Palermo Protocol had laid the foundations for international action against human trafficking. The decision to draft a regional instrument in an area already covered by an international treaty was a logical continuation of other initiatives by the Council of Europe since the late 1980s, as well as being fuelled by the ambition to further the standards established by the Palermo Protocol and strengthen the protection of the human rights of victims of trafficking.

The Convention is the first international legal instrument which places the protection of victims at the centre of the fight against human trafficking. The Secretary General of the Council of Europe at the time of its adoption, Terry Davis, described the Convention as 'one of the most important achievements of the Council of Europe during its 60 years of existence, and the most important human rights treaty of the last 10 years'.[1] The Convention has been praised as embodying 'a revolutionary way of thinking about trafficking and victims of trafficking'.[2] It is one of the most successful Conventions in the history of the Council of Europe, all but one of the Council of Europe Member State having ratified it, as well as attracting requests from accession from non-member States.

And yet, the drafting of the Convention was not devoid of controversies, and many of its ground-breaking features became possible only due to consistent pressure from the Parliamentary Assembly of the Council of Europe and NGOs.

The main added value of the Convention is its human rights perspective and focus on victim protection. Its Preamble explicitly recognises trafficking in human beings as a violation of human rights and an offence to the dignity and integrity of the human being. The Convention provides for a series of rights for victims of trafficking, in particular the right to be identified as a victim, irrespective of willingness to co-operate with criminal justice authorities, to be granted a recovery and reflection period of at least 30 days, to receive protection and assistance, as well as compensation for the damages suffered. Other innovative provisions include the criminalisation of users of services of a victim (Article 19), the recognition of previous convictions by foreign courts (Article 25), and the non-punishment provision (Article 26).

An important feature of the Convention is the setting up of an independent monitoring mechanism, the Group of Experts on Action against Trafficking in Human Beings (GRETA), which follows the implementation of the Convention by the State Parties and, in doing so, clarifies the substantive content of obligations contained in the Convention.

Appearing 15 years after the adoption of the Convention, this *Commentary* is the first comprehensive, analytical guide to its provisions, complementing the existing Explanatory Report to the Convention (which is admittedly rather brief on the scope of some of the obligations contained in it), and drawing on the knowledge built through 15 years of implementation of the Convention.

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1 GRETA 1st Meeting, List of items discussed and decisions taken, 24–27 February 2009, para 2.

2 Anne T. Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010) 127.

Having been appointed as the Executive Secretary of GRETA in October 2010, at the critical time when the first country evaluations began, I have directly witnessed the evolution of efforts to ensure compliance with the Convention. The fact that GRETA decided to organise country visits to all State Parties to the Convention is significant: face-to-face meetings with stakeholders are crucial for clarifying the responses to the questionnaire sent by GRETA and assessing the practical implementation of adopted measures. In 2014, GRETA amended its rules of procedure for evaluating implementation of the Convention, adding a rule regarding urgent requests for information, which enables it to react rapidly to situations where problems require immediate attention to prevent or limit the scale or number of serious violations of the Convention.

Thanks to GRETA's reports, it is possible to gauge the impact of the Convention on national anti-trafficking legislation, policy and practice. By the end of 2019, GRETA had completed two rounds of evaluation of the Convention in respect of 42 of its 47 State Parties. GRETA's 9th General Report, published on 3 April 2020, took stock of the implementation of the Convention.[3] The great majority of State Parties continue to have important gaps in the identification of child victims of trafficking (39 out of 42 countries), as well as the provision of specialised assistance to them (33 out of 42 countries). In the third place, GRETA has urged 29 countries to improve the provision of assistance to victims of trafficking. In the fourth place, GRETA found that 28 countries needed to address gaps in the application of the recovery and reflection period. GRETA also found widespread gaps in the implementation of Article 10 (identification of victims), Article 15 (compensation and legal redress), and Article 26 (non-punishment provision). It is clear that some of the provisions of the Convention have not yet reached their full potential.

In its country evaluation reports, GRETA emphasises the obligations of States to respect, fulfil and protect human rights, including by ensuring compliance by non-State actors, in accordance with the duty of due diligence. GRETA's work thus contributes to preventing violations of the European Convention on Human Rights, Article 4 of which includes within its scope trafficking in human beings, as confirmed by the case-law of the European Court of Human Rights.

A number of the authors of the *Commentary* have served as, or currently are, GRETA members, which gives them a valuable insight into the workings of GRETA, while maintaining the academic freedom to engage with contentious issues. The *Commentary* draws extensively on GRETA's reports and conclusions, but at the same time takes a critical perspective and develops further the analysis of the content and scope of the provisions of the Convention.

By clarifying the substantive content of the provisions of the Convention and the relationship between its different articles, as well as with other relevant standards, this *Commentary* has the potential of eliminating discrepancies in the interpretation of the obligations of State Parties, thereby contributing to ensuring compliance with the Convention. This is crucial for closing the gaps, extending protection to trafficked people, and curbing human trafficking.

Dr Petya Nestorova
Executive Secretary of the Council of Europe Convention
on Action against Trafficking in Human Beings

3 GRETA, 9th General report, April 2020.

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The Commentary was developed over three years at the Ludwig Boltzmann Institute of Human Rights, which were exciting and turbulent years: children were born, a Ph.D was finished and, during the finale of the Commentary, we were challenged by the coronavirus pandemic. All the more we are very grateful for the cooperation and endless support of our colleagues at the Ludwig Boltzmann Institute of Human Rights, in particular of Isolde Prommer and Karl Schoenswetter for assisting us with the financial part of a project like this. Our sincere thanks to our colleagues Vahnessa Espig, Nora Katona, Barbara Linder and Katerina Simonova, who contributed to the Commentary as authors. We would also like to thank Siobhán Mullally, Ryszard Piotrowicz, Conny Rijken and Vladislava Stoyanova for sharing their expertise with us in their own contributions to this Commentary. We wish to express our sincere gratitude to many individuals who provided us with advice, guidance and information during our research, above all the members of our advisory board consisting of Mike Dottridge, Manfred Nowak and Georgina Vaz Cabral, who supported us with their insights and critical feedback. Furthermore, we would like to thank the Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings, in particular for its support concerning the research on the drafting history of the Convention.

We are also deeply indebted to numerous research fellows and interns who contributed in a most professional manner to the preparation of the Commentary. In this context, special thanks go to Kate-Keita Karklina, Anna Makrypidi and Carley Willis. We are very grateful to Bernadett Földváry, Nikole Metz, David Reimann, Celina Schwark, Hsin-Yu (Cynthia) Wang and Bastian Würkner. Furthermore, we would like to express our gratitude to the team of Edward Elgar Publishing for their readiness to embark with us on this publication project, in particular to Luke Adams, Sarah Brown, Sally Philip, Fiona Todd and Stephanie Tytherleigh, who greatly supported us throughout the process.

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Julia Planitzer and Helmut Sax
Mitterberg-St. Martin and Vienna, April 2020

ABBREVIATIONS

AMMTC	ASEAN Ministerial Meeting on Transnational Crime
App	Application
ASEAN	Association of South East Asian Nations
CAHDI	Committee of Legal Advisers on Public International Law
CAHTEH	Ad hoc Committee on Action against Trafficking in Human Beings (Council of Europe)
CBSS	Council of the Baltic Sea States
CDEG	Steering Committee for Equality between Women and Men
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CETS	Council of Europe Treaty Series
CFREU	Charter of Fundamental Rights of the European Union
CM	Committee of Ministers
CoE	Council of Europe
CoP	Committee of the Parties (CoE)
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	UN Convention on the Rights of the Child
Dir	Directive
EC	European Communities
ECHR	European Convention in Human Rights
ECJ	Court of Justice of the European Union
ECOSOC	United Nations Economic and Social Council
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
ENPI	European Neighbourhood and Partnership Instrument
ESC	European Social Charter
ETS	European Treaty Series
EU	European Union
EU MS	EU Member State

fn	footnote
GC	Grand Chamber of the European Court of Human Rights
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
HRC	Human Rights Committee (UN)
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ID	Identification Document
ILO	International Labour Organization
IOM	International Organization for Migration
JIT	Joint Investigations Team
MoU	Memoranda of Understanding
NGOs	Non-governmental Organisations
No	Number
NRM	National Referral Mechanism
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
para	paragraph
SAARC	South Asian Association for Regional Cooperation
SOMTC	ASEAN Senior Officials Meeting on Transnational Crime
TFEU	Treaty on the Functioning of the EU
THB	Trafficking in Human Beings
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime

UNTS	United Nations Treaty Series
US	United States
WHO	World Health Organization

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EUROPEAN COMMITTEE OF SOCIAL RIGHTS (ECSR)

EUROPEAN COURT OF HUMAN RIGHTS (ECTHR)

INTER-AMERICAN COURT OF HUMAN RIGHTS (IACTHR)

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

PERMANENT COURT OF INTERNATIONAL JUSTICE (PCIJ)

NATIONAL CASE LAW

Australia

Belgium

United Kingdom

Germany

The Netherlands

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INTRODUCTION

Julia Planitzer and Helmut Sax

A. OBJECTIVES OF THE PUBLICATION

I.01 This commentary is the first up-to-date and comprehensive analysis of the CoE Convention against Trafficking. It forms a concise guide to anti-trafficking legal standards and corresponding human rights obligations of State Parties, aimed at – not exclusively legal – practitioners including policy makers, lawyers, academics and anti-trafficking activists. Its compact format should support the usage of it in the daily work for a broad range of professionals that are for instance developing measures against trafficking in human beings or represent trafficked persons in legal proceedings.

I.02 The main objective of this publication is to provide its readers with a better understanding of the obligations deriving from the CoE Convention against Trafficking and their scope. This commentary's aim is to contribute to a clarification of concepts used in the Convention such as applying a human rights-based approach or following a child-rights approach. In doing so, this commentary analyses for the first time comprehensively the findings of the Convention's monitoring body, the Group of Experts on Action against Trafficking in Human Beings (GRETA). The commentary makes use of GRETA's findings gathered in the first and second evaluation round of the monitoring mechanism, including all published reports until the end of the year 2019.

B. SIGNIFICANCE OF THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING

I.03 The Council of Europe Convention on Action against Trafficking[1] is the first legal instrument concerning trafficking in human beings that frames trafficking in human beings as a matter of human rights protection. By adopting the Convention, the Council of Europe achieved to define legal standards specifying how its State Parties must respond to cases of trafficking in

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

persons. The Convention is still the only legal instrument dealing with trafficking in human beings that frames it as 'a violation of human rights'[2] and aims at strengthening the application of a human rights-based approach. In comparison, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[3] or the later ASEAN Convention against Trafficking in Persons, Especially Women and Children[4] are primarily criminal justice instruments and show certain weaknesses concerning the protection of rights of trafficked persons.[5] As the Convention further develops standards and spearheads the framing of trafficking in human beings as a human rights issue in a binding treaty under international law, it is of global relevance and guidance also to States that are not members of the Council of Europe in applying a human rights-based approach to measures against trafficking in human beings.

I.04 Framing trafficking in human beings as a human rights matter in the CoE Convention against Trafficking has several implications. For instance, assistance to trafficked persons is obligatory[6] and State Parties have to grant a recovery and reflection period for trafficked persons. Concerning prevention of trafficking in human beings, Article 5 of the CoE Convention against Trafficking importantly adds that all prevention measures need to promote a human rights-based approach and 'shall use gender mainstreaming and a child-sensitive approach'. Furthermore, the monitoring process of the CoE Convention against Trafficking is unique compared to any other international or regional instrument on combating trafficking in human beings. By installing the first independent anti-trafficking monitoring mechanism in the world, the Convention contributes to strengthened accountability of States, a basic principle of the human rights-based approach.

C. UNDERSTANDING THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING

1. Development of the Convention

I.05 The Council of Europe's activities against trafficking in human beings trace back to the late 1980s,[7] eventually leading to two legal instruments adopted by the Council of Europe

2 CoE Convention against Trafficking, Preamble.

3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

4 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017.

5 See for instance UNGA, Informal Note by the United Nations High Commissioner for Human Rights, 1 June 1999, A/AC.254/16, para 3; Bridget Anderson and Rutvica Andrijasevic, 'Sex, Slaves and Citizens: The Politics of Anti-trafficking' (2008) 40 *Soundings*, 136; Tom Obokata, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2005) 54 *International and Comparative Law Quarterly*, 445. On the ASEAN Convention against Trafficking in Persons see Marija Jovanovic, *Comparison of Anti-Trafficking Legal Regimes and Actions in the Council of Europe and ASEAN: Realities, Frameworks and Possibilities for Collaboration* (Council of Europe 2018) 29 and 32.

6 As compared to the Palermo Protocol that regulates in its Art 6(3) that State Parties 'shall consider implementing measures'.

7 See for instance Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, paras 11–12.

Committee of Ministers with a focus on sexual exploitation of women and children: Recommendation No. R(2000)11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation and Recommendation No. R(2001)16 of the Committee of Ministers to Member States on the protection of children against sexual exploitation.[8] In 2002, the Council of Europe Parliamentary Assembly recommended that the Committee of Ministers should develop a European convention on trafficking in women,[9] and one year later, the Parliamentary Assembly broadened the focus and recommended that the Committee of Ministers should start drafting a convention 'on trafficking in human beings'.[10] At the same time, the Steering Committee for Equality between Women and Men (CDEG) conducted a feasibility study coming to the conclusion that it was necessary to draft a legally binding instrument which goes 'beyond minimum standards agreed upon in other international instruments'.[11]

I.06 In April 2003, the terms of reference for setting up the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) were adopted.[12] Between September 2003 and February 2005, CAHTEH held eight meetings in which the text of the Convention was negotiated. After the 8th CAHTEH meeting, several controversial questions remained open for decision by the Committee of Ministers, as an example in which the 'Committee of Ministers takes a more active role in overcoming the deadlock reached on questions of a rather political nature'.[13] This was necessary, for instance, concerning Article 13 of the CoE Convention against Trafficking and the minimum length of the recovery and reflection period, in light of States' sensitivity towards all matters of residence and immigration control.[14] Furthermore, late in the process, the European Union submitted proposals for a separate monitoring process in relation to some EU matters of competence; and it insisted on the inclusion of the 'disconnection clause' in Article 40 of the CoE Convention against Trafficking. Only following high-level negotiations and decisions by the Committee of Ministers,[15] it was possible to open the Convention for signature on the occasion of the Third Summit of Heads of State and Government of the Council of Europe to be held in Warsaw on 16–17 May 2005.

I.07 The assessment of the drafting history showed a considerable influence of the European Commission on the language adopted as can be for instance seen concerning Article 12 of the CoE Convention against Trafficking leading to the differentiation and restriction concerning

8 Committee of Ministers, Recommendation No. R(2000)11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation, 19 May 2000; Recommendation No. R(2001)16 of the Committee of Ministers to Member States on the protection of children against sexual exploitation, 31 October 2001.

9 Parliamentary Assembly, Recommendation No. 1545 (2002) Campaign against trafficking in women, 21 January 2002.

10 Parliamentary Assembly, Recommendation 1610(2003) on migration connected with trafficking in women and prostitution, 25 June 2003, (i). See also Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 25.

11 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 30.

12 Committee of Ministers, Ministers' Deputies, CM/Del/Dec(2003)838, 838th meeting, 30 April 2003, Appendix 4.

13 Jörg Polakiewicz, *Treaty-making in the Council of Europe* (Council of Europe Publishing 1999) 24.

14 Council of Europe Committee of Ministers, 920th meeting of the Ministers' Deputies on 23 March 2005, Notes on the Agenda, CM/Notes/920/4.3, 10 March 2005.

15 See Council of Europe Committee of Ministers, 925th meeting of the Minsters' Deputies on 3 and 4 May 2005, CM/Del/Dec(2005)925.

medical services or employment for only those who are lawfully resident within the State Party's territory.[16] Also in relation to Article 14 (residence permit) the drafting process was influenced by EU Council Dir 2004/81/EC on the residence permit issued to victims of trafficking in human beings from third countries.[17] Civil society organisations played an important role in the drafting of the Convention, although NGO representatives were not allowed to attend meetings at early stages of the drafting.[18] NGOs lobbied for instance in relation to Article 16 of the CoE Convention against Trafficking to conduct in any case a needs and risk assessment prior to return of a trafficked person to the country of origin.[19]

2. Trafficking in human beings as an issue of human rights protection

I.08 The Preamble of the Convention states that trafficking in human beings 'constitutes a violation of human rights' and that the Convention focuses on 'the human rights of victims of trafficking'. Furthermore, the Convention states that when preventing trafficking in human beings, State Parties should apply a human rights-based approach.[20] Despite the circumstance that trafficking in human beings constitutes an act often committed by private persons, it triggers human rights obligations of States.[21] In general, States have an obligation to respect, fulfil and protect human rights.[22] The obligation to respect means that States must abstain from violating the rights of individuals under their jurisdiction.[23] Secondly, States have an obligation to fulfil human rights. In order for individuals to make the enjoyment of human rights possible, the State has to implement 'legislative, administrative, judicial and practical measures'.[24] Thirdly, States have an obligation to protect. It is recognised that States have an obligation to avoid acts by private persons against other private persons by taking positive actions. An individual has the right to be protected by the State. In general, the obligation to protect is twofold: first, there is the obligation to prevent the act and secondly, if preventive measures fail, the State has to investigate and provide remedies.[25] Although trafficking in human beings constitutes an act which is committed in many cases by private persons, the

16 See also on this the Commentary on Art 12 of the CoE Convention against Trafficking.

17 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (thereinafter Dir 2004/81/EC) (OJ L 261/19).

18 Julia Planitzer, *Trafficking in Human Beings and Human Rights – The Role of the Council of Europe Convention on Action against Trafficking in Human Beings* (Neuer Wissenschaftlicher Verlag 2014) 24 and Anne T Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 *European Journal of Migration and Law* 163, 173.

19 Amnesty International, *Joint NGO Statement on the draft European Convention against Trafficking in Human Beings*, IOR61/020/2004 (November 2004).

20 CoE Convention against Trafficking, Art 5(3).

21 For critical reflections on the trafficking concept and issues of lack of conceptual clarity, see Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered – Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017).

22 Planitzer, 57. The tripartite typology was mentioned for instance by Asbjorn Eide describing the obligations of States concerning the right to adequate food as an obligation to respect, to protect and fulfil human rights, see UN Human Rights Commission, Sub-Commission on the Promotion and Protection of Human Rights, *The Right to Adequate Food as a Human Rights. Final report by Asbjorn Eide*. E/CN.4/Sub.2/1987/23 (7 July 1987), paras 66 et seq.

23 Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 365.

24 Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers 2003) 49.

25 De Schutter, 365–6.

State has an obligation to take actions in order to prevent exploitation of private persons by other private persons.[26]

I.09 The European Court of Human Rights (ECtHR) developed the concept of positive obligation,[27] which is also necessary to understand the extent of the obligations of States concerning Article 4 of the European Convention on Human Rights (prohibition of slavery and forced labour). In *Rantsev v. Cyprus and Russia* the ECtHR significantly broadened the positive obligations beyond the obligation to criminalise trafficking in human beings. The ECtHR also emphasised the obligation to protect trafficked persons and to prevent trafficking in human beings. Consequently, and first, States are under an obligation to adopt an appropriate legal and administrative framework[28] that provides 'real and effective protection of the rights of victims of human trafficking'.[29] Secondly, States have to take protective operational measures when being 'aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited (…).'[30] Hence, States have to take operational measures to protect 'actual or potential victims of treatment contrary to Article 4'.[31] Thirdly, there is a procedural obligation to investigate potential trafficking situations, to conduct effective investigation and court proceedings.[32]

I.10 Framed in the discussion of the scope of due diligence under international law, the UN Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro underlines that due diligence has to be understood as an 'obligation of conduct' that requires States to take 'reasonable measures that have a real prospect of altering outcomes or mitigating harms and to assess their effectiveness'.[33] Due diligence requires that States 'must initiate an investigation of their own' when they are 'aware of an act that constitutes slavery, servitude or trafficking in persons'. Particular vulnerability of the persons concerned leads 'to an exceptional degree of due diligence' to address the situation.[34] To prevent trafficking in human beings, States that act with due diligence 'address the wider, more systemic processes or root causes that contribute to trafficking in persons, such as inequality, restrictive immigration policies, and unfair labour conditions, particularly for migrant workers.'[35] An integral part of

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26 Planitzer, 58–61.

27 Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 229.

28 *Rantsev v. Cyprus and Russia,* App no 25965/04 (ECtHR, 7 January 2010) para 285, referring to *Siliadin v. France*, App no 73316/01 (ECtHR, 26 July 2005) paras 89 and 112.

29 *Chowdury and Others v. Greece,* App no 21884/15 (ECtHR, 30 March 2017) para 87.

30 *Rantsev v. Cyprus and Russia*, para 286. See also *C.N. v. the United Kingdom*, App no 4239/08 (ECtHR, 13 November 2012) para 67. See further Vladislava Stoyanova, 'L.E. v. Greece: Human Trafficking and the Scope of States' Positive Obligations Under the ECHR' (2016) 3 *European Human Rights Law Review*, 290.

31 *Chowdury and Others v. Greece*, para 88.

32 Ibid., para 89, *Rantsev v. Cyprus and Russia,* para 288. See further Stoyanova, *Human Trafficking and Slavery Reconsidered*, 365.

33 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/70/260, 3 August 2015, para. 47.

34 *Inter-American Court of Human Rights, Workers of the Hacienda Brasil Verde v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318, 20 October 2016, paras 362–5, cited after Case Report, 'Inter-American Court of Human Rights: Workers of the Haciendas Brasil Verde v Brazil' (2017) 3 *International Labor Rights Case Law*, 375–6.

35 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/70/260, para. 48.

States' obligation under the due diligence standard forms the social inclusion of trafficked persons into societies, be it in the countries of origin, transit or origin.[36]

I.11 The human rights-based approach is a concept, which is normatively based on international human rights standards and is operationally directed to promoting and protecting human rights.[37] It is a tool that is integrated in the development of projects that should promote and protect the human rights of trafficked persons. In contrast to charity- or needs-based approaches, trafficked persons are entitled to assistance and not simply because they 'deserve' it.[38] The basic idea of the human rights-based approach in the context of trafficking in human beings is that trafficked persons get empowered in order to claim their rights and States are enabled to meet their obligations towards the trafficked persons.[39] Application of a human rights-based approach follows certain basic principles: the universality, inalienability and indivisibility of human rights as well as the inter-dependence and inter-relatedness of human rights. Further principles are non-discrimination and equality, participation and inclusion as well as accountability and the rule of law.[40] Implementing the principle of participation in prevention measures for instance means that trafficked persons are also involved in the development, implementation and evaluation of anti-trafficking measures.[41] Furthermore, a human rights-based approach requires to link measures supporting gender equality with efforts against trafficking in human beings and to see gender equality as integral part of anti-trafficking measures;[42] these are complemented by further cross-cutting dimensions, such as primary consideration to the best interests of the child and inclusion of persons with disabilities.

I.12 The CoE Convention against Trafficking comprises several such cross-cutting principles that form the basis for implementing all obligations deriving from the Convention. These principles are also core elements of the human rights-based approach. The Convention explicitly lists guaranteeing gender equality, the principle of non-discrimination and the application of a child-rights approach. As indicated in the Preamble, these principles have to be applied in relation 'to all actions or initiatives against trafficking in human beings'.[43] Gender equality and using gender mainstreaming in order to reach gender equality are stressed at several points within the Convention.[44] The prominent status of gender equality stems also from the historical development of the Convention, since it was the Steering Committee for Equality between Women and Men that prepared a feasibility study on drawing up a convention.[45] In addition to the fact that all actions or initiatives need to follow a child-rights approach, several articles specifically tackle the situation of trafficked children and provide for

36 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/41/46, 23 April 2019, para. 66(a).
37 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations 2010) 49.
38 Planitzer, 21.
39 OHCHR, *Commentary*, 50.
40 Planitzer, 22–3.
41 Ibid., 114–17.
42 Ibid., 99–101. See on this also the Commentary on Art 17 of the CoE Convention against Trafficking.
43 CoE Convention against Trafficking, Preamble.
44 See CoE Convention against Trafficking, Arts 3, 5(3), 6(d), 17.
45 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 28.

higher protection standards concerning children.[46] Consequently, several chapters of this Commentary will tackle these principles.

3. Contextualisation of trafficking in human beings

I.13 This Commentary aims to contribute to stronger conceptual clarity, in relation to trafficking in human beings, and corresponding obligations by Parties to the Convention. The understanding of trafficking is still marred by the persistence of stereotypes and ambiguities in the use of related, partly overlapping concepts – with negative implications for a consistent implementation of anti-trafficking standards and for the prevention of political instrumentalization of trafficking in human beings.

I.14 In terms of stereotypical connotations, for many persons, members of professional groups engaged in the field included, trafficking is about organised crime involving foreign women engaged in prostitution. This runs directly counter to each and every element of Article 2 of the CoE Convention against Trafficking, which is applicable to 'all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime'. Male workers moved from one construction site to another in the same region of a country may be victims of trafficking just as women exploited in 24-hour home care services, irrespective of nationality, or children forced into pickpocketing. Moreover, the refugee protection crisis in Europe, following the migratory movements in 2015, further exposed weaknesses not only in terms of concepts, but also of application – in relation to principles of *non-refoulement* and other human rights and refugee law standards, and also concerning identification of victims of trafficking and protection of their rights.[47] Already during the Convention's drafting process, issues related to migration and residence, such as enabling safe migration as a preventive measure, ensuring a recovery and reflection period to victims of trafficking, during which no forced return is allowed, and provisions on assistance and on residence proved most controversial. Both lack of firm understanding and of commitment eventually fuelled divisive, anti-migrant agendas of certain political groups, partly using even trafficking prevention rhetoric to build further pressure against migrants. Consequently, the nexus between migration policies and anti-trafficking measures needs close scrutiny to avoid 'collateral damages' for the protection of human rights of migrants through tightening immigration regulations under the pretext of prevention of human trafficking.[48] In a related development, concerns have been raised about efforts for increased collection of personal data of trafficked persons and implications for data protection and prevention of abuse as an instrument of control.[49]

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46 See CoE Convention against Trafficking, Arts 5(3) and (5), 10(3) and (4), 11(2), 12(7), 16(7), 33(2).

47 Triggering public statements by GRETA, which reminded governments of their obligations under the CoE Convention, see GRETA, *5th General Report on GRETA's Activities*, February 2016, para 92.

48 See, Mike Dottridge, 'Collateral Damage Provoked by Anti-trafficking Measures', in Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2017) in particular 343 and 351; See further Global Alliance Against Traffic in Women (GAATW), *Collateral Damage – The Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW 2007).

49 See KOK e.V. – German NGO Network against Trafficking in Human Beings – Data protection in anti-trafficking action (datACT), *Data Protection Challenges in Anti-Trafficking Policies – A Practical Guide* (2015) and Uhl B, 'Assumptions built into code – datafication, human trafficking, and human rights – a troubled relationship?' in Piotrowicz, Rijken, Heide Uhl.

I.15 As far as ambiguities concerning trafficking and related concepts are concerned, partly strained relationships can be observed, especially between trafficking, slavery and forced labour.[50] The definition of trafficking regards the latter as intended purposes of the trafficking process only, whereas in the forced labour context, trafficking may be regarded only as a form of forced labour. Recently, the need for conceptual clarity has gained further momentum by the increased reference to 'modern slavery' as a distinct approach to situations including trafficking.[51] Another contested area relates to differences in concepts between 'child trafficking', as defined under the CoE Convention against Trafficking, and 'sale of children', as referred to in Article 35 of the UN Convention on the Rights of the Child and its Optional Protocol 'on the sale of children, child prostitution and child pornography'.[52]

I.16 Concepts come with attitudes, approaches and means for application: the situation of a child found begging in the streets may be considered a case of parental neglect or of child labour (or even a 'worst form') or of child trafficking. Depending on context and protocols applied or training received, the situation will trigger responses from child protection authorities, or police, or community workers, or passers-by. It may lead to criminal investigations or social services intervention or a combination of all these measures. As a guiding principle in such situations of potentially conflicting approaches, reference should be made to Principle 3 of the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking, according to which no anti-trafficking measure should have an adverse impact on the right of trafficked persons or others.[53]

D. METHODOLOGICAL APPROACH

I.17 Based on Article 31 of the Vienna Convention on the Law of Treaties (VCLT),[54] an international treaty should be interpreted 'in the light of its object and purpose'. Supplementary means of interpretation includes the preparatory work of the treaty (Art 32 VCLT), which has been consistently addressed in the discussion of every Article in this commentary. Furthermore, a particularly relevant source for interpreting the Articles of the Convention is provided by the work of the monitoring body GRETA and its country evaluation reports. It should be noted that GRETA is not a judicial body and has no competence in taking decisions on individual complaints. Nevertheless, as the monitoring body established directly by the Convention, GRETA's evaluation findings are directly based on the application of its provisions and, thus, offer essential guidance for the interpretation of the Convention.[55] As held by the ECtHR in *Chowdury vs Greece* in relation to Article 4 ECHR, 'the member States' positive obligations under Article 4 of the Convention must be construed in the light of the

50 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered*, 3.

51 International Labour Office (ILO) and Walk Free Foundation, *Global estimates of modern slavery: Forced labour and forced marriage* (ILO 2017).

52 See Helmut Sax, 'Child Trafficking – a Call for Rights-based Integrated Approaches' in Piotrowicz, Rijken, Heide Uhl, 253.

53 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations 2010) 83.

54 See Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, entered into force 27 January 1980.

55 See the Commentaries on Arts 36–38 on the role of GRETA and the evaluation procedure.

Council of Europe's Anti-Trafficking Convention'.[56] Furthermore, the 'Court is guided by that Convention and the manner in which it has been interpreted by GRETA'.[57]

I.18 GRETA has developed its own unique methodology for the assessment of State Parties' compliance with Convention provisions, by distinguishing between three different levels of conclusions and recommendations. These levels correspond to three different verbs used in the assessment: 'urge', 'consider' and 'invite'. When stating an 'urge', GRETA assesses this situation as particularly serious and not in compliance with the Convention provision. In case of 'consider', further improvements are necessary in order to fully comply with an obligation of the Convention.[58] Apart from the country-specific evaluation reports, GRETA publishes annual 'General Reports' on its activities, which contain thematic sections on different trafficking-related aspects; these thematic sections provide further explanation and guidance on the outcomes of the evaluation procedure.[59]

I.19 Analysing findings of monitoring bodies of the Council of Europe has also played a vital role, with a particular focus on the European Committee of Social Rights. As shown above, positive obligations under Article 4 of ECHR 'must be construed in the light of the Council of Europe's Anti-Trafficking Convention'.[60] To a certain extent, selected case law of national courts of State Parties of the Convention has been taken into account, however, within the limits of a concise guidebook, the commentary cannot provide for a comprehensive review of domestic case law of all State Parties. Furthermore, the Commentary has taken into account also the practice of United Nations treaty monitoring bodies including special procedures of the Human Rights Council, in particular the Special Rapporteur on trafficking in persons, especially women and children. Finally, relevant literature has been taken into account.

I.20 In relation to the terminology used, it is pointed out that reference to 'the Convention' or 'CoE Convention against Trafficking' always relates to the Council of Europe Convention on Action against Trafficking in Human Beings. Authors have been free to use 'trafficking in human beings' or 'human trafficking'. In addition, it was decided to use the term 'trafficking for the purpose of labour exploitation' when referring to trafficking in human beings for the purpose of forced labour or services, slavery or practices similar to slavery or servitude. Furthermore, 'trafficking for the purpose of sexual exploitation' is used for trafficking in human beings for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation.[61] Throughout the commentary, both terms, 'victim' and 'trafficked person', will be found, depending on the context. The authors are aware that the term 'victim' can also imply negative connotations and concepts of weakness, vulnerability and passivity of the person,[62] which is contrary to a rights-based empowerment of trafficked persons. At the same

56 *Chowdury and Others v. Greece*, para 104.

57 Ibid.

58 See for further explanations on the methodology, GRETA, *4th Report on GRETA's Activities*, GRETA(2015)1, March 2015, 31–3, and the Commentary on Art 38 of the CoE Convention against Trafficking.

59 See GRETA's Website, at https://www.coe.int/en/web/anti-human-trafficking/general-reports (accessed 10 August 2020).

60 *Chowdury and Others v. Greece*, para 104.

61 CoE Convention against Trafficking, Art 4(a).

62 See for instance Marjan Wijers, *La Strada – European Network Against Trafficking in Women – Facts & Practices* (International La Strada Association 2005) 25; Rutvica Andrijasevic and Nicola Mai, 'Editorial: Trafficking (in)

time, 'victim' is a well-established legal term[63] that entitles to certain 'victims' rights'. Hence, particularly in the context of the discussion of the Articles of Chapter III of the Convention ('Measures to protect and promote the rights of victims, guaranteeing gender equality') and Articles 28 and 30 of the Convention, the term 'victim' has been used as well.

I.21 Discussion of all substantive articles of the Convention follow the same structure. The chapter starts with an introduction, which is followed by an analysis of the drafting history. Furthermore, relations with other Articles in the CoE Convention against Trafficking or provisions in other relevant standards are discussed in the sub-chapter 'Article in Context'. The main part of each Article's discussion forms the sub-chapter 'Issues of Interpretation'.[64]

I.22 The manuscript was drafted over a three-year period and finalised in April 2020. The commentary takes into account published reports of GRETA of the first and second evaluation round. All chapters were reviewed by the editors, Julia Planitzer and Helmut Sax. Furthermore, the work of the authors was supported by an advisory group consisting of the long-standing eminent experts Mike Dottridge, Professor Manfred Nowak and Georgina Vaz Cabral.

Representations: Understanding the Recurring Appeal of Victimhood and Slavery in Neoliberal Times' (2016) 7 *Anti-Trafficking Review*, 2.

63 A 'victim' within the meaning of the CoE Convention against Trafficking is any 'natural person who is subject to trafficking in human beings' as defined in Art 4 of the CoE Convention against Trafficking.

64 In some exceptional cases, the discussion ends with a summarised 'conclusion'.

PREAMBLE

Nora Katona

The member States of the Council of Europe and the other Signatories hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being;

Considering that trafficking in human beings may result in slavery for victims;

Considering that respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives;

Considering that all actions or initiatives against trafficking in human beings must be non-discriminatory, take gender equality into account as well as a child-rights approach;

Recalling the declarations by the Ministers for Foreign Affairs of the Member States at the 112th (14–15 May 2003) and the 114th (12–13 May 2004) Sessions of the Committee of Ministers calling for reinforced action by the Council of Europe on trafficking in human beings;

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and its protocols;

Bearing in mind the following recommendations of the Committee of Ministers to member states of the Council of Europe: Recommendation No. R (91) 11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults; Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence; Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation and Recommendation Rec (2001) 16 on the protection of children against sexual exploitation; Recommendation Rec (2002) 5 on the protection of women against violence;

Bearing in mind the following recommendations of the Parliamentary Assembly of the Council of Europe: Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member states; Recommendation 1450 (2000) on violence against women in Europe; Recommendation 1545 (2002) on a campaign against trafficking in women; Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution; Recommendation 1611 (2003) on trafficking in organs in Europe; Recommendation 1663 (2004) Domestic slavery: servitude, au pairs and mail-order brides;

Bearing in mind the European Union Council Framework Decision of 19 July 2002 on combating trafficking in human beings the European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings and the European Union Council Directive of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities;

Taking due account of the United Nations Convention against Transnational Organized Crime and the Protocol thereto to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children with a view to improving the protection which they afford and developing the standards established by them;

Taking due account of the other international legal instruments relevant in the field of action against trafficking in human beings;

Taking into account the need to prepare a comprehensive international legal instrument focusing on the human rights of victims of trafficking and setting up a specific monitoring mechanism,

Have agreed as follows:

A. INTRODUCTION

P.01 Similar to most other international human rights treaties, the Council of Europe's Convention on Action against Trafficking in Human Beings[1] contains an extensive preamble. The preamble places the obligations of State Parties entailed in the Convention in the context of the important international legal instruments, which directly deal with trafficking in human beings in the framework of the Council of Europe (CoE), the European Union (EU) and the United Nations (UN).[2] The preamble reiterates the overall aim of the CoE Convention against Trafficking and expresses its focus on the protection of victims and the respect of their rights as

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention)

2 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 49.

well as the action to combat trafficking in human beings.[3] Further, it enshrines a broad approach to achieve these objectives by preventive, protective, repressive and monitoring measures.

P.02 The preamble entails aspects that have raised controversies. Amongst them during the drafting phase, the wording 'trafficking in human beings constitutes a human rights violation' was contentious.[4] This is because in most cases of trafficking in human beings, individuals, and not the state or its agents, are the perpetrators. Nevertheless, states have specific obligations to respect, protect and fulfil the human rights of individuals. Further, the preamble recognises the linkage between trafficking in human beings and slavery. The concrete relationship in light of the case law of the European Court of Human Rights (ECtHR) is still evolving.

P.03 According to Article 31 (general rule of interpretation) of the Vienna Convention on the Law of Treaties (VCLT),[5] the provisions of an international treaty are to be interpreted in their 'context and in the light of its object and purpose'.[6] In the official records to the VCLT, it was stated that it is so well established that the preamble forms part of the treaty that no further note was required. The preamble is also explicitly referenced in Article 31(2) VCLT as an integral part of the treaty text and context for purposes of interpretation.[7] Thereby, the preamble has an important legal significance that is recognised under international law.[8]

B. DRAFTING HISTORY

P.04 Most of the parts of the Convention's preamble were adopted without amendments after the first reading. However, on some aspects, the delegations could only agree after some time.[9] The wording of the preamble changed in some paragraphs following the 5th meeting of the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH). It had been further amended in the 7th meeting before being adopted in its current version.

P.05 The preamble explicitly refers to relevant instruments of the CoE and the EU. Concerning UN instruments, the preamble mentions exclusively the UN Convention against Transnational Organized Crime[10] (UNTOC) and the Protocol thereto to Prevent, Suppress and Punish

3 Ibid., para 46.
4 See for further elaboration section B.
5 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, entered into force 27 January 1980.
6 Malcolm N. Shaw, *International Law* (Cambridge University Press 2008) 934.
7 International Law Commission (ICL), *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. No. 9, U.N. Doc. A/6309/Rev.1 (1966) 221.
8 Max H. Hulme, 'Preambles in treaty interpretation' (2016) 164 *U. Pa. L. Rev.* 1281, 1297 et seq.
9 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, paras 20–38; CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, paras 11–16. The wording has been updated after the European Union Council Directive of 29 April 2004 came into force; see CAHTEH, *Revised Draft Council of Europe Convention on action against trafficking in human beings: Following the 5th meeting of the CAHTEH (29 June–2 July 2004)*, CAHTEH(2004)INFO4, 5 July 2004, 5.
10 United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, entered into force 29 September 2003.

Trafficking in Persons, Especially Women and Children.[11] Despite the comments of various delegations including Italy and the representatives of the International Labour Office (ILO), the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[12] the UN Convention on the Rights of the Child (CRC)[13] and the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour[14] were not included into the preamble. However, their importance was considered by explicitly naming them as relevant international instruments in the Convention's Explanatory Report.[15]

1. Trafficking in human beings 'constitutes a human rights violation'

P.06 Concerning the third paragraph of the preamble, on the one hand some delegations, including the Netherlands and Denmark, suggested rephrasing the provision to emphasise that trafficking in human beings 'seriously undermines the enjoyment of human rights'. Their reasoning consisted of the view that violations of human rights could only originate in actions by states. On the other hand, the case law of the ECtHR was highlighted, as it recognised state liability also for acts committed by private individuals. The Committee acknowledged that for some delegations, the recognition of trafficking in human beings as a human rights violation would have consequences for the national systems.[16] As no agreement on the wording could be reached in the 5th CAHTEH meeting, the Committee offered two versions for further discussion: 'trafficking in human beings seriously undermines the enjoyment of human rights' and 'trafficking in human beings constitutes a human rights violation'.[17]

P.07 The Non-governmental Organisations' (NGOs) representatives from Amnesty International and Anti-Slavery Initiative reiterated their explicit support for adopting the version 'trafficking in human beings constitutes a human rights violation' as they noted that this option accurately characterised trafficking in human beings in line with existing instruments previously adopted by the CoE, the EU, the UN, the Organization for Security and Co-operation in Europe (OSCE) and the Organisations of American States. In the statement, they recalled that states not only have the responsibility to respect human rights (i.e., do not interfere) but also to criminalise the perpetrators as well as to respect and protect the human rights of the trafficked persons.[18] With similar arguments, the Committee on Equal Opportunities stated that there is

11 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).
12 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979, entered into force 3 September 1981.
13 Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, entered into force 2 September 1990.
14 International Labour Organisation (ILO), Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, C182, 17 June 1999, entered into force 19 November 2000 (thereinafter ILO Child Labour Convention).
15 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 8.
16 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, paras 22 et seq.
17 Ibid., para 25.
18 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Contribution by Non-Governmental Organisations,* CAHTEH(2004)17, Addendum IV, 30 August 2004.

no reason why trafficking in human beings should not be recognised and thus explicitly inserted in the text as a human rights violation.[19]

P.08 At the 7th CAHTEH meeting, the wording of paragraph three was deliberated. Besides the two options, an additional wording was introduced for the vote. Taken from the Council of the EU's Framework Decision on combating trafficking in human beings[20] it was suggested to amend the wording to 'trafficking in human beings comprises serious violations of fundamental rights'. Since the delegations could not agree on the wording, an indicative vote was conducted. The majority of states voted for 'trafficking constitutes a human rights violation' as it reads in the final text.[21]

2. Paramount objectives of the CoE Convention against Trafficking

P.09 Early drafts of the CoE Convention against Trafficking considered the 'best interest of the victims of trafficking in human beings' to be the paramount objective. In this context, it was argued that the best interest of the victim could only be pursued insofar as it was compatible with the Member State's national law and thus was limited by national regulations in its scope. Some delegations argued that in keeping the proposed wording, it could be interpreted broadly and oblige states to grant residence to the victims in the destination country, 'even if for purely economic reasons'.[22] Upon the initiative of some of the delegations including Germany, United Kingdom and Denmark, the term 'best interest' was removed and replaced by a reference to 'respect for the rights and the protection of victims'.

P.10 In order to emphasise the importance and the overall objectives of the Convention, and to counter the lack of a reference about preventing and combating trafficking in human beings in the initial draft, the initial text of the preamble was modified. The final wording was adopted in the 7th CAHTEH meeting and instead of '(…) the fight against trafficking in human beings (…)' the wording '(…) action to combat trafficking in human beings must be the paramount objectives' was adopted.[23]

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19 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 4 November 2004.

20 Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L203/1).

21 Four delegations voted for the wording 'trafficking in human beings seriously undermines the enjoyment of human rights', 18 delegations voted for the wording 'trafficking in human beings comprises serious violations of fundamental rights' and 23 delegations voted for the wording 'Trafficking in human beings constitutes a human rights violation', see CAHTEH, *7th meeting – Meeting Report*, CAHTEH(2005)RAP7, para 13.

22 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Amendments to Preamble and to articles 1 to 24 proposed by national delegations and observers*, CAHTEH(2004)14, 11 June 2004, 5; CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 27.

23 CAHTEH, *Revised Draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 7th meeting of the CAHTEH (7 – 10 December 2004)*, CAHTEH(2004)INFO7, 10 December 2004; CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 8th meeting of the CAHTEH (22 – 25 February 2005)*, CAHTEH (2004)INFO10, 25 February 2005; CAHTEH, *7th meeting – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 14.

3. All actions must be 'non-discriminatory, take gender equality into account as well as a child-rights approach'

P.11 Early drafts had no reference to non-discrimination, gender equality or a child-rights approach in the preamble. On the initiation of numerous delegations, first, a 'gender perspective'[24] and a 'child sensitive approach' were included in a separate paragraph of the preamble after the 5th CAHTEH meeting. During that meeting, it was also accentuated that the application of a gender-sensitive perspective should not be restricted to prevention but should be a paramount principle also in assistance to victims, as well combating trafficking in human beings. The wording 'all actions or initiatives on action against trafficking in human beings' adhere to this broad understanding.[25]

P.12 In the 7th CAHTEH meeting, the text was amended, and also non-discrimination was explicitly referred to in the text.[26] Further, the wording was adapted by including that these three aspects (non-discrimination, gender equality and child-rights approach) 'must' and not only 'should' be taken into account in all actions and initiatives against trafficking in human beings. Further, the wording was changed from child-sensitive to child-rights approach.[27]

4. Purpose and added value of the CoE Convention against Trafficking

P.13 The last paragraph of early drafts of the preamble read '[t]aking into account the fact that despite the existence of other international legal instruments, there is no comprehensive international legal instrument that strikes a proper balance between matters concerning human rights of victims of trafficking and criminal law'.[28] The paragraph was amended, as it was argued that it would suggest 'a negative view of the Palermo Protocol'.[29] The preamble should rather focus on its key elements of added value, in particular on the protection of the victim's human rights and the monitoring mechanism, which should be explicitly referenced in the preamble.[30] The wording was revised and adopted accordingly.

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24 The French delegation expressed reservations about the use of the term 'gender perspective'. See CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 30.

25 See e.g., CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004; CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 30; CAHTEH, *Revised draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 5th meeting of the CAHTEH*, CAHTEH(2004)INFO4, 5 July 2004, 5.

26 See on this also the Commentary on Art 3 of the CoE Convention against Trafficking, section B.

27 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 8th meeting of the CAHTEH*, CAHTEH(2004)INFO10, 25 February 2005, 5; CAHTEH, *7th meeting – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 15.

28 CAHTEH, *Revised draft Council of Europe Convention on action against trafficking in human beings: Following the 4th meeting of the CAHTEH (11 May–14 May 2004)*, CAHTEH(2004)12, 17 May 2004, 5.

29 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, 10.

30 Ibid., para 37.

C. PREAMBLE IN CONTEXT

1. Preamble and other related provisions of the CoE Convention against Trafficking

P.14 In its sixth paragraph, the preamble states that 'all actions and initiatives against trafficking in human beings must be non-discriminatory, take gender equality into account as well as a child-rights approach'. These aspects are indicated in the Convention's Article 1(1)(a) in relation to gender equality, Article 3 concerning the non-discrimination principle and Article 5(3) on 'the child-sensitive approach'.

P.15 Paragraph four of the preamble reads 'trafficking in human beings may result in slavery for victims'. The preamble focuses on the relationship between slavery and trafficking in human beings for the purposes of interpretation of other Articles of the CoE Convention against Trafficking. Article 4 (definitions) of the Convention defines trafficking in human beings and displays slavery as one example of exploitative practices for the element of purpose of the definition of trafficking in human beings.

2. Preamble and other related international and regional standards

P.16 Given the nature of the preamble, it mentions principles, approaches and numerous international instruments, but does not reflect in depth on these. During the drafting phase, the experts recalled the need to take existing conventions, recommendations and resolutions on the subject into account. Besides the CoE documents, other regional and international instruments found their way into the preamble, such as the relevant Framework Decisions of the EU and the UN Palermo Convention and Protocol.[31] Chapter VIII (relationship with other international instruments) of the Convention deals in detail with the relationship between the Convention and other international legal instruments.

P.17 The preamble's seventh paragraph refers to the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (hereinafter ECHR).[32] Trafficking in human beings interferes with numerous rights: from the causes for, the actual process of to the responses to trafficking in human beings.[33] The rights and freedoms contained in the ECHR offer holistic protection for the rights of victims of trafficking in human beings. In the ECHR, the following provisions are particularly relevant: Article 4 (prohibition of slavery); furthermore Article 2 (right to life), Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 6 (right to fair trial) and Article 8 (right to respect for private and family

31 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 8 et seq.

32 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005, 4 November 1950 (thereinafter ECHR).

33 See for instance OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc. E/2002/68/Add. 1, 20 May 2002, 3: 'Violations of human rights are both a cause and a consequence of trafficking in persons.' See further Julia Planitzer, *Trafficking in Human Beings and Human Rights – The Role of the Council of Europe Convention on Action against Trafficking in Human Beings* (Neuer Wissenschaftlicher Verlag 2014) 51. See also OHCHR, *Human Rights and Human Trafficking, Fact sheet No. 36* (United Nations 2014) 5.

life). The guarantees of the ECHR equally apply to the suspects and accused persons (i.e., perpetrators) in criminal proceedings for cases of trafficking in human beings.[34]

D. ISSUES OF INTERPRETATION

1. Trafficking in human beings 'constitutes a human rights violation'

P.18 According to the preamble, trafficking in human beings constitutes a human rights violation. The wording of this paragraph was a point of contention during the drafting process and delegations highlighted that the recognition of trafficking in human beings as a human rights violation would result in consequences for the states.[35] However, the CoE Convention against Trafficking is not the first instrument that frames trafficking in human beings this way. In several other international documents, it is considered directly or indirectly a human rights violation.[36]

P.19 Traditionally, human rights are the rights of the individuals towards the state. States are obliged to 'respect', meaning refrain from interfering in the enjoyment of individual rights.[37] Subsequently, it was argued during the drafting process of the Convention that a human rights violation only occurs by actions attributed to the state. Thus, in the context of trafficking in human beings, the state itself would not violate human rights if the perpetrators were individuals who are independent of the state.[38] And as mentioned earlier, in most cases related to trafficking in human beings, the perpetrators are individuals who exploit other individuals.[39]

P.20 To this point, the obligations of states go further than to abstain from human rights infringements by its agents: states have an obligation to respect but in addition also the obligation to protect and fulfil human rights. First, the state has to respect and thus refrain from interfering with the enjoyment of human rights. Second, states have to protect individuals from any interference with their human rights by other private persons. This also includes the obligation to prevent interferences. Third, the states have an affirmative obligation

34 In particular Art 5 (right to liberty and security), Art 6 (right to a fair trial) of the ECHR.

35 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 41.

36 Ibid., para 42. See for instance Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1), Recital 1 and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 33 I.L.M. 1534, 9 June 1994, entered into force 5 March 1995, preamble. For earlier documents framing trafficking in human beings as human rights violation see UN Working Group on Contemporary Forms of Slavery, *Report on its twenty-third session* (E/CN.4/Sub.2/1998/14), paras 23 and 24; Committee of Ministers, Recommendation No. R(2000)11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation adopted on 19 May 2000 and explanatory memorandum, 6; Parliamentary Assembly, Recommendation No. 1325 (1997) of the Parliamentary Assembly on traffic in women and forced prostitution in Council of Europe Member States, 23 April 1997.

37 Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers 2003) 26 et seq.

38 CAHTEH, *Council of Europe Draft Convention on action against trafficking in human beings: Comments by the Delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers,* CAHTEH (2004) 24, 19 November 2004, see Latvia 18, Sweden 21.

39 Planitzer, 56. Nowak, 50.

to ensure that human rights are fully implemented.[40] The Human Rights Committee recognised in its General Comment No 31 that the ensured human rights can only be fully realised if individuals are protected by the state, not just against acts by its agents, but also against interferences committed by private persons that 'would impair the enjoyment of Covenant rights [i.e. under ICCPR] in so far as they are amenable to application between private persons (…)'.[41] Thus, trafficking in human beings triggers human rights obligations of states, including the obligation to protect, even if it is an act committed by individuals against other individuals.[42]

P.21 Accordingly, under their obligation to protect, states have to prevent interferences by a third party and if the interference already has occurred, they have to provide an investigation and if necessary, remedies.[43] In other words, acts committed by individuals might be a breach of states' human rights obligations and hence, a human rights violation when the state fails to take appropriate measures to protect.[44] The particular scope of this obligation is controversial. The obligation is rather to take the necessary means to achieve the result, than a specific result itself.[45]

P.22 The Explanatory Report of the CoE Convention against Trafficking refers in the context of the applicability of the ECHR to relations between private individuals to the case *X and Y v. the Netherlands*.[46] The ECtHR has made clear that states can violate their human rights obligations even if the state is not directly involved in the violation by its agents if they fail to take adequate measures to protect the human rights of the individual. These necessary measures can be criminal in nature but are not limited to criminalisation.[47] The case law of the ECtHR defines and develops the positive obligations of states under Article 4 of the ECHR. Central is the case of *Rantsev v. Cyprus and Russia*.

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40 OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (Geneva 2005), para 48. UN Commission on Human Rights: Sub-Commission on the Promotion and Protection of Human Rights, The Right to Adequate Food as a Human Right. Final report by Asbjorn Eide, E/CN.4/Sub.2/1987/23 (1987) cited after Planitzer, 57.

41 Human Rights Committee, *General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 8:

> The (…) obligations are binding on States and do not, as such, have direct horizontal effect as a matter of international law. (…) However the positive obligations on State Parties to ensure Covenant rights [i.e. under ICCPR] will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.

42 See Planitzer, 56. As shown in *Rantsev v. Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 286: '(…) there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk (…)'.

43 Planitzer, 57 et seq.

44 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 44.

45 Oliver De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 40.

46 *X and Y v. the Netherlands,* App no 8978/80 (ECtHR, 26 March 1985). Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 44.

47 Ibid., para 24; *Osman v. the United Kingdom,* App no 23452/94 (ECtHR, 28 October 1998), para 115; *Siliadin v. France*, App no 73316/01 (ECtHR, 26 July 2005), para 112; *Rantsev v. Cyprus and Russia*, para 285.

P.23 In the case of *Rantsev v. Cyprus and Russia*, the ECtHR defines different categories of positive obligations under Article 4 of the ECHR: the obligation to put in place an appropriate legislative and administrative framework, to investigate cases of trafficking in human beings and to protect victims of trafficking.[48] In this case, Ms Rantseva, a Russian national, went to Cyprus to work in a cabaret using an 'artiste visa'. According to the Cypriot Ombudsman, young women coming to Cyprus with this visa 'in fact worked as prostitutes'.[49] Soon after Ms Rantseva's arrival, she left her employment. The owner of the cabaret found her and brought Ms Rantseva to the police. Based on immigration laws, the owner requested for Ms Rantseva's detention and expulsion, but the police released her back into his custody. The following morning, Ms Rantseva was found dead.[50] In this regard, the obligation to take operational measures to protect victims or potential victims of trafficking in human beings is triggered when the 'State authorities were aware, or ought to have been aware of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited'.[51] However, this obligation should not impose 'an impossible or disproportionate burden on the authorities'.[52]

P.24 In *Rantsev v. Cyprus and Russia*, the critical point is that the Cypriot state was aware of the artiste visa regime regarding the entry and employment of alien women and the risks to the women involved.[53] Thus, a state has to act when there is the existence of official awareness.[54] As shown in the later judgement *L.E. v. Greece*,[55] which deals with the case of a Nigerian woman trafficked to Greece for the purpose of sexual exploitation, the ECtHR defined that the official awareness was only given at the point when the applicant herself explicitly stated to the authorities that she was a victim of trafficking.[56] However, in *Chowdury v. Greece*,[57] one decisive factor among others for the awareness of authorities was that the police were made aware by workers who had gone to the police to complain about the refusal of their employer to pay their wages.[58]

48 *Rantsev v. Cyprus and Russia,* paras 290 et seq.

49 Ibid., para 83.

50 Ibid., paras 18–29.

51 Ibid., para 286. As shown by *Stoyanova*, the test under which the obligation to protect arises as developed in *Osman v. United Kingdom* had been changed and further developed in *Rantsev v. Cyprus and Russia*. Using the terms 'circumstances giving rise to a credible suspicion' in comparison to the wording used in *Osman* ('existence of real and immediate risk') means that also a suspicion of trafficking in human beings triggers the obligation. See Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 400–402.

52 *Osman v. United Kingdom*, para 116.

53 Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24 *International Journal of Refugee Law* 1, 194. Stoyanova, *Human Trafficking and Slavery Reconsidered*, 299. Commissioner for Human Rights, *Report by Thomas Hammarberg, the Council of Europe Commissioner for Human Rights on his visit to Cyprus on 7-10 July 2003* (CommDH(200836) 12 December 2008, paras 45–48.

54 *Osman v. United Kingdom*, paras 116 et seq, cited after Stoyanova, ibid., 402–3.

55 *L.E. v. Greece*, App no 71545/12 (ECtHR, 21 January 2016).

56 Vladislava Stoyanova, 'L.E. v Greece: Human Trafficking and the Scope of States' Positive Obligations under the ECHR' (2016) *3 E.H.R.L.R.* 290, 296.

57 *Chowdury and Others v. Greece,* App no 21884/15 (ECtHR, 30 March 2017).

58 Ibid., para 111.

2. Trafficking in human beings 'may result in slavery'

P.25 The wording of the text 'considering that trafficking in human beings may result in slavery for victims' was adopted without amendment in the 5th CAHTEH meeting.[59] The motion by the Coalition Against Trafficking in Women to replace 'may result' with 'results' was not further mentioned in the drafting history documents.[60]

P.26 The evolving question if trafficking in human beings results or may result in slavery, is based on the development of the definition of slavery over the last decades. The Slavery Convention of 1926 is the first working document to define slavery stating that slavery is 'the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised'.[61] The recognition of any practice as slavery has profound legal effects because the prohibition of slavery is recognised as a rule under international customary law; the prohibition has *ius cogens* character and poses legal obligations towards all (*erga omnes*).[62]

P.27 Although it is legally not possible to own another human being, slavery and practices similar to slavery, servitude or forced labour continue to exist.[63] The terms 'status' and 'condition' used in Article 1 of the Slavery Convention of 1926 distinguishes between slavery *de jure* and slavery *de facto*.[64] In *Queen v. Tang*, a landmark Australian judgment of the High Court, it concluded that 'since the legal status of slavery did not exist in many parts of the world, and since it was intended that it would cease to exist everywhere, the evident purpose of the reference to "condition" was to cover slavery *de facto* as well as *de jure*'.[65]

P.28 In *Prosecutor v. Kunarac, Kovac and Vukovic*,[66] the International Criminal Tribunal for the former Yugoslavia (ICTY) acknowledged the evolution of the definition of slavery from the Slavery Convention 1926 in international law to 'encompass various contemporary forms of slavery which are based on the exercise of any or all of the powers attaching to the right of ownership'.[67] The Trial Chamber stated that:

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59 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, 9.

60 CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Contribution by the Coalition Against Trafficking in Women (CATW) and the Gender Equality Grouping of the international NGOs enjoying participatory status with the Council of Europe*, CAHTEH(2004)17 Addendum IX, 24 September 2004, 3.

61 Convention to Suppress the Slave Trade and Slavery, 60 LNTS 253, 25 September 1926, entered into force 9 March 1927, Art 1.

62 Piotrowicz, 183; Anne T. Gallagher, 'Human rights and human trafficking: quagmire or firm ground? A response to James Hathaway' (2009) 49 *Virginia Journal of International Law* 789, 798; Nicholas L. McGeehan, 'Misunderstood and neglected: the marginalisation of slavery in international law' (2011) 15 *The International Journal of Human Rights* 436, 441–2.

63 Piotrowicz, 183. See also Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 45.

64 Jean Allain, 'The definition of slavery in international law' (2009) 52 *Howard Law Journal* 239, 261.

65 *The Queen v. Tang* [2008] High Court of Australia 39, 28 August 2008, para 25. See also Jean Allain, 'Introduction', in Jean Allain, *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press 2012) 1.

66 *Prosecutor v. Kunarac, Kovac and Vukovic (Judgement)*, IT-96-23-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.

67 *Prosecutor v. Kunarac, Kovac and Vukovic (Judgement)*, ibid., para 542 and *Prosecutor v. Kunarac, Kovac and Vukovic (Appeal Judgement)*, IT-96-23/1-T, ICTY, 12 June 2002, para 117. See also Gallagher, 807.

> indications of enslavement include elements of control and ownership; the restriction or control of a person's autonomy, freedom of choice or freedom of movement; (…) The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often though not necessarily involving physical hardship; sex; prostitution; and human trafficking.[68]

P.29 Whereas the acquisition or disposal of a person alone may not be enough to constitute enslavement, it is enough to satisfy the right to ownership aspect that is key in determining slavery, or enslavement, which is a broader term than slavery.[69] One key phrase in regard to the definition of slavery is the notion 'ownership', which means the possession that one individual holds over another. Since the legal ownership is not possible, courts have to look for 'the powers that an owner would have over another person, if the law recognised the right to own that other'.[70] While multiple factors might be required to determine slavery, no single factor is decisive or necessary on its own.[71]

P.30 A group of experts developed the Bellagio-Harvard Guidelines on the Legal Parameters of Slavery in order to establish a reference point for grounding future study on contemporary slavery.[72] They acknowledge that the possession is paramount for the recognition of slavery, although legal systems do not 'support a property right in respect of persons'.[73] The Guidelines state that the 'exact form of possession might vary; in essence, it supposes control over a person by another such as a person might control a thing'. In order to constitute slavery thus, it is essential that control is tantamount to possession.[74] The exercise of the power to control is the decisive element to differentiate between slavery and slavery-like practices.[75] According to Guideline 2, the constituting control over a person has to be established 'in such a way as to significantly deprive that person of his or her individual liberty, with the extent of exploitation (…)'. This control is supported or reached by force, deception or coercion.[76] Through this control, the person can exercise acts such as the buying, selling or transferring of a person or profiting from the use of a person.[77] In conclusion, the legal right to own a person is not anymore a decisive requirement to establish slavery, but the control tantamount to ownership and possession as well as the exercise of the powers attached are identified as the relevant elements.[78]

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68 *Prosecutor v. Kunarac, Kovac and Vukovic (Judgement)*, para 542.

69 See International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996*, in Yearbook of the International Law Commission, 1996, vol II, part 2.

70 *The Queen v. Tang*, para 142. See Holly Cullen, 'Contemporary international legal norms on slavery', in Allain, 305.

71 Gallagher, 807.

72 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery (2012), <https://glc.yale.edu/sites/default/files/pdf/the_bellagio_harvard_guidelines_on_the_legal_parameters_of_slavery.pdf > (accessed 14 August 2020). See also Jean Allain, 'Introduction', in Allain, 5.

73 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery, Guideline 3.

74 Ibid., Guideline 3.

75 Ibid., Guideline 9.

76 Ibid., Guideline 2.

77 Ibid., Guideline 4. Planitzer, 52.

78 Piotrowicz, 200.

P.31 The definition of trafficking in human beings encompasses three different elements: action, means, and purpose (exploitation).[79] Taking into due account the reasoning in the *Kunarac* case – where it is about enslavement – as well as the Bellagio-Harvard Guidelines, it can be argued that the definition of slavery could also apply to cases of trafficking in human beings. First, selling or transferring of a person, named as possible powers attached to the right of ownership, can be actions of the trafficking definition.[80] Second, the control to exercise these powers can be reached by means such as violent force, deception or coercion, reflecting the means-element in relation to trafficking in human beings.[81] Third, the purpose of exploitation can be attached to profiting from the use of a person.[82] Respectively, trafficking in human beings may result in slavery but does not necessarily do so.[83] It is essential not to conflate trafficking in human beings with slavery, servitude and forced labour. The definition of trafficking in human beings constitutes three elements, and thus the materialisation of the purpose of exploitation alone is not sufficient to amount to trafficking in human beings.[84] If all these elements (action, means and purpose) are proven and reflect the decisive requirements of slavery, only then does trafficking in human beings result in slavery. Further, other purposes of exploitation may lead to trafficking in human beings apart from slavery, for instance, the removal of organs.[85] In other words, there might be a case of trafficking in human beings without constituting slavery. Finally, trafficking in human beings consists of the process of acquiring a person for the purpose of exploitation, while slavery and enslavement is about the treatment exacted upon a person and the gravity of the subjugation.[86]

P.32 The ECtHR assessed in its case law the facts relevant for Article 4 of the ECHR in different ways. In *Siliadin v. France,* the ECtHR stated that a Togolese girl, who had been brought to France by deception and was forced to perform household work and childcare without payment, was subjected to forced labour within the meaning of Article 4 of the ECHR. According to the ECtHR, there was a lack of exercise of a 'genuine right of legal ownership over her',[87] hence slavery, in the 'classic' sense, would not have been fulfilled.[88] In the later *Rantsev v. Cyprus and Russia* the ECtHR stated that it would be 'unnecessary to identify whether the treatment (…) constitutes "slavery", "servitude" or "forced and compulsory labour"'.[89] Trafficking in human beings 'itself (…) falls within the scope of Article 4' devoid of an explanation exactly how.[90] After *Rantsev v. Cyprus*, the ECtHR again classified the facts as forced labour and servitude, in *C.N. and V. v France*. The Court claimed that the case was 'more similar to the case *Siliadin* than *Rantsev*'.[91] In *Chowdury and Others v. Greece*, the applicants, 42 Bangladeshi nationals with undocumented status, worked on a farm in

79 CoE Convention against Trafficking, Art 4 and Palermo Protocol, Art 3. See on this also Art 4 in this commentary.
80 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery, Guideline 4.
81 Ibid., Guideline 2.
82 Ibid., Guideline 4.
83 Planitzer, 52 et seq.
84 Stoyanova, *Human Trafficking and Slavery Reconsidered*, 292.
85 CoE Convention against Trafficking, Art 4(a).
86 Nicole Siller, '"Modern slavery": Does international law distinguish between slavery, enslavement and trafficking?' (2006) 14 *Journal of International Criminal Justice* 405, 407.
87 *Siliadin v. France*, para 122.
88 Cullen, 308–9.
89 *Rantsev v. Cyprus and Russia*, para 282.
90 Ibid., 282. See also Piotrowicz, 196; Planitzer, 53.
91 *C.N. and V. v. France*, App no 67724/09 (ECtHR, 11 January 2013), paras 88 and 94.

horrendous working conditions and were not paid what they were promised. In this case, the ECtHR assessed the situation of undocumented migrant workers as trafficking in human beings and forced labour.[92]

92 *Chowdury and Others v. Greece,* para 100. Vladislava Stoyanova, 'Sweet taste with bitter roots – forced labour and Chowdury v Greece' (2018) 1 *E.H.R.L.R.* 67, 68.

ARTICLE 1

PURPOSES OF THE CONVENTION

Julia Planitzer

1 The purposes of this Convention are:
- **a to prevent and combat trafficking in human beings, while guaranteeing gender equality**
- **b to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;**
- **c to promote international cooperation on action against trafficking in human beings.**

2 In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific monitoring mechanism.

A. INTRODUCTION

1.01 Article 1 of the Council of Europe Convention on Action against Trafficking in Human Beings[1] gives an overview of the structure of the Convention and serves, to a certain extent, as a table of contents for the Chapters of the Convention. The Convention is structured in ten Chapters. Article 1(1)(a) refers to prevention which is dealt with in Chapter II (Prevention,

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

co-operation and other measures). Article 1(1)(b) is further set out in Chapter III (Measures to protect and promote the rights of victims, guaranteeing gender equality) and Chapter V (Investigation, prosecution and procedural law). Article 1(1)(c) refers to Chapter VI (International co-operation and co-operation with civil society). The monitoring mechanism, stated in Article 1(2), is defined in Chapter VII (Monitoring mechanism).

B. DRAFTING HISTORY

1.02 Early initiatives to draft a convention against trafficking in human beings stemmed from various bodies of the Council of Europe (CoE), in particular from the Steering Committee for Equality between Women and Men (CDEG).[2] Recommendation 1545 (2002) on a campaign against trafficking in women recommended that the Committee of Ministers draft a convention on trafficking in women.[3] Later in 2002, the Committee of Ministers assigned the CDEG to do a feasibility study on 'drafting a Convention on trafficking in human beings'.[4] CDEG discussed the main added value of a new convention and thereby also set the cornerstones of the purpose of the Convention, which are a clear human rights focus, the inclusion of a gender perspective and a system of monitoring.[5]

1.03 In 2003, the Committee of Ministers adopted terms of reference for the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH). The text of the terms of reference forms the basis of the text of Article 1:

> the Committee shall put a special focus on the human rights of the victims of trafficking and design a comprehensive framework for the protection and assistance of victims and witnesses, also taking gender equality aspects into consideration, as well as on the effective prevention, investigation, prosecution and on international co-operation;
>
> define a monitoring mechanism to ensure compliance of States Parties with the provisions of the Convention.[6]

1. Guaranteeing gender equality

1.04 The wording of Article 1(a) changed throughout the drafting process from 'taking gender equality aspects into consideration'[7] to 'guaranteeing gender equality'.[8] There were different opinions on whether women and children should specifically be mentioned in Article 1. Norway suggested using the wording of Article 2 of the Palermo Protocol, 'paying particular

2 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 13.
3 Parliamentary Assembly, Recommendation No. 1545 (2002) Campaign against trafficking in women, 21 January 2002, para 11(ii).
4 Ministers' Deputies, *Meeting Report*, CM(2002)129, 812th Meeting, 16 October 2002.
5 Ministers' Deputies, *A Council of Europe Convention on Action against Trafficking in Human Beings, Feasibility study, an executive summary of the study drawn up, at the request of the Committee of Ministers, by the CDEG in co-operation with the CDPC, CDDH and CDPS*, CM(2002)129, 812th Meeting, 16 October 2002.
6 Committee of Ministers, Ministers' Deputies, CM/Del/Dec(2003)838, 838th meeting, 30 April 2003, Appendix 4.
7 Committee of Ministers, *Specific terms of reference*, CM/Del/Dec(2003)838/4.4-Appendix 4, Recital 1.
8 Ibid., Art 1 (a) and (b).

attention to women and children' in the draft wording of Article 1.[9] However, the International Labour Organisation suggested addressing the special needs of women 'as the "gender" aspect of human trafficking and action against it'.[10] During the 2nd CAHTEH meeting, the issue of the reference to gender equality was widely discussed. One delegation questioned the usefulness of including a reference to gender equality since non-discrimination was included in Article 3 (Non-discrimination principle) of the Convention, while other delegations requested more explanation of the concept. By referring to the terms of reference, the CAHTEH agreed to include a detailed explanation on gender equality in the Convention's Explanatory Report.[11] Despite this decision, Switzerland and France later proposed to delete the phrase.[12] In the 5th CAHTEH meeting, it was decided to stress the importance of gender equality and added the phrase 'taking gender equality aspects into consideration' also concerning prevention and combating trafficking in human beings. Prior to that, gender equality was mentioned in relation to the protection of rights of trafficked persons only.[13] By this, the CAHTEH went beyond the wording of the Committee of Ministers' terms of reference[14] and broadened the importance of gender equality to further areas. Following the 5th CAHTEH meeting, the first part of draft Article 1 read as follows:

> 1. The purposes of this Convention are:
>
> a. To prevent and combat trafficking in human beings, also taking gender equality aspects into consideration;
> b. To protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, also taking gender equality aspects into consideration, as well as to ensure effective investigation and prosecution; (…)[15]

1.05 The text of the draft Convention was approved by the CAHTEH at its 7th meeting and was transmitted, by the Committee of Ministers, to the Parliamentary Assembly for opinion. The Parliamentary Assembly recommended replacing the wording 'also taking gender equality aspects into consideration' with 'guaranteeing gender equality' for terminological clarity.[16] The

9 CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings*, *Contributions by the delegation of Norway and by the observer Mexico*, CAHTEH(2003)8 rev 2, Addendum II, 1 December 2003, 6.

10 CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings*: *Contributions by the delegation of Sweden and by the observer of the International Labour Office (ILO)*, CAHTEH(2003)8 rev 2, Addendum I, 28 November 2003, 9.

11 CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH(2003)RAP2, 26 January 2004, para 11.

12 CAHTEH, *Projet de Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains: Contribution de la délégation de la Suisse*, CAHTEH(2004)1 Addendum II, 29 January 2004, 3 and CAHTEH, *Projet de Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains: Contribution des délégations de la France et de la Suisse*, CAHTEH(2004)13, Addendum I, 9 June 2004, 5. France suggested a different wording and proposed to adapt measures to specific needs of certain categories of victims, 'in particular gender-related'. See CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Amendments to preamble and to articles 1 to 24 proposed by national delegations and observers*, CAHTEH(2004)14, 11 June 2004, 8.

13 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 41.

14 Committee of Ministers, *Specific terms of reference*, CM/Del/Dec(2003)838/4.4-Appendix 4.

15 CAHTEH, *Revised draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Following the 5th meeting of the CAHTEH (29 June–2 July 2004)*, CAHTEH(2004)INFO 4, 5 July 2004.

16 Parliamentary Assembly, *Draft Council of Europe Convention on Action against Trafficking in Human Beings*, Opinion 253(2005), 26 January 2005, para 15.

CAHTEH examined the proposal by the Parliamentary Assembly during its final meeting and agreed to amend the text.[17]

2. Promotion of international co-operation on action against trafficking in human beings

1.06 The reference to 'effective investigation and prosecution' was paired with the promotion of international co-operation on action against trafficking in early drafts of the Convention. In the 5th meeting of the CAHTEH, it was decided that Article 1(c) should solely refer to international co-operation to clarify that international co-operation is needed for all actions against trafficking, comprising of prevention, assistance to victims as well as criminal law measures.[18] Hence, the reference to effective investigation and prosecution was moved to Article 1(b).

3. Setting up of a specific monitoring mechanism

1.07 In the 2nd CAHTEH meeting, the wording in relation to monitoring was amended since a delegation pointed out that a monitoring mechanism could not be treated as a purpose of the Convention itself. Monitoring would be rather a means of guaranteeing parties' compliance. Other delegations stressed that monitoring would be an added value of the future Convention; hence, it should be stated in Article 1.[19] The wording was amended and read as follows: 'The purposes of the Convention are: (…) to ensure effective implementation by the Parties of the provisions of this Convention by defining a monitoring mechanism.'[20] The outcome of the 5th CAHTEH meeting led to a fundamental change of Article 1. The sentence referring to the monitoring mechanism was moved to a newly added second paragraph of Article 1. Strictly speaking, monitoring would not be one of the purposes of the Convention, but rather a means to achieve the purposes. Therefore, it was decided to mention it in a separate paragraph instead of listing it with the purposes. By keeping it in Article 1, the intention was to make it clear that the monitoring mechanism is an essential feature of the Convention.[21] The movement of the phrase also led to a slight amendment of the wording without changing the substantial meaning, which was the final wording of Article 1(2).[22]

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17 16 delegations supported the Parliamentary Assembly amendments, five delegations opposed them and 12 delegations abstained. See CAHTEH, *Final Activity Report*, CAHTEH(2005)RAP8, 16 March 2005, paras 11–12.

18 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, paras 42–43.

19 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 14.

20 CAHTEH, *Revised Draft Convention of the Council of Europe on Action against Trafficking in Human Beings, 3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, 38.

21 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 44.

22 Ibid., 44.

C. ARTICLE IN CONTEXT

1. Relationship between Article 1 and Article 3 of the CoE Convention against Trafficking

1.08 Article 1 lists the purposes of the Convention, which should be implemented 'while guaranteeing gender equality'. At the same time, Article 3 (Non-discrimination principle) of the CoE Convention against Trafficking states that the implementation of the provisions of the Convention 'shall be secured without discrimination on any ground such as sex (…)'.[23] Article 3 lists, next to 'sex', further grounds including race, colour, language or political or other opinion. The wording of Article 3 follows that of Article 14 (Prohibition of discrimination) of the European Convention on Human Rights (ECHR)[24] and the list contained in Protocol No. 12 to the ECHR,[25] hence the list of non-discrimination grounds is not exhaustive.[26] Consequently, gender could also fall under the list of non-discrimination grounds of Article 3. Nevertheless, 'guaranteeing gender equality' is specifically mentioned in Article 1.

1.09 A reason for the explicit mention of 'gender equality' is that the Committee of Ministers included it in its terms of reference of the CAHTEH.[27] The Committee of Ministers requested to 'put a special focus on the human rights of the victims of trafficking and design a comprehensive framework for the protection and assistance of victims and witnesses, also taking gender equality aspects into consideration'.[28] The CAHTEH implemented this request and did not limit gender equality to the protection and assistance as mentioned in the terms of reference, but broadened the application of gender equality in Article 1 of the CoE Convention against Trafficking to prevention, combating and protection of human rights of trafficked persons. Article 3 of the CoE Convention against Trafficking defines non-discrimination as a cross-cutting principle for the whole Convention covering all articles.

1.10 The Explanatory Report of the CoE Convention against Trafficking unequivocally shows that the meanings of 'gender equality' and non-discrimination on the grounds of sex or gender are not identical: '(…) gender equality is not reducible to the non-discrimination principle (as laid down in Article 3)'.[29] Non-discrimination is seen as a prerequisite in order to achieve gender equality. Member States of the CoE that also ratified the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[30] are supposed to remove discriminating provisions and implement equality legislation. Legislation is a

23 CoE Convention against Trafficking, Article 3.
24 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 5, 4 November 1950, entered into force 3 September 1953.
25 Protocol No. 12 to the ECHR, CETS No. 177, 4 November 2000, entered into force 1 April 2005 (thereinafter Protocol No. 12).
26 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 66.
27 Committee of Ministers, CM/Del/Dec(2003)838/4.4-Appendix 4.
28 Ibid.
29 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 55.
30 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979, entered into force 3 September 1981.

necessary basis to achieve *de jure* equality,[31] but further measures are needed to achieve *de facto* equality, which is also required for the implementation of CEDAW.[32] This can also be found in relevant legal instruments of the CoE. For example, the CoE Convention on preventing and combating violence against women and domestic violence states in its preamble that '*de jure* and *de facto* equality between women and men is a key element in the prevention of violence against women'.[33] Besides legal actions, substantive gender equality or *de facto* equality requires positive actions, plans of action or mainstreaming.[34] This has also been stressed by the Group of Experts on Action against Trafficking in Human Beings (GRETA).[35] Gender equality requires, for instance, 'adequate human and financial resources allocated to programmes, projects and initiatives for the achievement of gender equality' and the application of gender budgeting.[36] In relation to trafficking in human beings, the Recommendation CM/Rec(2007)17 of the Committee of Ministers on gender equality standards and mechanisms lists an example for going beyond *de jure* equality to implement national action plans against trafficking that take gender equality fully into consideration. Hence, gender equality should play a role in all areas of an action plan, including prosecution.[37]

2. Relationship between Article 1 and Article 17 of the CoE Convention against Trafficking

1.11 Article 1(b) stresses, as a purpose of the Convention, that for the implementation of measures, gender equality needs to be guaranteed. On the other hand, Article 17 serves as a reminder and provides further details about the request formulated in Article 1. Article 17 explicitly refers to gender mainstreaming as a strategy to promote gender equality.

3. Relations with provisions in other standards

1.12 Gender equality plays a prominent role in the CoE Convention against Trafficking. A comparison with other standards on combating trafficking in human beings shows the significant strengthening of gender equality in relation to trafficking by this Convention. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[38] makes a reference to gender in relation to the assistance to and protection of

31 Council of Europe, *Gender Mainstreaming – Conceptual framework, methodology and presentation of good practices, Final Report of Activities of the Group of Specialists on Mainstreaming* (EG-S-MS), EG-S-MS (98) 2, May 1998, 11.

32 Andrew Byrnes, 'Article 1', in Marsha A. Freeman, Christine Chinkin, Beate Rudolf (eds), *The UN Convention on the Elimination of all Forms of Discrimination against Women*: *A Commentary* (Oxford University Press 2012) 65.

33 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210, 11 May 2011, entered into force 1 August 2014, Art 3(d).

34 Council of Europe, *Gender Mainstreaming – Conceptual framework, methodology and presentation of good practices, Final Report of Activities of the Group of Specialists on Mainstreaming (EG-S-MS)*, EG-S-MS (98) 2 rev, 2004, 13; Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 54.

35 GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 73 and GRETA, *Report on Montenegro*, I GRETA(2012)9, para 62.

36 Committee of Ministers, Recommendation CM/Rec(2007)17 of the Committee of Ministers to member states on gender equality standards and mechanisms, 21 November 2007 (thereinafter Recommendation CM/Rec(2007)17) para 3.

37 Committee of Ministers, Recommendation CM/Rec(2007)17, para 55.

38 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

trafficked persons. The gender of trafficked persons should be taken into account when applying these measures.[39] Furthermore, under the Palermo Protocol, the State Parties shall strengthen measures to reduce the factors that make individuals more susceptible to trafficking, such as the lack of equal opportunities.[40] Although the Palermo Protocol acknowledges that particular attention must be paid to women and children, the aim to ensure gender equality as a tool to eradicate trafficking cannot be found. The UN Office of the High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Right and Human Trafficking[41] gives gender equality more importance and recommends to address 'gender-based discrimination (…) systematically when anti-trafficking measures are proposed.'[42] Furthermore, measures should address 'inequality, poverty and all forms of discrimination'.[43]

1.13 Instruments that have been adopted after the CoE Convention against Trafficking seem to follow the Palermo Protocol and its approach to dealing with gender equality. The Association of South East Asian Nations Convention against Trafficking in Persons, Especially Women and Children,[44] adopted in 2015, requires the State Parties to take the gender of trafficked persons into account when assisting them[45] and to take measures 'to alleviate the factors that make persons (…) vulnerable to trafficking', such as a lack of equal opportunities in prevention.[46] The European Union's (EU) central instrument on trafficking in persons is Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims,[47] which uses the terms 'gender-specific' and 'gender perspective'. Assistance and support measures should be gender-specific.[48] For prevention and protection, a 'gender perspective' should be taken into account,[49] which can be interpreted as an acknowledgement that a 'gendered response' to trafficking in human beings is needed.[50] The directive can be seen as an instrument of the EU to adopt a rights-based legislative response to trafficking,[51] hence aligning the standard with the CoE Convention against Trafficking. Nevertheless, the CoE standard of 'guaranteeing gender equality' was replaced by the broader standard of 'taking into account the gender perspective' by the EU instrument.

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39 Palermo Protocol, Art 6.
40 Ibid., Art 9(4).
41 UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.
42 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Guideline 1 para 4.
43 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Principle 5.
44 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017 (thereinafter ASEAN Convention against Trafficking in Persons).
45 ASEAN Convention against Trafficking in Persons, Art 14(12).
46 Ibid., Art 11(4). However, *Ranyta Yusran* criticises that the language used in Art 11 of ASEAN Convention against Trafficking in Persons lacks any practical obligation to address root causes and therefore would not meet the standard of the Palermo Protocol. See Ranyta Yusran, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' (2017) 8 *Asian Journal of International Law* 258, 279.
47 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (thereinafter Dir 2011/36/EU) (OJ L 101/1).
48 Dir 2011/36/EU, Recital 3.
49 Dir 2011/36/EU, Art 1.
50 OHCHR et al, *Prevent. Combat. Protect – Human Trafficking. Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (2011) 30.
51 Ibid., 18.

D. ISSUES OF INTERPRETATION

1. Article 1(1)(b) of the CoE Convention against Trafficking: 'Protect the human rights of the victims of trafficking'

1.14 One of the purposes of the Convention, to protect the human rights of trafficked persons, is defined in more detail in Chapter III, 'Measures to protect and promote the rights of victims, guaranteeing gender equality'. According to the Convention's Explanatory Report, Chapter III is an essential part of the Convention because 'it is centred on protecting the rights of trafficking victims' and was inspired by Principle 1 of the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking'.[52]

1.15 The 'human rights of victims of trafficking' refers to the various human rights trafficking interferes with. Some rights are particularly relevant to the causes of trafficking, such as the prohibition of discrimination. Other rights are relevant for the actual process of trafficking and other rights are important for the response to trafficking, such as the right to remedy.[53] Various international human rights treaties offer enhanced protection to certain groups, such as women, children or migrants. Based on the tripartite division of human rights obligations, consisting of the obligation to respect, protect and fulfil,[54] the state as a duty bearer has an obligation to protect human rights. This obligation also applies to trafficking in human beings, although it is an act of private persons.[55] Deriving from international and regional human rights treaties, Chapter III defines the human rights obligations of the State Parties in more detail for the specific group of trafficked persons. It defines rights such as access to emergency medical treatment[56] and the protection of the identity of trafficked children.[57] The Convention defines trafficked persons as rights-holders who can claim their rights from the state and its organs. By this, the Convention empowers trafficked persons and helps to reduce the notion of 'passive victims'.[58]

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52 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Principle 1; Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 125.

53 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations 2010) 52.

54 Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 242.

55 Julia Planitzer, *Trafficking in Human Beings and Human Rights – The Role of the Council of Europe Convention on Action against Trafficking in Human Beings* (Neuer Wissenschaftlicher Verlag 2014) 62. See on this also the Commentary on the Preamble.

56 CoE Convention against Trafficking, Art 12(b).

57 Ibid., Art 11(2).

58 Baerbel Heide Uhl, 'Lost in Implementation? Human rights Rhetoric and Violations – A Critical Review of Current European Anti-Trafficking Policies' (2010) 21 *Security and Human Rights*, 126; Ann D. Jordan, 'Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings' (2002) 10 *Gender and Development* 28, 30; Jonathan Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to A Labor Paradigm for Human Trafficking' (2013) 60 *UCLA L. Rev. Disc.* 142, 154.

2. Article 1(1)(b) of the CoE Convention against Trafficking: 'Guaranteeing gender equality'

1.16 According to Article 1(1), the purpose of the Convention is to prevent and combat trafficking in human beings and protect the human rights of trafficked persons 'while guaranteeing gender equality'. The CoE defines the term 'gender equality' as follows:

> Equal visibility, empowerment and participation of both sexes in all spheres of public and private life. Gender equality is the opposite of gender inequality, not of gender difference, and aims to promote the full participation of women and men in society. (…) Gender equality means accepting and valuing equally the differences between women and men and the diverse roles they play in society. Gender equality includes the right to be different. This means taking into account the existing differences among women and men, which are related to class, political opinion, religion, ethnicity, race or sexual orientation. Gender equality means discussing how it is possible to go further, to change the structures in society which contribute to maintaining the unequal power relationships between women and men, and to reach a better balance in the various female and male values and priorities.[59]

1.17 Gender equality and its relevance for trafficking means, for example, that social perceptions of the role of men and women in society, for instance, the notion of a man as the main provider of the family, can give rise to trafficking.[60] Furthermore, it should be recognised that women and men are often trafficked for different purposes. Hence, assistance and support measures should also be gender-specific.[61] Prevention measures should be tailored to different types of trafficking, for instance, prevention measures in relation to exploitation in the construction sector will be different than measures to prevent exploitation in care work.

1.18 Gender equality is a principle of human rights and 'sex-related discrimination (…) constitutes impediments to the recognition, enjoyment and exercise of human rights and fundamental freedoms'.[62] This implies, as set out in Recommendation CM/Rec(2007)17 of the Committee of Ministers to Members States on gender equality standards and mechanisms,[63] that 'governments of member states have a clear and pressing obligation to eliminate discrimination and achieve gender equality'.[64] Whereas the Convention defines 'gender equality' as an obligation in Article 17 concerning measures to protect and promote the rights of victims, there is no similar obligation to promote gender equality concerning measures to prevent and 'combat' trafficking in human beings. Nevertheless, since 'guaranteeing gender equality' is clearly mentioned as a purpose of the Convention, an interpretation based on Article 31(1) of the Vienna Convention on the Law of Treaties[65] shows that the State Parties have an obligation to guarantee gender equality when preventing and 'combating' trafficking in human beings as well.

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59 Council of Europe, *Gender Mainstreaming – Conceptual framework, methodology and presentation of good practices, Final Report of Activities of the Group of Specialists on Mainstreaming* (EG-S-MS), EG-S-MS (98) 2, May 1998, 7–8.

60 Fine Tune, *Trafficking for Labour Exploitation – Gender* (ITUC 2015) 7–9.

61 Dir 2011/36/EU, Recital 3.

62 Committee of Ministers, *Declaration on equality of women and men*, 83rd Session, 16 November 1988, paras 1 and 5.

63 Committee of Ministers, Recommendation CM/Rec(2007)17.

64 Ibid., para 7.

65 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, entered into force 27 January 1980.

1.19 In order to achieve gender equality, violence against women needs to be prevented and eliminated.[66] Violence against women forms an obstacle to the enjoyment of human rights and fundamental freedoms. Consequently, gender-based violence[67] is a form of discrimination, as developed in 1992 by General Recommendation No. 19 adopted by the Committee on the Elimination of Discrimination against Women[68] and the later Declaration on the Elimination of Violence against Women.[69] Trafficking in women can be defined as a form of gender-based violence against women.[70] Recommendation Rec(2002)5 of the Committee of Ministers to Member States on the protection of women against violence defines 'trafficking in women for the purposes of sexual exploitation and economic exploitation and sex tourism' as forms of gender-based violence.[71]

1.20 Gender inequality is both a cause and a consequence of trafficking in human beings.[72] By confirming the importance of gender equality as a cross-cutting issue in the CoE Convention against Trafficking, the Recommendation of the Committee of Ministers to Member States on gender equality standards and mechanisms develops further guidance for the State Parties and outlines elements that show commitment of states to achieve gender equality. The Recommendation states that 'inequalities between women and men must be systematically addressed in the development and implementation of actions against trafficking in human beings'.[73] An example of the commitment to gender equality is when a states' co-ordinating body for actions against trafficking in human beings also comprises of Non-Governmental Organisations relevant for gender equality policies.[74]

1.21 GRETA refers to gender equality in its reports and calls upon the State Parties to 'promote gender equality, combat gender-based violence and stereotypes'.[75] Violence against women is identified as a root cause of trafficking in women, and as in the case of Hungary, GRETA urges to address this root cause.[76]

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66 Committee of Ministers, Recommendation CM/Rec(2007)17, para 51.

67 Gender-based violence is defined as 'violence that is directed against a woman because she is a woman or that affects women disproportionately', UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 19: Violence against women, A/47/38 (1992) para 6. This definition is also used by the Istanbul Convention, Art 3(d).

68 CEDAW Committee, General Recommendation No. 19, para 1.

69 UN General Assembly, Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993.

70 CEDAW Committee, General Recommendation No. 19, paras 13–16; Janie Chuang, 'Article 6', in Freeman, Chinkin, Rudolf (eds) 180.

71 Committee of Ministers, Recommendation CM/Rec(2002)5 of the Committee of Ministers to Member States on the protection of women against violence, 30 April 2002 (thereinafter Recommendation CM/Rec(2002)5) para 1(b).

72 Committee of Ministers, Recommendation CM/Rec(2007)17, para 53; Bregje Blokhuis, *Violation of Women's Rights: A cause and consequence of trafficking in women* (La Strada International 2008) 43; and on the link between gender inequality and trafficking in women in Albania: Imelda Poole, 'Trafficking in Albania: The Present Reality', in Gillian Wylie and Penelope McRedmond (eds), *Human Trafficking in Europe – Character, Causes and Consequences* (Palgrave Macmillan 2010) 100.

73 Committee of Ministers, Recommendation CM/Rec(2007)17, para 54.

74 Ibid., para 55.

75 See for instance GRETA, *Report on Latvia*, II GRETA(2017)2, para 81; GRETA, *Report on Georgia*, II GRETA(2016)8, para 76. See also GRETA, *Report on Romania*, II GRETA(2016)20, para 78; GRETA, *Report on Portugal*, II GRETA(2017)4, para 90 and GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 104.

76 GRETA, *Report on Hungary*, I GRETA(2015)11, para 116.

3. Comprehensiveness and multidisciplinarity

1.22 Article 1(b) defines the purpose of the Convention as to 'protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses (…) as well as to ensure effective investigation and prosecution'. This should reflect the multidisciplinarity that would be necessary for effective action against trafficking in human beings. Multidisciplinarity is seen as basic to any action against trafficking.[77] The Convention's Explanatory Report on the one hand equals multidisciplinarity with the '3 P-structure' (prevention, prosecution and protection) and states that a multidisciplinary approach against trafficking in human beings incorporates 'prevention, protection of human rights of victims and prosecution of traffickers'.[78] On the other hand, multidisciplinarity is also understood in a broader sense meaning that different bodies co-operate to take action against trafficking in human beings.[79] Multidisciplinarity in Article 1(b) focuses on co-operation among different actors at the national level, which is further defined by Article 35 (Co-operation with civil society).

1.23 Multidisciplinarity can be found as a relevant principle concerning the implementation of the Palermo Protocol. As the Model Law against Trafficking in Persons[80] sets out, bodies co-ordinating the action against trafficking at national level should be multidisciplinary.[81] The necessity of multidisciplinarity is also stressed by the Organization for Security and Co-operation in Europe (OSCE). By developing the concept of a 'national referral mechanism',[82] the OSCE contributed substantially to the development and definition of multidisciplinary responses. Multidisciplinary teams should attempt to combine approaches of investigation and prosecution with the protection of human rights of trafficked persons.[83] As stated in the Convention's Explanatory Report, 'the two are related to each other'.[84]

1.24 The purpose of the Convention to 'ensure effective investigation and prosecution' is strongly linked to the implementation of Article 27 (*Ex parte* and *ex officio* applications) and Article 29 (Specialised authorities and co-ordinating bodies). GRETA's evaluations show that there is a gap between the number of identified victims of trafficking and the number of convictions. Reasons are, for instance, the over-reliance on victims' statements, issues in relation to the credibility of witnesses and challenges concerning the sufficiency of evidence.[85] The obligation of effective investigation requires various measures including setting up specialised investigation units, usage of special investigative techniques, financial investigations and setting up joint investigation teams as well as investigating relevant offences committed through the internet.[86]

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77 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 56.
78 Ibid., para 4.
79 Ibid., para 102 in relation to Art 5 of the CoE Convention against Trafficking.
80 UNODC, *Model Law against Trafficking in Persons*, UN Sales No. E.09.V.11, 5 August 2009.
81 UNODC, *Model Law*, UN Sales No. E.09.V.11, Arts 35, 84.
82 OSCE, Decision No. 557: OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 24 July 2003, Annex; and Theda Kröger, Jasna Malkoc and Baerbel Heide Uhl, *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons: A Practical Handbook* (OSCE/ODIHR, Warsaw, Poland 2004).
83 Kröger, Malkoc and Heide Uhl, ibid., 27.
84 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 57.
85 GRETA, *4th General Report on GRETA's Activities*, March 2015, 54.
86 GRETA, *Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties – Second evaluation round*, GRETA(2014)13, question 51.

The ECtHR defines effective investigation as being 'capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means'.[87] The obligation to investigate effectively is binding on the law enforcement and judicial authorities. Whenever a matter of trafficking in human beings comes to the attention of these authorities, they 'must act of their own motion'.[88] Full and effective investigation has to cover all aspects of trafficking allegations covering recruitment and exploitation.[89]

4. Promotion of international co-operation

1.25 The drafting history shows that the structure of Article 1 of the Convention was changed in order to ensure that 'international cooperation' as used in Article 1(1)(c) is understood to cover all areas of action against trafficking in human beings, not just investigation and prosecution. 'Action against trafficking in human beings' includes prevention and assistance to victims as well as criminal law measures.[90] Article 32 (General principles and measures for international co-operation) further stresses that the State Parties should co-operate among each other to the 'widest extent possible' for protection, prevention and investigations or proceedings.[91] Also, in relation to Article 33 (Measures relating to endangered or missing persons), GRETA stresses the importance of international co-operation in particular concerning missing children.[92]

87 *Rantsev v. Cyprus and Russia*, App no 25965/04 (ECtHR, 7 January 2010) para 288.

88 *Chowdury and Others v. Greece*, App no 21884/15 (ECtHR, 30 March 2017) para 116.

89 *Rantsev v. Cyprus and Russia*, para 307.

90 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 43.

91 CoE Convention against Trafficking, Art 32 (General principles and measures for international co-operation). The understanding of 'international cooperation' and its importance for prevention, assisting of victims and prosecution is also stressed by GRETA in its reports. See for instance GRETA, *Report on Finland*, I GRETA(2015)9, para 98.

92 GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 196. GRETA, *Report on Romania*, II GRETA(2016)20, para 207.

ARTICLE 2

SCOPE

Nora Katona and Helmut Sax

This Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime.

A. INTRODUCTION

Article 2 plainly declares that the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] applies to all forms of trafficking in human beings. First, this means that all types of trafficking, as defined in Article 4(1), are covered, irrespective of purposes or whoever the victim is. Second, the scope of the Convention is broader than the United Nations Convention against Transnational Organized Crime (UNTOC)[2] and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[3] as the CoE Convention explicitly applies whether the trafficking is of national or transnational nature and whether or not related to organised crime.[4] Accordingly, domestic cases of trafficking without any cross-border dimension also trigger the application of the Convention's Chapters II to VI (Prevention, co-operation and other measures; Measures to protect and promote the rights of victims, guaranteeing gender equality; Substantive criminal **2.01**

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (CoE Convention against Trafficking or Convention).

2 UN Convention against Transnational Organized Crime, 2225 UNTS 209, entered into force 29 September 2003, Art 3(1).

3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

4 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 14.

law).[5] Furthermore, in cases of transnational trafficking, the Convention is applicable—in principle, with some exceptions—irrespective of the legality of entry and stay in the country.

2.02 While new legal instruments often aim to narrow down their scope of application,[6] this is not the case for the CoE Convention against Trafficking. In respect to the UNTOC and the Palermo Protocol, which are universal instruments, the Convention defines its scope broader than the United Nations (UN) documents,[7] with the explicit intention to 'enhance the protection afforded' to victims.[8] *Gallagher* summarised that the Convention 'is defined, at least in part, by what the UN Trafficking Protocol *is not* '.[9]

B. DRAFTING HISTORY

2.03 In the years leading up to the development of the CoE Convention against Trafficking, a number of legal documents adopted by the Committee of Ministers and the Parliamentary Assembly of the CoE directly addressed trafficking in human beings.[10] A set of recommendations started already in 1991 and continued throughout the drafting process in the following decade. A majority of the recommendations were similar in terms of dealing with the special protection of women and children from trafficking,[11] but often in different contexts, such as sexual exploitation, migration, 'domestic slavery', trafficking in organs, terrorism and the emergence of new technologies. At a meeting to discuss the proposal for a convention on trafficking, organised by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the CoE during the 2002 session of the UN Commission on Human Rights, the UN High Commissioner for Human Rights urged the CoE to use the planned instrument to further strengthen the achievements of the Palermo process and to cover all types of trafficking and groups of victims.[12]

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5 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 61.

6 See on this for instance CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings*: *Contributions by the delegation of Norway and by the observer Mexico*, CAHTEH(2003)8 rev 2, Addendum II, 1 December 2003, 10.

7 CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH(2003)RAP2, 26 January 2004, para 17. See also Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 36.

8 CoE Convention against Trafficking, Art 39. See also, CoE Convention against Trafficking, Preamble ('improving the protection').

9 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 114 (emphasis added by the original author).

10 For an overview of instruments and developments, see Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, paras 10 et seq., and, Gallagher, *The International Law of Human Trafficking*, 110 et seq.

11 See, for instance, Committee of Ministers, Recommendation No. R(2000)11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation, 19 May 2000 and Committee of Ministers, Recommendation No. R(2001)16 of the Committee of Ministers to Member States on the protection of children against sexual exploitation, 31 October 2001.

12 Office of the High Commissioner for Human Rights, Council of Europe, *Panel Discussion on Combating Trafficking in Human Beings: A European Convention*, Palais des Nations, 9 April 2002, Address by the United Nations High Commissioner for Human Rights; cited after Anne T Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 *European Journal of Migration and Law* 163, 171–2.

2.04 Initially, there was no consensus among the CoE Member States about the need for a legally binding regional document, especially so soon after the adoption of the Palermo instruments. From 2002 to 2003, the CoE bodies on gender equality and on crime issues started consultations, and inquiries were sent out to Member States to receive their opinions on the feasibility of a specific European Convention on Action against Trafficking in Human Beings. In 2003 at last, a majority emerged from a broad range of responses in favour of a regional document, building on the Palermo Protocol trafficking definition and enhancing the protection of rights of victims, based on a human rights approach.[13]

2.05 Consequently, at the first meeting of the new Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) in September 2003, it was determined to replicate the Palermo Protocol definition of trafficking, and that the future European convention would cover all aspects of trafficking regardless of its connection to organised crime. It was also decided that trafficking required being looked at from a transnational and a national perspective.[14] Finally, it was also made clear that the Convention would cover all victims of trafficking; therefore, it would include men, women and children.

2.06 Throughout the drafting process, a number of individual countries and organisations were asked to provide comments on the text of the Convention. However, no specific States or organisations discussed Article 2 except the observer of Mexico. The latter remarked that the 'scope of application of a treaty are usually drafted to establish limits to its personal, material and temporal scope. Article 2 does not have that purpose. If the intention is to have a European Convention applicable in all instances, article 2 could be deleted'.[15] This approach was not adopted by the CAHTEH. The *travaux préparatoires* reveals only limited discussion on the matter of the scope of the Convention, except for the relationship to the Palermo documents.

2.07 During the second CAHTEH meeting, some of the delegations and observers again raised concerns that the broad scope of the Convention would undermine the Palermo Protocol. In the end, however, the Committee reaffirmed its decision that the Convention applied to both national and transnational trafficking regardless of any connection to organised crime.[16] This explicit reference was seen to strengthen the already existing standards.

2.08 In 2004, a revised draft of the Convention was adopted in which the scope of the Convention was defined as applying 'to all forms of trafficking in human beings, whether national or transnational, whether or not related to organised crime'.[17] Later in 2004, the draft Explanatory Report to the Convention, for the first time, addressed the issue of residence status, by stating that the Convention will cover both victims who entered and are present in a country

13 See Committee of Ministers, 838th Meeting of the Ministers' Deputies, CM(2003)42, 838th Meeting, 30 April 2003 (Proposal to prepare a draft Council of Europe Convention on action against trafficking in human beings – Opinion of the Bureau of the European Committee on Crime Problems (CDPC) on the summary of the feasibility study on a Council of Europe Convention on Action against Trafficking in Human Beings) paras 13–16.

14 CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, paras 24–25.

15 CAHTEH(2003)8 rev 2, Addendum II, 10.

16 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 17.

17 CAHTEH, *Revised draft Europe Convention on Action against Trafficking in Human Beings: Following the 3rd meeting of the CAHTEH (3–5 February 2004)*, CAHTEH(2004)8, 12 February 2004, 6.

legally as well as those who entered and are present illegally. Minor changes to the text of Article 2 were made in the final draft; the term 'related to' was replaced by 'connected with' organised crime.[18]

C. ARTICLE IN CONTEXT

1. Article 2 and other related provisions of the CoE Convention against Trafficking

2.09 Article 2 delimits the overall material, personal and temporal scope of application of the Convention. Concerning the substance of trafficking, Article 4 contains the definition, which, in line with Article 18 (Criminalisation of trafficking in human beings), forms the basis for criminalising this phenomenon in domestic law, and for which Article 31 (Jurisdiction) requires the State Parties to adopt also necessary measures to establish domestic jurisdiction over such offences. Together, these provisions reflect the full scope of the Convention.

2.10 The relationship between the scope of applicability of the Convention and regular entry and stay of trafficking victims in a country was first mentioned in the 2004 draft Explanatory Report. In the final version regarding Article 2, the Report clarifies that 'in the case of transnational trafficking', the Convention applies to all victims of trafficking, irrespective of whether they entered or are legally present in the territory of the receiving party or not.[19] Additionally, the Report refers to situations when persons are taken illegally into the country, for example, when forced or deceived into such situations. Further, it states that persons may also enter a country 'legally as tourists, future spouses, artists, domestic staff, au pair girls or asylum seekers'. The Convention, in principle, is applicable for both types of situations, irrespective of residence status.[20]

2.11 On the other hand, by linking exclusively transnational trafficking with residence status, the Explanatory Report[21] also reveals an ambiguous, imprecise concept of national trafficking, meaning trafficking within a country, as part of the trafficking definition. For example, when undocumented migrant workers are exploited in one country and continue to be trafficked to other areas within the same country, these cases are not be considered as transnational trafficking anymore. Nevertheless, residence status still matters in terms of continued vulnerabilities and access to rights.[22]

2. Article 2 and other related international and regional standards

2.12 One of the main differences between the Convention and the Palermo Protocol relates to the scope of its application. As explained above, the Convention aims to address trafficking in all

18 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, Appendix III, 16 March 2005, 48.

19 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 62.

20 On the relationship with Articles 13 and 14, also with respect to the non-discrimination principle, see below.

21 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 62.

22 See Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 41, for a critical assessment of Art 2 in the light of the transnational origins of the Palermo Protocol trafficking definition.

its forms comprehensively,[23] while, according to Article 4 (Scope of application) of the Palermo Protocol, it 'shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with Article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group (…)'. This is clearly owed to the fact that both the UNTOC and its Protocols are instruments of transnational criminal law, aimed at inter-state co-operation and domestic suppression of crimes.[24] The Palermo Protocol does not adopt a human rights approach and as *Gallagher* has remarked 'a State will not be breaching either the letter or the spirit of the Convention if it decides to provide no material, medical, or other assistance whatsoever to any victim of trafficking within its territory'.[25]

2.13 The European Union (EU) Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims,[26] on the other hand, states, at least, in its fourth preambular paragraph its commitment 'to the prevention of and fight against trafficking in human beings, and to the protection of the rights of trafficked persons'.[27] Still, the competence for enacting EU legislation in the field of trafficking is taken from Articles 82(2) and Article 83(1) of the Treaty on the Functioning of the EU, which deals with judicial co-operation in criminal matters and particularly serious crime with a cross-border dimension.[28] The EU Directive's Preamble refers to trafficking as 'a serious crime, often committed within the framework of organised crime', but does not contain a statement on national trafficking inside a country similar to the Convention.

D. ISSUES OF INTERPRETATION

1. Application to all forms of trafficking in women, children and men

2.14 Despite the long-standing focus in earlier anti-trafficking documents by the CoE on women and girls only,[29] agreement was reached in the end that the Convention covers all persons who are victims of trafficking, including women, children and men.[30] As an additional step, the drafters of the Convention, in Article 4(e), decided to include an explicit and broad definition of 'victim' of trafficking, to mean 'any natural person who is subject to trafficking in human beings', as defined in Article 4 of the Convention. Taken together with Article 3 (non-discrimination principle) of the Convention, with preambular paragraph 5 on a child-rights

23 Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2012) 45.

24 Stoyanova, *Human Trafficking and Slavery Reconsidered*, 25 et seq.

25 Gallagher, *The International Law of Human Trafficking*, 83.

26 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (thereinafter Dir 2011/36/EU) (OJ L 101/1).

27 For aspects of a human rights approach in Dir 2011/36/EU, see, for instance, OHCHR, UNHCR, UNICEF, UNODC, UN Women, ILO, *Prevent. Combat. Protect – Human Trafficking. Joint UN Commentary on the EU Directive – A Human Rights-Based Approach*, November 2011, 18.

28 See Stoyanova, *Human Trafficking and Slavery Reconsidered*, 29: 'any engagement with human trafficking by the EU is situated within the context of immigration control and co-operation among states in criminal matters'.

29 See section B above.

30 Gallagher, 'Recent Legal Developments in the Field of Human Trafficking', 171; CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, para 26.

approach as well as Articles 1(1)(a) and 17 (gender equality), this approach aims to prevent any discrimination of any group of victims in protection and promotion of their rights under this treaty.

2. 'whether national or transnational'

2.15 Transnational crime is generally defined as 'criminal phenomena transcending international borders, transcending the laws of several states or having an impact on another country'.[31] Accordingly, inter-state crimes can be equally defined as transnational if they have effects beyond the state's border.[32] This broad definition of transnational criminal law is reflected in Article 3(2) of the UNTOC, which states that an offence is transnational in nature if:

> (a) it is committed in more than one State; (b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) it is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or (d) it is committed in one State but has substantial effects in another State.[33]

2.16 Furthermore, transnational crimes may be committed by private or non-State actors, although State actors can be involved in the commission as well.[34] However, it should be noted that the trafficking definition itself, as contained in Article 3 of the Palermo Protocol, does not include a requirement of transnational movement (or organised crime connection).[35]

2.17 Generally, transnational criminal law treaties are primarily concerned with international co-operation and criminalisation and not with the protection of rights of victims of crimes.[36] The CoE Convention, on the other hand, strives to attain 'a proper balance between matters concerning human rights and prosecution'.[37] Through the Convention's statement in Article1(1)(b) referring to the Convention's human rights protection purpose, substantive provisions (Chapter III) aimed at providing individual rights to protection and assistance of victims, and its independent monitoring mechanism (Chapter VII), the nature of the Convention has been changed towards a human rights treaty.[38]

2.18 As far as dealing with national trafficking, i.e. the elements of trafficking occur within one country, is concerned, 'intriguing questions about the meaning of human trafficking' can be raised.[39] This is because the Convention cannot deny its roots of the international trafficking discourse originating from cross-border movement of persons for exploitative purposes. This

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31 Gerhard Mueller, 'Transnational Crime: Definitions and Concepts' in Phil Williams and Dimitri Vlassis (eds), *Combating Transnational Crime: Concepts, Activities, Responses* (Frank Cass 2001) 13; Stoyanova, *Human Trafficking and Slavery Reconsidered*, 25.

32 Stoyanova, ibid., 26.

33 UNTOC, Art 3(2)(a)(d).

34 Stoyanova, *Human Trafficking and Slavery Reconsidered*, 25.

35 Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) *Virginia Journal of International Law*, 812.

36 Boister, *An Introduction to Transnational Criminal Law*, 278.

37 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 29. Stoyanova, *Human Trafficking and Slavery Reconsidered*, 27.

38 Gallagher, *The International Law of Human Trafficking*, 114.

39 Stoyanova, *Human Trafficking and Slavery Reconsidered*, 28.

starts with the trafficking definition, especially the 'action' element, with further evidence in provisions about trafficking prevention through border control and travel identity checks (Arts 7–9), the problematic distinction in access to certain services depending on lawful residence (for example, Article 12(3) and(4)) and the general relationship with residence status (Art 14) and protection from expulsion and forced return (Arts 13 and 16), and an entire Chapter VI on international co-operation. Leaving aside the entire cross-border dimension of trafficking in order to address national trafficking makes some conceptual challenges visible, especially related to the trafficking definition and the distinct nature of trafficking vis-à-vis other offences in the field of exploitation of persons. National trafficking may happen within the same neighbourhood, between households, even without movement, since also harbouring a domestic worker in a vulnerable position with exploitative intention would meet the trafficking definition. As the evaluation practice by the Group of Experts on Action against Trafficking in Human Beings (GRETA), the Convention's monitoring mechanism, has shown, many governments struggle to address national trafficking in data collection, strategies, policy-making, identification and referral for assistance.[40]

3. 'Whether or not connected with organised crime'

2.19 Again, the origins of the terminology 'whether or not connected with organised crime' can be found in the Palermo Protocol and its scope of application. Article 2(a) of the UN Transnational Organized Crime Convention explains that:

> 'organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

2.20 Based on this, the Palermo Protocol defines its scope of application in relation to offences involving an 'organized criminal group' (Art 4). Despite this definitional attempt, the 'nature and extent of organized crime threats remain deeply contested terrain'. The drafters of the Convention decided to leave out any reference to such criterion in terms of the scope of application.

2.21 The ways and structures of operation of criminal groups vary from country and type of exploitation to target groups involved, extending beyond stereotypical images of 'mafia-style' groups. In the case of trafficked children, parents, close relatives and other persons of trust may be involved in the trafficking process, creating particular challenges for social workers and child protection authorities to identify victims and break through cycles of dependency. In its monitoring work, GRETA has observed difficulties in particular in relation to the provision of guardianship services, both for unaccompanied children and for those accompanied by persons, where worries about possible involvement in the trafficking process have been raised.[41]

40 GRETA, *4th General Report on GRETA's Activities*, March 2015, 35 and 42.

41 GRETA, *6th General Report on GRETA's Activities*, March 2017, paras 110–111 and paras 128–131.

4. Regular entry and stay

2.22 Although not mentioned in the text of Article 2, the drafters of the Explanatory Report to the Convention felt it important to assert that 'the Convention applies both to victims who legally entered or are legally present in the territory of the receiving Party and those who entered or are present illegally'.[42] As already described above, the Report continues to provide some examples for such relevant situations, ranging from entry as tourists to asylum-seekers. Such conclusion in relation to residence status could also be argued from the point of the definition of a victim of trafficking under Article 4(e), which refers to any person 'subjected to trafficking' as defined in this provision, and including any human being irrespective of sex and age.[43] In addition, general human rights obligations to protect, fulfil and respect as well as, more specifically, obligations to protect victims of trafficking would prevent governments from exempting persons with for instance irregular residence status from the scope of applicability of the Convention. In *Chowdury v. Greece*, the European Court of Human Rights considered the irregular migration status of farmworkers as an element of vulnerability contributing to a forced labour situation under Article 4 of the European Convention on Human Rights (ECHR), while refering to the Convention and its interpretation by GRETA.[44]

2.23 At the same time, the Convention contains a few provisions in which reference is made to lawful stay in the country as a condition for access to certain services, such as Article 12(3) (Access to necessary medical assistance), Article 12(4) (Access to the labour market). Apart from that, the Explanatory Report states that 'certain specific provisions (Arts 13 and 14) apply only to victims illegally present'.[45] This statement is misleading in its width of scope, as those provisions (about recovery and reflection period, about renewal residence permit) may be relevant for victims in situations also of regular stay, but who are under immediate threat of termination due to, for example, time limits of the residence status or the need for a renewal of residence.

42 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 62.

43 See section D.1 above.

44 *Chowdury and others v. Greece*, App no 21884/15 (ECtHR, 30 March 2017) para 104. See also, Vladislava Stoyanova, 'Sweet Taste with Bitter Roots: Forced Labour and Chowdury and Others v Greece' (2018) 1 *European Human Rights Law Review*, 67.

45 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 62.

ARTICLE 3

NON-DISCRIMINATION PRINCIPLE

Julia Planitzer

The implementation of the provisions of the Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

A. INTRODUCTION

3.01 The non-discrimination principle of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] obliges Parties to implement all provisions of the Convention in a non-discriminatory manner since all provisions 'shall be secured without discrimination'. Trafficked persons should be able to enjoy for instance the rights defined in Chapter III (Measures to protect and promote the rights of victims, guaranteeing gender equality) of the Convention and the rights defined for the protection of witnesses (Art 28) without discrimination. The wording of Article 3 largely follows the wording of Article 14 of the European Convention on Human Rights (ECHR).[2] Attempts during the Convention's drafting process to amend the non-discrimination clause and add further grounds of discrimination remained unsuccessful.

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 4 November 1950, entered into force 3 September 1953.

B. DRAFTING HISTORY

1. The list of non-discrimination grounds

3.02 In Recommendation 1545 (2002) on a campaign against trafficking in women, the Parliamentary Assembly recommended the drafting of a convention on trafficking in women which should include a non-discrimination clause.[3] The Assembly attempted, unsuccessfully, to lobby for a non-discrimination clause, which had already been proposed two years earlier for Protocol No. 12 to the ECHR.[4] [5] In 2000, the Parliamentary Assembly proposed to use a non-discrimination clause that was not identical with the one used in Article 14 of the ECHR. The proposed clause contained a reference to the principle of equal rights for women and men and lists also 'sexual orientation' as an additional ground. The proposed non-discrimination clause reads as follows:

> 1. Men and women are equal before the law.
>
> 2. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (…).[6]

3.03 In the 1st meeting of the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH), it was decided to include the non-discrimination principle, by referring to the longer version, including a reference to the principle of equal rights for women and men as mentioned above.[7] During the 2nd CAHTEH meeting, the discussion on Article 3 continued, but the version discussed at that point was the non-discrimination clause identical to Article 14 of the ECHR,[8] hence the proposal of the Parliamentary Assembly was not used. Discussions of the CAHTEH led to the inclusion of the reference that the implementation of the convention by the Parties, 'in particular the enjoyment of measures to protect and promote the rights of victims' shall be secured without discrimination.[9] The observer of Mexico proposed to include, as further grounds, 'the principles of ethnic origin, nationality, age, economic situation and legal status'.[10] The Secretariat indicated that 'the list of non-discrimination criteria was an open list and identical to the one in Article 14 of the [ECHR]'[11] and the CAHTEH decided to maintain it.

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3 Parliamentary Assembly, Recommendation No. 1545 (2002) Campaign against trafficking in women, 21 January 2002, para 11(ii)(d).

4 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 177, 4 November 2000, entered into force 1 April 2005 (thereinafter Protocol No. 12).

5 Parliamentary Assembly, Recommendation No. 1545 (2002), para 11(ii)(d), refers to a 'non-discrimination clause modelled on the one proposed by the Assembly in Opinion No. 216 (2000) on draft Protocol No. 12 to the European Convention on Human Rights.'

6 Parliamentary Assembly, Opinion No. 216 (2000) on the draft Protocol No. 12 to the European Convention on Human Rights, 26 January 2000, para 9.

7 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, paras 17–19.

8 CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH(2003)RAP2, 26 January 2004, para 19.

9 Ibid., para 21.

10 CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Norway and by the observer of Mexico*, CAHTEH(2003)8 rev 2, Addendum II, 1 December 2003, 10.

11 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 20.

3.04 During the 5th meeting, the CAHTEH examined Article 3 in a second reading.[12] France suggested to amend the wording and use the term '*le bénéfice*' instead of '*la jouissance*' (enjoyment).[13] It was decided to stick to the term '*la jouissance*', which is also used in Article 14 of the ECHR and Article 1 of Protocol No. 12. However, the CAHTEH decided to replace '*distinction*' (distinction) with '*discrimination*' (discrimination) in order to be in line with the wording of Article 1 of Protocol No. 12.[14] United Nations International Children's Emergency Fund (UNICEF), as an observer, undertook a further attempt to include age as an additional ground but did not succeed.[15]

3.05 The principle of non-discrimination was further emphasised by its inclusion in the Convention's preamble. Sweden proposed the addition of 'all actions or initiatives against trafficking in human beings should be non-discriminatory (…)',[16] to which the CAHTEH agreed to during its 7th meeting.[17]

3.06 Article 3 would have been an option to include further grounds and in turn, follow the trend started by the Charter of Fundamental Rights of the European Union.[18] The Charter was adopted in 2000, and the drafters added further grounds such as disability or sexual orientation.[19] Similar to the development of Article 1 of Protocol No. 12, the drafters opted for a more conservative approach[20] and limited the list of grounds to those mentioned in Article 14 of the ECHR. The discussions around Article 1 of Protocol No. 12 might have served as a model for the discussion under Article 3. Concerning both provisions, the drafters deemed the inclusion of additional grounds as legally unnecessary, since 'the list of non-discrimination grounds is not exhaustive and inclusion of any specific additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included'.[21]

12 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 5.

13 CAHTEH, *Projet de Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains: Contribution des délégations de la France et de la Suisse*, CAHTEH(2004)13, Addendum I, 9 June 2004, 5.

14 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 49.

15 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004, 47 and CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 50.

16 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers*, CAHTEH(2004)24, 19 November 2004, 21.

17 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 15.

18 Charter of Fundamental Rights of the European Union, 2010 OJ C 83/02, 30 March 2010 (thereinafter the EU Charter of Fundamental Rights).

19 EU Charter of Fundamental Rights, Art 21.

20 William A. Schabas, *The European Convention on Human Rights – A Commentary* (Oxford University Press 2015) Part Seven: Protocol No. 12, 1184.

21 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 66 and Council of Europe, *Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 177, 4 November 2000, para 20.

2. 'Due respect of the rights of children'

3.07 The Organization for Security and Cooperation in Europe (OSCE) suggested adding a special provision on the rights and needs of children to Article 3:

> The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured with due respect of the rights of children and in consideration of their special needs. References to such rights and needs of children in specific articles of this Convention shall not be construed as excluding the application of this principle to the remaining articles of the Convention where such reference has not been made.[22]

3.08 In the 5th CAHTEH meeting, the arguments against a specific provision were that the wording would be overly general and could, therefore, weaken the text of the Convention. Furthermore, the general provision could duplicate other child-specific provisions in articles, as could be found in articles of Chapter III. The third argument against a general provision was that the preamble would anyway require a – at that stage of the drafting process – 'child-sensitive approach' for all actions or initiatives against trafficking in human beings.[23] The provision proposed would have been an additional explicit obligation for the State Parties to ensure that all provisions of the Convention are implemented with due regard to the rights and needs of children. Additionally, 'age' is not explicitly mentioned as one of the non-discrimination grounds in Article 3. Nevertheless, a reference to a child-rights approach in the preamble and the child-specific provisions ensure the recognition of a general child-rights approach of the Convention.

C. ARTICLE IN CONTEXT

1. Article 3 of the CoE Convention against Trafficking and Article 14(2) of the Palermo Protocol

3.09 Article 14(2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[24] states:

> (t)he measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the grounds that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

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22 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 41.

23 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 52. The wording 'child-sensitive approach' was replaced, as proposed by UNICEF, by 'child rights approach'. See CAHTEH, *CoE Draft Convention against Trafficking: Comments by the delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers*, CAHTEH(2004)24, 25.

24 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

3.10 The second sentence is a saving clause meaning that the provisions of the Palermo Protocol should not prevent the enjoyment of other rights established under other treaties.[25] The first sentence of Article 14(2) of the Palermo Protocol is, to a certain extent, comparable to Article 3 of the Convention, since it also refers to a non-discriminatory application of the provisions. Article 14(2) declares that the measures in the Protocol are to be applied and understood in a way that is not discriminatory to persons because they are victims of trafficking. Article 3 of the Convention does not contain such a measure. During the drafting process, a similar saving clause for Article 3 was proposed, arguing that next to the non-punishment provision, additional specific language would be useful.[26]

3.11 The non-discrimination principle in the Convention is formulated in a stronger way and is more detailed than Article 14(2) of the Palermo Protocol.[27] Article 3 clearly prohibits a discriminatory implementation of the provisions,[28] which includes the implementation of the Convention by national law. The Legislative Guide to the Palermo Protocol states, in contrast, that its non-discrimination clause 'focuses on the interpretation of the Protocol and not the national law that implements it'.[29] The Legislative Guide leaves it open to the State Parties to apply the principle or not and rather recommends it asserting that 'drafters may wish to consider the principle of non-discrimination in drafting specific provisions (…)'.[30]

2. Relationship between the CoE Convention against Trafficking and the ECHR

3.12 Article 3 uses a list of non-discrimination grounds that is identical to the list in Article 14 of the ECHR and Article 1(1) of Protocol No. 12 of the ECHR. As shown in the discussion of the drafting history, the drafting of Article 3 followed the reasoning of Article 1(1) of Protocol No. 12. The main difference between Article 14 of the ECHR and Article 1 of Protocol No. 12 is that Article 1 of Protocol No. 12 is not an accessory to the rights and provisions of the Convention and the Protocol. Article 14 of the ECHR is applicable when the facts of a case fall within the scope of other substantive provisions of the ECHR, such as the right to a fair trial (Art 6 of the ECHR). This requirement does not exist for Article 1 of Protocol No. 12; hence, the 'scope of application of the prohibition of discrimination is extended'.[31] Article 3 of the Convention refers to the implementation of the provisions of the Convention. Consequently, Article 3 should ensure that measures such as assistance under Article 12 of the Convention should be applied without discrimination.[32]

3.13 Analysis of the case-law of the European Court of Human Rights (ECtHR) relevant to trafficking in human beings shows that the issue of non-discrimination plays only a minor role.

25 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 19.

26 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers*, CAHTEH(2004)24, 19 November 2004, 28.

27 Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 458.

28 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 63.

29 UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN 2004), 256, para 20.

30 Ibid.

31 Christoph Grabenwarter, *European Convention on Human Rights – Commentary* (C.H. Beck, Hart, Nomos, Helbing Lichtenhahn Verlag 2014) 444–5.

32 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, paras 67–68.

While there is no case-law related to trafficking in human beings in which Article 4 of the ECHR (Prohibition of slavery and forced labour) is applied in conjunction with Article 14 of the ECHR (Prohibition of discrimination), the ECtHR discussed Article 14 of the ECHR in *M. and others v. Italy and Bulgaria*.[33] The applicants, a Romani family from Bulgaria, moved to Italy following an alleged promise of work in the place of another Romani man. According to the applicants, the parents were forced to leave their then 17-year-old daughter behind, who was then kept under constant surveillance and was forced to steal against her will, was beaten, threatened with death and repeatedly raped.[34] The mother filed a complaint with the Italian police reporting that her daughter was kidnapped. Following interviews, the Italian police initiated proceedings against the mother for perjury and libel, since the authorities concluded that an agreement about marriage took place.[35] The ECtHR found that the circumstances could have amounted to trafficking in human beings, but due to a lack of evidence, trafficking in human beings could not be proven and therefore did not apply Article 4 of the ECHR.[36] However, the Court found a violation of Article 3 of the ECHR concerning the ineffectiveness of investigation. The applicants stated that they had been discriminated against by the authorities who handled their case. According to the ECtHR, Article 14 of the ECHR would not have been violated, since the treatment by the Italian authorities 'cannot be said in any way to have racist overtones'[37] and that the failure to investigate adequately was not 'a consequence of discriminatory attitudes'.[38] Judge Kalaydjieva discusses in her dissenting opinion that the action of the Italian authorities was carried by the assumption that 'the applicants had been telling lies from the outset' and a certain understanding of what a 'Roma marriage' includes.[39] The Court's finding on Article 14 of the ECHR raised criticism since these assumptions can be interpreted as discriminatory behaviour that might have indeed influenced the investigation.[40]

3.14 *B.S. v. Spain*[41] does not directly deal with trafficking in human beings, but the Court found a violation of Article 3 of the ECHR (prohibition of torture) because police officers verbally and physically abused a woman from Nigeria working as a prostitute and the authorities' investigations of this matter were not sufficiently thorough and effective.[42] The Court did not further elaborate on the government's submission that the action 'had taken place in the context of the implementation of preventive measures designed to combat networks trafficking in immigrant women', but held that this could not justify discriminatory treatment.[43] The behaviour described in the judgement shows that responses to trafficking in human beings can be discriminatory and thereby stresses the importance of the explicit non-discrimination principle for the implementation of the Convention.

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33 *M. and others v. Italy and Bulgaria* App no 40020/03 (ECtHR, 17 December 2012).
34 Ibid., para 9.
35 Ibid., paras 23–25.
36 Ibid., para 154.
37 Ibid., para 178.
38 Ibid., para 179.
39 Ibid., dissenting opinion of Judge Kalaydjieva.
40 See Alexandra Timmer, 'The Court on Racial Discrimination (Part I): M. and Others v. Italy and Bulgaria', Strasbourg Observers (2012) <https://strasbourgobservers.com/2012/10/09/the-court-on-racial-discrimination-part-i-m-and-others-v-italy-and-bulgaria/> accessed 14 February 2020.
41 *B.S. v. Spain* App no 47159/08 (ECtHR, 24 July 2012).
42 Ibid., para 47.
43 Ibid., para 46.

D. ISSUES OF INTERPRETATION

1. The concept of 'discrimination'

3.15 Discrimination means treating people differently in 'relevantly similar situations', 'without an objective and reasonable justification'.[44] Or, discrimination is present, 'if a person or group is treated, without proper justification, less favourably than another'.[45] In order for a state to justify different treatment in similar situations, a legitimate aim has to be pursued, and there must be a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention. The fair balance needs to be a reasonable relationship of proportionality between the means employed, and the aim sought to be realised.[46] Different treatment therefore can be justified when there is: (1) a legitimate aim and; (2) when the measure complies with the principle of proportionality.

3.16 States have a wide margin of appreciation when they assess whether different treatment can be justified or not. The scope of the margin of appreciation varies 'according to the circumstances, the subject-matter and its background'.[47] States can define the legitimate aim, and in most cases, the ECtHR finds that differences in treatment pursue a legitimate aim.[48] The principle of proportionality can be assessed on different levels. One factor of proportionality is whether there is a possibility of alternative – less intrusive – means for achieving the same end.[49] Further factors can be the assessment of a balance between the aim pursued and the means used. Grabenwarter summarised that:

> where a difference in treatment is based on a legal status that contains an element of choice (such as the immigration status), the justification required is not as weighty as where a different treatment is based on inherent or immutable personal characteristics (such as sex or race) or where there is no such element of choice (for example refugee status).[50]

For differences based on nationality, 'very weighty reasons have to be put forward before the Court'[51] to be compatible with the ECHR. In relation to (un-)equal treatment of foreigners and nationals, statelessness or the refugee status narrows the margin of appreciation of states in order to be non-discriminatory. The ECtHR case-law shows that the room for differentiation also depends on the nature of the right at stake and decided, for instance, that the margin of appreciation for the state was narrow concerning the right to education.[52]

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44 See for instance *Nachova and others v. Bulgaria* App no 43577/98 and 43579/98 (ECtHR, 6 July 2005) para 145.

45 *Abdulaziz, Cabales and Balkandali v. UK* App no 9214/80, 9473/81, 9474/81 (ECtHR, 28 May 1985) para 82.

46 Schabas, *The European Convention on Human Rights – Commentary*, Part Two: European Convention on Human Rights, 565 and Grabenwarter, *European Convention on Human Rights – Commentary*, Article 14, para 11.

47 *Rasmussen v. Denmark* App no 8777/79 (ECtHR, 28 November 1984) para 40.

48 Grabenwarter, *European Convention on Human Rights – Commentary*, Art 14, para 13.

49 Schabas, *The European Convention on Human Rights – A Commentary*, 565.

50 Grabenwarter, *European Convention on Human Rights – Commentary*, Art 14, para 15.

51 *Gaygusuz v. Austria* App no 17371/90 (ECtHR, 16 September 1996) para 42.

52 Evelien R. Brouwer and Karin M. de Vries, 'Third-Country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach' in Marjolein van den Brink, Susanne Burri, and Jenny Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble?* (Netherlands Institute of Human Rights 2015) 134. *Ponomaryovi v. Bulgaria* App no 5335/05 (ECtHR, 28 November 2011).

3.17 *Bah v. UK*[53] is one example that shows, that, according to Dembour, 'it may not be very difficult for states to justify a difference of treatment on the ground of immigration status'.[54] Different treatment of nationals and migrants does not have to be justified by very weighty reasons. Since 'immigration status is not an inherent or immutable personal characteristic such as sex or race' (…), the 'justification required will not be as weighty as in the case of a distinction based, for example, on nationality'.[55] In *Bah v. UK*, the applicant arrived in the UK as an asylum seeker from Sierra Leone. The applicant's son joined her some years later with a conditional leave to remain in the UK. The son lived in the UK on the condition that he would not need public funds and was considered as being 'subject to immigration control'. The applicant applied for housing assistance, but priority in the allocation of social housing was refused on the basis of her son's immigration status. The ECtHR found that the different treatment based on the immigration status of the applicant's son did not violate Article 14 of the ECHR in conjunction with Article 8 of the ECHR (Right to respect for private and family life, home and correspondence). The ECtHR referred to an 'element of choice involved in immigration status',[56] which would justify, to a certain extent different treatment. Since the argument of an 'element of choice' in relation to the immigration status of trafficked persons is limited, the immigration status does not seem to be an adequate ground to assess the differentiation made between nationals and trafficked persons who are migrants. Differentiations made for instance in accessing medical treatment, education or the labour market, should be rather assessed based on a status that contains no element of choice such as for instance the refugee status or nationality. Due to the lack of the 'element of choice' in context of trafficking in human beings, it could be argued that states would need to put forward very weighty reasons in order to justify different treatment.

2. The list of non-discrimination grounds

3.18 The Convention's Explanatory Report refers to Article 14 of the ECHR and states that 'the meaning of discrimination in Article 3 is identical to the one given under Article 14'.[57] Hence, the case-law of the ECtHR concerning Article 14 of the ECHR plays a vital role. As discussed above,[58] Article 3 of the Convention also uses the same list of grounds as the one given in Article 14 of the ECHR, but the list is not exhaustive. The ECtHR applies Article 14 of the ECHR also to discrimination grounds that are not explicitly mentioned in the list.[59] Discrimination on the grounds of sexual orientation and gender identity play an important role in trafficking in human beings. Some of the State Parties identify, for instance, trafficking in

53 *Bah v. UK* App no 56328/07 (ECtHR, 27 September 2011).

54 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 277.

55 *Bah v. UK* para 47.

56 Ibid.

57 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 63.

58 See section B on the drafting history above.

59 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 66. In *Identoba and others v. Georgia* App no 73235/12 (ECtHR, 12 May 2015), the ECtHR held in para 96 that the 'prohibition of discrimination under Article 14 (…) duly covers questions related to sexual orientation and gender identity'. See further for instance *M.C. and C.A. v. Romania* App no 1206/12 (ECtHR, 12 April 2016): The applicants were attacked after visiting the annual gay march in Bucharest, but investigations were ineffective and did not take into account possible discriminatory motives. On issuing a residence permit for family reunification to different-sex couples but not to same-sex couples see *Pajić v. Croatia* App no 68453/13 (ECtHR, 23 February 2016).

transgender persons as an emerging trend or encompass in their outreach work also outreach to transgender persons.[60] Discrimination on the grounds of sexual orientation, gender identity or gender expression can be a root cause of trafficking in human beings.

3. Actions against discrimination to prevent trafficking in human beings

3.19 In general, the Group of Experts on Action against Trafficking in Human Beings (GRETA) recommends that the principle of non-discrimination as a preventive measure should be strengthened.[61] In GRETA's country monitoring work, the discussion of discrimination as a root cause of trafficking in human beings plays an important role. Measures to reduce discrimination are dealt with under Article 5 (Prevention of trafficking in human beings) of the Convention, and GRETA recommends to 'strengthen the prevention of THB through social, economic and other measures for groups vulnerable to THB (…)'.[62] GRETA has often noted discrimination as a root cause in the context of trafficking within the Roma community.[63]

3.20 In relation to discrimination of migrants in countries of destinations, GRETA highlights that discrimination of migrants raises their risk of being trafficked. Therefore, GRETA recommends the inclusion of measures to prevent trafficking in 'the policies for children of immigrant origin, asylum seekers and persons with protection status'.[64] GRETA refers to the findings and recommendations of the European Commission against Racism and Intolerance (ECRI),[65] which are also relevant for measures against trafficking. For instance, ECRI recommends increasing resources to assist persons with protection status to learn the language and integrate into society. Furthermore, equal access to education, including higher education, for children of immigrant origin, should be ensured. Additionally, asylum seekers who have been in the asylum process for a significant period of time should have access to paid employment.[66] Concerning Italy, GRETA also refers to asylum seekers and undocumented migrants, highlighting the link between discrimination and the crime of 'illegal entry and stay' and that both contribute to labour exploitation.[67]

3.21 ECRI's General Policy Recommendations can be a guide for the interpretation of the obligations in Article 12(1)b of the Convention. Article 12(1)(b) obliges the State Parties to

60 GRETA, *Report on Italy*, I GRETA(2014)18, para 10; GRETA, *Report on Norway*, I GRETA(2013)5, para 157; GRETA, *Report on Austria*, II GRETA(2015)19, para 13.

61 GRETA, *Report on Romania*, I GRETA(2012)2, para 99.

62 GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 70.

63 See for instance GRETA, *3rd General Report*, October 2013, para 66. Also the UN Committee on the Elimination of Racial Discrimination (CERD) refers in its Concluding Observations concerning Albania to the fact that Roma and Egyptian women and children are disproportionately represented among victims of trafficking and that more efforts to prevent are necessary in order to implement Art 5 of the International Convention on the Elimination of All Forms of Racial Discrimination; see Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined ninth to twelfth periodic reports of Albania*, CERD/C/ALB/CO/9–12, 2 January 2019.

64 GRETA, *Report on Ireland*, I GRETA(2013)15, paras 128–129.

65 ECRI, *Report on Ireland* (fourth monitoring cycle), CRI(2013)1, 5 December 2012.

66 Ibid., paras 127, 105, 128.

67 GRETA, *Report on Italy*, I GRETA(2014)18, paras 114–116.

ensure access to emergency medical treatment, whereas the ECRI's General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination recommends offering, along with access to emergency medical treatment, 'other forms of necessary health care'.[68]

4. 'Implementation of the provisions of this Convention by Parties'

3.22 Article 3 should ensure non-discriminatory 'implementation of the provisions of this Convention by Parties'. This wording should define the extent of the prohibition on discrimination. Trafficked persons should not be discriminated against when Parties implement their obligations, such as measures to assist trafficked persons (Art 12 of the Convention).[69] In Germany, for instance, measures to support trafficked persons are organised at the provincial level (*Länder*), which can lead to differences in protection depending on their place of residence in Germany. GRETA, therefore, recommends greater coherence by more coordination among the federal and provincial level in order 'to protect victims without discrimination'.[70]

3.23 Various GRETA reports address discriminatory treatment based on the national origin of the trafficked person. In Luxemburg, trafficked persons from European Union (EU) countries were able to have access to paid employment, whereas victims from third countries faced difficulties in accessing the labour market. GRETA points out that for a non-discriminatory implementation of Article 12(4) (access to the labour market, to vocational training and education), all victims lawfully resident within the territory should have equal access to the labour market.[71] The Slovak Republic grants a recovery and reflection period (Art 13), but it is unclear whether this would also apply to victims who are EU citizens. Hence, GRETA urges the implementation of a recovery and reflection period that applies to all possible victims of trafficking.[72] With regard to access to compensation (Art 15), GRETA urges the State Parties to ensure 'that compensation is made available to all victims of THB, irrespective of their nationality and residence status'.[73] At the time of GRETA's country report in 2015, the Slovak Republic had a regulation on compensation in place that was only applicable to EU nationals and hence was discriminatory towards trafficked persons from third countries.

5. Discriminatory responses to trafficking in human beings

3.24 Responses to trafficking in human beings that could be discriminatory are discussed in GRETA's reports. For instance, Albania introduced higher sanctions for trafficking in women compared to trafficking in men and justified this by the majority of trafficked persons being women. In Albania's view, this measure aimed at having positive effects in addressing

68 ECRI, *General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination*, CRI(2016)16, 16 March 2016, para 21 and Explanatory Memorandum, 22. Emergency medical treatment and other forms of necessary health care as a minimum entitlement for all persons has been defined by the European Committee of Social Rights, in *FIDH v. France*, Complaint No. 14/2003, 3 November 2004.

69 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 67.

70 GRETA, *Report on Germany*, I GRETA(2015)10, paras 68–69.

71 GRETA, *Report on Luxembourg*, I GRETA(2013)18, paras 104 and 107. See also GRETA, *4th General Report*, March 2015, 49.

72 GRETA, *Report on Slovak Republic*, II GRETA(2015)21, paras 125 and 127.

73 GRETA, *Report on Slovak Republic*, I GRETA(2011)9, para 120.

gender-based violence. However, GRETA recommends reviewing the effectiveness of this different treatment in light of the non-discrimination principle[74] to make sure that the different treatment can be reasonably justified.

74 GRETA, *Report on Albania*, II, GRETA(2016)6, para 152.

ARTICLE 4

DEFINITIONS

Helmut Sax

For the purposes of this Convention:

a **'Trafficking in human beings' 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;**

b **The consent of a victim of "trafficking in human beings" to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;**

c **The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in human beings' even if this does not involve any of the means set forth in subparagraph (a) of this article;**

d **"Child" shall mean any person under eighteen years of age;**

e **"Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article.**

A. INTRODUCTION

4.01 Reflecting on the definitions contained in Article 4 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] inevitably leads to the core of the anti-trafficking discourse, and to the question of what constitutes trafficking in human beings. The Convention aims to provide answers here in relation to a legal definition of trafficking in human beings in general, as well as specifically in respect to child trafficking. Further, it presents a definition in relation to an understanding of the nature of being a 'victim' of trafficking and an interpretative statement concerning the (ir)relevance of any eventual consent to intended exploitation.

4.02 Most importantly, Article 4 of the Convention establishes a trafficking definition, which consists, in principle, of three distinct components, commonly referred to as the 'action' (such as recruitment of a victim), 'means' (any form of manipulation of the will of the victim to make eventual exploitation possible) and '(exploitative) purpose' elements (such as trafficking for the purpose of sexual exploitation or forced labour).

4.03 However, this conceptualisation of trafficking[2] was not the invention of the drafters of the CoE Convention against Trafficking. Instead, the Convention takes the definition from an earlier international document, namely of Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[3] This Protocol has been considered a decisive break-through in international law, providing, for the first time, an internationally accepted definition of trafficking after a conceptual struggle for almost 100 years. The Palermo Protocol has set the model definition for all future standard-setting processes, including at the regional level, be it the CoE Convention against Trafficking (Art 4), the Directive 2001/36/EU on preventing and combating trafficking in human beings (Art 2)[4] or the Convention Against Trafficking in Persons, Especially Women and Children (Art 2(a)) of the Association of Southeast Asian Nations (ASEAN).[5]

4.04 Considering the pioneering role of the Palermo Protocol's definition, the following analysis of Article 4 of the CoE Convention against Trafficking will draw also on interpretative guidance from that document, including the Palermo Protocol's drafting process. This is also because, as described by Gallagher, 'in the euphoria of securing an internationally agreed-upon definition, many legal and practical matters remain to be fully considered',[6] despite the apparently clear-cut three-element approach of the definition in the Palermo Protocol. One aspect still impacting the discussion relates to the nature and history of trafficking, in light of how the

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 See Anne T Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010) 29.

3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol), supplementing the UN Convention against Transnational Organized Crime, 2225 UNTS 209, entered into force 29 September 2003.

4 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

5 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017 (thereinafter ASEAN Convention against Trafficking in Persons).

6 Gallagher, 53.

anti-trafficking discourse has started: as a concern focused on transnational situations primarily affecting women and children, who have been moved across borders for engagement in prostitution.[7] Up to date, trafficking is still widely seen in public debate as an issue related to cross-border migration; considering, however, also the national scope of application (Art 2 of the CoE Convention against Trafficking), and to understand trafficking also 'as a purely national phenomenon causes conceptual problems', as Stoyanova notes.[8]

4.05 Another important contextualisation of trafficking comes from the predominant criminal justice approach, which establishes human trafficking as a criminal offence aiming to harmonise criminal sanctions and to ensure international co-operation in the criminal field. Initially, trafficking was not conceived by many actors as a human rights issue; governments even questioned their responsibility in trafficking situations, which often appear only to involve private actors.[9] However, under international human rights law, it is now well-established that state responsibility extends beyond abstaining from actively committing violations through its own agents, and that there are obligations to respect (not to interfere with rights of the individual), to fulfil (ensuring access to certain services) and to protect, in the latter case also private individuals from interference through other private individuals (e.g., by establishing a regulatory framework and providing means of redress to victims).[10] Such positive obligations fall upon governments also in the context of trafficking in human beings, especially through criminalising such acts, investigating any allegations, protecting victims and ensuring redress.[11]

4.06 A third aspect which requires attention concerns the relationship of trafficking to exploitation, which goes to the core of the question of the added value of the anti-trafficking concept *per se*. Over the last century, a broad range of instruments has been developed by the United Nations (UN), the International Labour Organisation (ILO) and regional bodies to address forced labour, slavery and slavery-like practices, worst forms of child labour, sale of children and sexual exploitation of children, expecting governments to eradicate such practices, including through criminalisation. If trafficking in human beings would, for instance, converge under the concept of forced labour, would it be only a mere preparatory act? And would it not be sufficient to try those involved in such acts as accomplices under the exploitation offence?[12] Arguably, trafficking in human beings should be conceived as a distinct phenomenon, although closely related to exploitation.[13] Trafficking is about creating or maintaining situations of dependency and vulnerability – typically including (but not limited to) movement of persons into difficult environments – with a view to prepare the ground for subsequent forms of exploitation. It is about conditions and logistics behind the exploitation, extending

7 See for instance the International Agreement for the Suppression of the White Slave Traffic, 1 LNTS 83, 4 May 1904, entered into force 18 July 1905 and the International Convention for the Suppression of Traffic in Women and Children, 9 LNTS 415, 30 September 1921, entered into force 15 June 1922.

8 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered – Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 28.

9 In this regard it does not come as a surprise that the initiative within the UN system for drafting an international anti-trafficking document was not led by the human rights structures, but by crime prevention and criminal justice bodies, see Gallagher, 4.

10 Gallagher, 238. See on this also the Commentary on the Preamble of the CoE Convention against Trafficking.

11 See Stoyanova, 320, in respect to the interpretation also by the European Court of Human Rights (ECtHR).

12 Ibid., 43.

13 Ibid., 42. On the interpretation of trafficking and its relationship to forms of exploitation, see *S.M. v. Croatia*, App no 60561/14 (ECtHR GC, 25 June 2020), para 303.

beyond mere preparatory acts to it. As will be further examined in the following, such considerations are particularly relevant in the context of child trafficking, in order to prevent inflationary recourse to the trafficking concept for an overly broad range of societal concerns.[14]

4.07 Conceptual clarity about trafficking in human beings, including through a common understanding of its definition, is a precondition for addressing concerns on a variety of levels; foremost it is important for asserting what is expected from State Parties in order to comply with their treaty obligations. Agreement on the common terms of trafficking is essential also for any aspect of co-operation of actors not only in relation to cross-border international co-operation and various forms of mutual legal assistance, but also in relation to domestic and local co-operation, for instance, concerning the roles and responsibilities of partners under an anti-trafficking National Referral Mechanism (NRM). Furthermore, any comparative analysis and effective monitoring and evaluation processes are not possible without a clear framework of reference.

4.08 The Convention's own monitoring mechanism, consisting of the CoE Group of Experts on Action against Trafficking in Human Beings (GRETA), as its expert body, and the Committee of the Parties, for political peer review, has revealed – for the European region – a clear trend of convergence of trafficking concepts along with the definition provided in Article 4, but without reaching full consensus yet. In the course of a first stocktaking exercise of its initial assessment cycle in 2014, GRETA has documented that, at that time, only one State Party of 35 examined had not yet provided information regarding a distinct national trafficking definition.[15] Moreover, GRETA noted that a 'majority [of State Parties] had adopted a definition of [trafficking in human beings] containing the three above-mentioned constituent elements, but the content of the three elements was not always in line with the Convention's definition'. Consequently, GRETA has therefore 'urged' ten out of 35 evaluated countries to adapt their legislation.[16] Moreover, in the case of six countries,[17] the national definition of trafficking only comprised of the action and the exploitative purpose element; means were addressed only as aggravating circumstances. On the other hand, in the case of one country,[18] the action element was not mandatory for trafficking under criminal law. In its evaluation reports, GRETA generally expresses concern towards countries deviating from the three-element concept of trafficking, referring to potential risks for the consistent application of anti-trafficking provisions and for international co-operation, and recommends a review of the legal framework.

4.09 GRETA has also observed several other inconsistencies in relation to definitional aspects, most commonly in relation to gaps concerning specific means, such as abduction, abuse of vulnerability, and specific types of exploitation including the lack of inclusion of servitude or removal of organs, but also in relation to inconsistent age limits concerning child trafficking.

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14 'There is general agreement that not all undesirable practices involving the exploitation of individuals could or should be identified as trafficking', Gallagher, 49.

15 Referring to Andorra, see GRETA, *4th General Report on GRETA's Activities*, March 2015, 36. In the meantime, Andorra has criminalised trafficking, see, GRETA, *Report on Andorra*, II GRETA(2019)10, para 13.

16 GRETA, *4th General Report*, 36.

17 Belgium, Bulgaria, France (at the time of the first assessment in 2013, later amended), Luxembourg, Slovenia and Switzerland. For further examination, see the following sections.

18 Norway, see section D.1.(a) below.

Repeatedly, in relation to Article 4(b) of the Convention, GRETA insisted on explicit reference to the irrelevance of consent by a child victim, which was lacking in almost a third of State Parties examined in 2014.[19] Inconsistencies may also arise along with gender aspects[20] and in situations of different jurisdictions within one country.[21]

4.10 Consequently, despite an internationally agreed upon trafficking definition contained in the Palermo Protocol and its mirroring by Article 4 of the CoE Convention against Trafficking, serious conceptual questions as well as practical implementation challenges still remain.

B. DRAFTING HISTORY

4.11 Considering the unique relationship between the international Palermo Protocol and the CoE Convention against Trafficking as far as the shared definition of trafficking in human beings is concerned, it is necessary to also take the drafting history of the Palermo Protocol into account before turning to the CoE drafting process.

1. The drafting process of the definition in the Palermo Protocol

4.12 Based on recommendations from the UN Commission on Crime Prevention and Criminal Justice and the UN Economic and Social Council, the UN General Assembly (UNGA) adopted resolution 53/111 of 9 December 1998 and established an open-ended inter-governmental Ad hoc Committee for the purpose of elaborating a comprehensive international convention against transnational organised crime. Further, the resolution discussed and elaborated on 'international instruments addressing trafficking in women and children, combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, and illegal trafficking in and transporting of migrants, including by sea'.[22]

4.13 The terms of reference for that Ad hoc Committee already highlighted two important aspects indicative of the dynamics and complexities over the following two years of drafting. First, the initial UNGA resolution was an international instrument dealing with trafficking in women and children only. However, at the first session of the Committee in January 1999, the United States had tabled another negotiation text referring to 'trafficking in persons' in general.[23] A majority of the Committee eventually supported a broader scope, leading to another UNGA

19 GRETA, *4th General Report*, 37.

20 In Albania, harsher sentences for the trafficking of women can be imposed compared to the trafficking of men, which was explained by the Albanian authorities as an effort to address also gender-based violence, with women being more often victims of trafficking than men. GRETA, however, commented on it that 'while acknowledging the gender dimension of [trafficking in human beings], in view of the non-discrimination principle enshrined in Article 3 of the Convention, GRETA invites the Albanian authorities to keep under review the effectiveness of the different penalties for trafficking in women and trafficking in men', GRETA, *Report on Albania*, II GRETA(2016)6, para 152.

21 As in the case of Bosnia and Herzegovina at the time of the first round assessment in 2013, when not all state entities had yet adopted trafficking definitions in their criminal codes, GRETA, *Report on Bosnia and Herzegovina*, I GRETA(2013)7, para 42.

22 UN General Assembly, Resolution 53/111 (Transnational organized crime) of 9 December 1998, A/RES/53/111 (20 January 1999), para 10.

23 UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Conventionagainst Transnational Organized Crime and the Protocols thereto* (UN 2006) 349.

resolution endorsing this development. Second, it became apparent to clearly separate trafficking of persons from a broader 'illegal trafficking in and transporting of migrants' – the latter being a practice which does not aim at the exploitation of a victim, but at facilitation of illegal entry into a state for a benefit.[24] This endorsement subsequently led to a renaming of a separate Protocol Against the Smuggling of Migrants.[25]

4.14 As far as the definition of trafficking itself is concerned, the initial proposal by the US delegation for (now) Article 3[26] of the Palermo Protocol contained already the three constituent elements of the trafficking definition, by referring to certain acts ('recruitment, transportation, transfer, harbouring or receipt of persons') and means ('by the threat or use of kidnapping, force, fraud, deception or coercion', or 'by the giving or receiving of unlawful payments or benefits to achieve the consent or a person having control over another person') 'for the purpose of prostitution or other sexual exploitation or forced labour'.[27] It is worth noting that the 'acts' mentioned in this first draft proposal are identical to the wording in the final adopted text. Discussion in the Ad hoc Committee revealed few opposing voices to those terms. Participants stressed repeatedly the aspect of the movement of victims of trafficking, as highlighted by the intervention of the UN Special Rapporteur on Violence against Women, proposing that 'the trafficking definition should require the movement or transport of a person to a community other than the one in which he (she) lived to ensure that the movement was sufficiently significant to render the person particularly vulnerable to exploitation'.[28]

4.15 As far as the means of trafficking are concerned, the *travaux préparatoires* show that the additional term 'abuse of power' was not included as a potential umbrella term for any power relations. The term was included in a more restricted and formal understanding, initially named 'abuse of authority', which was meant as legal authority, such as – in some legal systems – male family members over female members, or parents over children.[29] Different views about the inclusion of 'abuse of vulnerability' led to an interpretative note by the Ad hoc Committee, explaining: 'The reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.'[30]

4.16 Linked to heated debates about the question of possible consent of a victim to an intended exploitation, controversies arose about the exploitative purposes included in the definition proposals. The final adopted text of Article 3 of the Palermo Protocol mentions explicitly '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'. For all of those purposes, further explanatory definitions had been proposed in the drafting process by

24 See Protocol against Smuggling of Migrants by Land, Sea and Air, 2241 UNTS 507, 15 November 2000 (thereinafter Migrant Smuggling Protocol), Art 3(a): 'Smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.'

25 UNODC, *Travaux préparatoires*, 463.

26 At the time of drafting, the definition was initially discussed as part of Art 2 (scope of application), later separated as Art 2 bis (use of terms).

27 UNODC, *Travaux préparatoires*, 349.

28 Ibid., 354.

29 Ibid., 343.

30 Ibid., 347.

various delegations, but all of them were dropped in the end due to disagreement. For instance, some delegations preferred to limit trafficking in human beings to purposes already regulated through international law,[31] such as 'slavery',[32] servitude[33] and 'forced labour'.[34] However, the most contentious issue concerned the relationship between trafficking and prostitution, which was fuelled by ideological agendas promoted both by governments and non-governmental organisations. Some feminist groups considered prostitution as a legitimate form of work, if no violence and coercion is involved. In contrast, other feminist groups perceived it as an inherently violent and exploitative practice.[35] Consequently, the issue arose whether non-coerced adult prostitution should be covered by trafficking. In the end, the trafficking definition referred to 'the exploitation of the prostitution of others or other forms of sexual exploitation',[36] with a general determination that consent to any intended exploitation has to be considered irrelevant (Art 3(b) of the Palermo Protocol). Furthermore, another Interpretative Note by the Ad hoc Committee emphasised that prostitution policies, in general, remain a prerogative matter for domestic legislation.[37]

4.17 Article 3 of the Palermo Protocol explains that exploitation shall include, 'at a minimum', the purposes specified above. During the drafting, the question whether the purposes listing should be exhaustive arose. Some delegations 'favoured the words "at a minimum" to ensure

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31 Stoyanova, 61.

32 See the proposed definition of slavery discussed during the negotiations of the text of the Palermo Protocol, taken from the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (266 UNTS 3, entered into force 30 April 1957) (thereinafter Supplementary Convention on the Abolition of Slavery): '"Slavery" shall mean the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised', UNODC, *Travaux préparatoires*, 342, footnote 15. On the relationship between slavery and human trafficking, see, generally, Stoyanova, 218 et seq. and 292 et seq.; Jean Allain, 'Genealogies of Human Trafficking and Slavery' in Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2017) 3, considers that 'in fact, and in law, these two regimes – human trafficking and slavery – are distinct conceptually, but also have separate historical origins, and only come together with the negotiations of the Palermo Protocol'.

33 See the definition of a servile status in the Supplementary Convention on the Abolition of Slavery; see further the interpretation of servitude developed by the ECtHR in *Siliadin v. France*, App no. 73316/01 (ECtHR, 26 July 2005).

34 See, for instance, one proposal defining forced labour – closely following the definition contained in the Convention concerning Forced or Compulsory Labour (ILO No 29), 39 UNTS 55, 28 June 1930, entered into force 1 May 1932 – as 'all work or service extracted from any person under the threat or use of force, and for which the person does not offer herself or himself with free and informed consent', UNODC, *Travaux préparatoires*, 340.

35 For details of the controversy, see Stoyanova, 62. On the role of sex worker rights activists organised in the Network of Sex Work Projects (NSWP) in the lobbying process of the Palermo Protocol in co-operation with the Human Rights Caucus (HRC) see Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books 2010) 145 et seq.

36 The US proposal to define 'sexual exploitation' read:

> 'sexual exploitation' shall mean: (i) Of an adult, [forced] prostitution, sexual servitude or participation in the production of pornographic materials, for which the person does not offer herself or himself with free and informed consent (ii) Of a child, prostitution, sexual servitude or use of a child in pornography.

See UNODC, *Travaux préparatoires*, 339–40.

37 Ibid., 347:

> The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. 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.

that unnamed or new forms of exploitation would not be excluded',[38] which became the decisive view for the final text. Several other purposes had been debated in the Committee, including illegal adoption of children, making or distribution of child abuse images, forced marriages and illicit removal of organs. Only the latter made it into Article 3, with one delegation noting 'that, while trafficking in persons for the purpose of removing organs was within the mandate of the Ad hoc Committee, any subsequent trafficking in such organs or tissues might not be'.[39]

4.18 The question of eventual consent of the victim to an intended exploitative situation became another strongly contested topic during the Palermo Protocol negotiations, with Gallagher observing that the 'drafters clumsy handling of the consent issue has generated considerable confusion'.[40] According to Article 3(b) of the Palermo Protocol, 'the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used'. However, one may ask about the added value of such a provision: conceptually, on the 'exploitative purpose' side, to consent to one's own exploitation would conflict with the inalienability of one's human right to personal integrity and freedom and, on the means side, stating the irrelevance of expressions of the will of a person manipulated through force or deception appears self-explanatory. The debate, in part, originated from the earlier described controversy about prostitution and whether it should be considered trafficking irrespective of the consent of the person. On the other hand, drafters referred to general difficulties of applying concepts of voluntariness to any situation of vulnerability. In court situations, victims of trafficking might be challenged by the defence for apparent consent to an exploitative purpose. This is why it was considered important by the drafters to include such an explicit statement targeting especially the criminal investigation process, as 'there was agreement that both the protocol and legislation implementing it should reduce this problem for prosecutors and victims as much as possible'.[41]

4.19 Although concern for the protection of children[42] from trafficking was one of the starting points for initiating the process of drafting the Palermo Protocol, the negotiations reveal a lack of a coherent concept of child trafficking. Substantially, the expected possible scope of application of trafficking in respect to children was initially seen rather narrowly, limited to concerns about sexual exploitation through prostitution and child abuse images ('child pornography') or in relation to illegal adoption practices.[43] Conceptually, from the beginning, drafters stressed the lack of capacity of children to consent to any such intended exploitation,

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38 Ibid., 344.

39 Ibid.

40 Gallagher, 28.

41 UNODC, *Travaux préparatoires*, 344.

42 Since from the first definition proposals, drafters agreed that 'child' shall mean any person under the age of 18 years', see the proposal from Argentina, UNODC, *Travaux préparatoires*, 349–50, which is basically in line with the age limit set by the Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, entered into force 2 September 1990.

43 See UNODC, *Travaux préparatoires*, 347, interpretative note on Art 3:

> Where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery it will also fall within the scope of the protocol.

although suggested early definitions of child trafficking did contain some of the means elements.[44] The *travaux préparatoires* of the Palermo Protocol refer to a radical deviation of that concept only at the final 11th meeting of the Ad hoc Committee in October 2000, declaring that: 'The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article' (final Art 3(c)). Consequently, child trafficking has become defined by only two of the trafficking definition elements, namely the 'acts', committed for an exploitative purpose. This decision by the drafters led to difficult questions in relation to the scope of child trafficking vis-à-vis child-specific types of exploitation, such as sexual exploitation and (worst forms of) child labour.[45]

4.20 Matters were further complicated by a parallel drafting process at UN level, which prepared a draft Optional Protocol to the Convention on the Rights of the Child (CRC) on the sale of children, child prostitution and child pornography.[46] Adopted also in the year 2000, Article 3 of that Protocol requires State Parties to criminalise the 'sale of children', which is defined by its Article 2 as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration', next to also addressing sexual exploitation. For example, through 'offering, obtaining, procuring or providing a child for child prostitution'. Despite the apparent overlaps of concepts, the Palermo Protocol *travaux préparatoires* do not reveal substantive consideration of the relationship between those two instruments adopted in the same year.

2. The drafting process of the CoE Convention against Trafficking

4.21 Turning now to the negotiation process of the trafficking definition of Article 4 of the CoE Convention against Trafficking, political concern by the CoE for trafficking in human beings dates back at least to the early 1990s.[47] The main topics addressed through the CoE relate to the protection of children from sexual exploitation and the trafficking of women, while other exploitative purposes such as forced labour did initially not receive such prominent attention. At the time of the drafting of the Palermo Protocol, the CoE Committee of Ministers adopted its Recommendation No. R(2000) on action against trafficking in human beings for the

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44 See, the 'Option 2' proposal submitted for the seventh session of the Ad hoc Committee in January 2000:

> 'Trafficking in persons' shall include recruitment, transportation, transfer, harbouring or receipt of any child, or giving of payments or benefits to achieve the consent of a person having control of a child, for the purpose of slavery, forced labour or servitude or for the purpose of using, procuring or offering a child for prostitution, for the production of pornography or for pornographic performances.

UNODC, *Travaux préparatoires*, 342.

45 A joint submission to the Ad hoc Committee in February 2000, by the Office of the High Commissioner for Human Rights (OHCHR), the International Organisation for Migration (IOM), UNICEF and the UN High Commissioner for Refugees (UNHCR) also called for a strong child rights based approach, respect for the principle of best interests as a primary consideration and equal treatment of foreign trafficked children with nationals, see UN Doc. A/AC.254/27, para 6.

46 Eventually adopted by General Assembly Resolution 54/263 of 25 May 2000, A/RES/54/263 (16 March 2001), see Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2171 UNTS 227, 25 May 2000, entered into force 18 January 2002 (hereinafter OPSC).

47 For an overview of developments, see Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 10.

purpose of sexual exploitation,[48] thus with still clearly limited material scope. Moreover, the definition contained in this instrument is indicative of the lack of a clear and strong concept of trafficking, stating in its Appendix:

> The basic notions should be as follows: trafficking in human beings for the purpose of sexual exploitation includes the procurement by one or more natural or legal persons and/or the organisation of the exploitation and/or transport or migration – legal or illegal – of persons, even with their consent, for the purpose of their sexual exploitation, inter alia by means of coercion, in particular violence or threats, deceit, abuse of authority or of a position of vulnerability.

4.22 From the beginning of the CoE Convention against Trafficking drafting process in 2003, there was a strong agreement that the CoE would not develop a separate definition of trafficking, but rather take over the trafficking definition contained in the Palermo Protocol. As explained in the CoE *Travaux préparatoires*, the:

> Chair said that Article 3(a) to (d) of the Palermo Protocol, reproduced in the draft convention, had been a 'package' in negotiation of the Protocol. Relevant explanation drawn from the preparatory work on the Palermo Protocol would be included in the explanatory report. The Committee decided to use the definition of trafficking contained in the Palermo Protocol in the future European convention, which, consequently, would reproduce Article 3(a) to (d) of the Palermo Protocol in its entirety.[49]

4.23 At the same time, the CoE Ad hoc Committee on action against trafficking in human beings (CAHTEH) stressed the added value of the CoE approach to trafficking, by emphasising human rights and victim protection, prevention of trafficking and the establishment of a monitoring mechanism.[50]

4.24 As the core of the definition was set from the beginning of the drafting process,[51] the CAHTEH's discussions centred more on specific aspects of Article 4. In respect to trafficking for the exploitative purpose of removal of organs, there was deliberation on whether to include more comprehensively the removal of tissue and other material from the human body. It was decided, however, to leave such an approach to a separate legal instrument, such as an eventual protocol to the CoE Convention against Trafficking dealing with trafficking in human organs and tissues.[52] The United Kingdom (UK) sought important clarifications on the interpretation of some elements of the trafficking definition, such as emphasising the link between the 'acts' element and illegal facilitation of travel/movement of the victim. The UK stated that in respect

48 Committee of Ministers, Recommendation No. R(2000)11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation, 19 May 2000.

49 CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH(2003)RAP2, 26 January 2004, para 22; see also the initial agreement reached already at the first meeting, CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 23.

50 CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, paras 9, 11, 15 and 27. See also the strong commitments expressed in the opening speech to CAHTEH by the Deputy Secretary General of the CoE, Maud De Boer-Buquicchio, reproduced in Appendix III of CAHTEH(2003)RAP1.

51 The initiative of The Netherlands to insert into the definition the term 'forced' before 'prostitution' was not accepted, CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegation of Austria, Netherlands and by the observer of UNICEF*, CAHTEH(2004)1, 26 January 2004, 7.

52 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 23. Eventually, the Council of Europe Convention against Trafficking in Human Organs, CETS No. 216, was adopted much later on 25 March 2015, and as a separate instrument, (thereinafter CoE Convention against Trafficking in Organs).

to work situations, the trafficking concept should focus on slavery and servitude and not on more common cases of labour exploitation through poor wages or working conditions. Additionally, the delegation declared that irregular stay situations of exploited persons might not prevent prosecution or removal of that person; raising the question of how to deal with traffickers who themselves may be considered victims of trafficking as well.[53]

4.25 In a joint statement by 127 NGOs – after criticising the insufficient consultation by states with civil society and trafficked persons – it was stressed that trafficking in human beings should be considered a violation of human rights, and that the Convention should assist states 'to incorporate definitions of trafficking in their domestic legislation in line with the Palermo Protocol, recognising that the issue of consent of a victim to the intended exploitation is irrelevant, where any of the prohibited means has been used to traffic the person'.[54] Furthermore, the NGOs called upon the CAHTEH to strengthen its approach to addressing child trafficking:

> The Convention should ensure a child rights based approach is adopted in relation to anyone aged under 18 who is suspected of having being trafficked. In defining the specific ways in which children are to be protected, we urge that this convention be explicit rather than referring in a generic way to the 'special needs of children'. Among others there should be express provisions which require states to ensure that: actions taken with regard to trafficked children must be taken in the best interests of the child; a legal guardian is appointed to represent the interests of the child; and that the wishes of the child are taken into account in so far as their maturity allows.[55]

4.26 Controversy during the CAHTEH drafting process arose in respect of the inclusion of a separate definition of 'victim' in Article 4 ('"Victim" shall mean any person who is subject to any act set forth in this Article').[56] On the one hand, it was considered important to define 'victim' for uniform interpretation within the Convention. On the other hand, delegations were missing a coherent concept of 'victim' in the Convention, being addressed in different ways: in the definition (Art 4); under identification, with reference to reasonable grounds (Arts 10 and 13); or sometimes referred to as 'identified victims' (Art 10).[57] Amnesty International and Anti-Slavery International proposed to explicitly include further clarification in the victim definition: 'a person shall be considered a victim from the moment when there are reasonable

53 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004, 24.

54 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Joint statement of 127 Non-Governmental Organisations*, CAHTEH(2004)17 Addendum X, paras 6–7.

55 Ibid., para 8; the NGOs also explicitly referred to UNICEF, *Guidelines for Protection of the Right of Children Victims of Trafficking in South Eastern Europe* (UNICEF, 2003) which were later further developed and resulted into UNICEF, *Guidelines on the Protection of Child Victims of Trafficking* (UNICEF 2006).

56 CAHTEH, *Revised draft Europe Convention on action against trafficking in human beings: Following the 3rd meeting of the CAHTEH (3–5 February 2004)*, CAHTEH(2004)8, 12 February 2004, Art 4(e).

57 See the critical comments by the European Commission, CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegation of the Commission of the European Communities*, CAHTEH(2004)17 Addendum II, 3.

grounds to believe that they are or have been a victim'.[58] However, the proposal was not accepted, and at the sixth CAHTEH meeting, it was agreed to keep the short text of draft Article 4(e).

C. ARTICLE IN CONTEXT

1. Implications for other Articles of the Convention

4.27 The definition of trafficking and its underlying concept build the foundation for the interpretation and implementation of the entire CoE Convention against Trafficking. As highlighted in the drafting history, the final wording of Article 4 has been the result of a complex international and European negotiation process with implications for the prevention of trafficking, protection of the rights of victims, prosecution of offenders and partnership between all relevant stakeholders. Together with the broad determination of the scope of application in Article 2 of the CoE Convention against Trafficking, covering trafficking in human beings both nationally and across borders, with or without the involvement of organised crime groups, Article 4 of the CoE Convention against Trafficking requires a comprehensive approach to trafficking of women, men and children, for any type of exploitation.

4.28 Such an approach has immediate consequences, first of all, for the understanding of a 'victim' of human trafficking, which Article 4(e) of the Convention ties directly to the definition in lit (a). Furthermore, the definition also frames various Convention articles: the obligation to criminalise trafficking in human beings under Article 18, as well as all other closely related provisions under substantive criminal law, such as the criminalisation of the known use of services of trafficking victims (Art 19), concepts of attempt, aiding and abetting the commission of trafficking (Art 21), liability of legal entities (Art 22), dissuasiveness of sanctions[59] and measures, such as confiscation of assets (Art 23) and the determination of aggravating circumstances (Art 24). The principle of non-punishment of victims for involvement in unlawful activities, to the extent that they have been compelled to do so due to the trafficking situation, as defined in Article 26 of the Convention, is also directly linked to the question of what defines such trafficking situation. Similarly, establishing jurisdiction over trafficking as stated in Article 31 of the Convention needs precise definitions, not least for international co-operation and co-operation with civil society (Chapter VI). Furthermore, based on a comprehensive definition, different categories of victims of trafficking require, for example, gender- and child-specific approaches to procedural safeguards for victims and witnesses at court (Arts 28 and 30). The same holds true for devising strategies to prevent trafficking, reduce the demand for such services, sensitise the public and train relevant professionals (Chapter II) and, above all, to establish effective mechanisms for comprehensively identifying victims of trafficking, referring them to adequate assistance and ensuring redress and compensation (Chapter III). Finally, the conceptualisation of trafficking bears paramount relevance for

58 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Amnesty International and Anti-Slavery International's Recommendations*, CAHTEH(2004)17 Addendum VI, 5.

59 For instance, GRETA voiced concern about a legal reform in Latvia generally decreasing sanctions for trafficking and leaving out any minimum duration for the basic offence, see GRETA, *Report on Latvia*, II GRETA(2017)2, para 159.

any monitoring of the implementation of the CoE Convention against Trafficking, both through its own supervisory system established in Chapter VII (Monitoring mechanism) of the Convention and through civil society as critical watchdogs of State performance.

2. Relation to other international and regional definitions

4.29 As explained, the Palermo Protocol and the CoE Convention against Trafficking share the same trafficking definition, however, the contextualisation of the two instruments is widely different. While the Palermo Protocol supplements an international treaty focused on crime prevention and international co-operation, the CoE Convention against Trafficking has been framed as a human rights and victim-centred instrument. Article 2 of the Palermo Protocol only broadly states its purpose as to 'protect and assist the victims of such trafficking, with full respect for their human rights' (lit b), whereas Article 1 of the CoE Convention against Trafficking specifically explains to 'protect the human rights of the victims of trafficking', with some articles directly referring to a 'right of victims', for instance, to compensation (Art 15(3)).

4.30 This human rights background of the CoE Convention against Trafficking is important to keep in mind when analysing the trafficking concept, interpreting Article 4 and the three elements of the definition. Human rights of victims may be at risk during recruitment (e.g., in regard to violation of privacy/online safety), in relation to the manipulation of the will of victims ('means element', considering implications on rights to personal integrity, safety and freedom), and in regard to the exploitative purposes, linking trafficking with a multitude of international and regional standards,[60] many of them with clear human rights background.[61] There is a direct relationship established between the CoE Convention against Trafficking and the European Convention on Human Rights (ECHR), with recent case-law growing on the interconnectedness of Article 4 ECHR – interpreted to include trafficking – with the CoE Convention against Trafficking.[62] An explicit reference to trafficking is contained in Article 5(3) of the European Union (EU) Charter of Fundamental Rights. Further interpretation of the trafficking concept will also be needed in respect to other CoE human rights instruments, in particular concerning the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, addressing, for instance, the recruitment of children for sexual exploitation[63] and the Revised European Social Charter,[64] for instance in relation to employment and social protection standards.

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60 See references in the previous chapter, Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour (ILO No 182), 2133 UNTS 161, 17 July 1999, entered into force 19 November 2000 (thereinafter Worst Forms of Child Labour Convention), Convention concerning decent work for domestic workers (ILO No 189), 2955 UNTS 407, 16 July 2011, entered into force 5 September 2013 (thereinafter Domestic Workers Convention), the CoE Convention against Trafficking in Organs as well as the CoE Convention on Cybercrime, ETS No. 185, 23 November 2001, entered into force 1 July 2004 (thereinafter Budapest Convention).

61 See, for instance, Art 8 on slavery, servitude and forced labour of the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, entered into force 23 March 1976, as well as the Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979, entered into force 3 September 1981 and the CRC including its OPSC.

62 See, for instance, *Chowdury and Others v. Greece*, App no 21884/15 (ECtHR, 30 March 2017).

63 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Reference, CETS No. 201, 25 October 2007, entered into force 1 July 2010 (thereinafter Lanzarote Convention).

64 Revised European Social Charter, ETS No. 163, 3 May 1996, entered into force 1 July 1999.

4.31 Apart from the CoE Convention against Trafficking, the main European Union anti-trafficking instrument – Directive 2011/36/EU – essentially takes over the definition of the Palermo Protocol, with only slight amendments and additions, most notably, in respect to the exploitative purposes by adding begging and criminal activities:

> Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.[65]

On the other hand, the Organization for Security and Co-operation in Europe (OSCE) decided to adopt the definition of the Palermo Protocol *verbatim* for its OSCE Action Plan to Combat Trafficking in Human Beings[66] and subsequent Ministerial Decisions.

4.32 In the Asian region, the Member States of the South Asian Association for Regional Co-operation (SAARC) drafted their own anti-trafficking instrument in 2002.[67] However, the SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution employs a very narrow understanding of trafficking, which does not reflect the developments since the adoption of the Palermo Protocol. This can be evidenced by its custom-made definition of trafficking: '"Trafficking" means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking' (Art I(3)), limiting trafficking to prostitution of women and children. A different approach was followed by ASEAN, which incorporated the Palermo Protocol definition in its ASEAN Convention Against Trafficking in Persons.[68]

4.33 In the Americas, no legally binding and comprehensive anti-trafficking instrument has been drafted yet, apart from the reference to types of slavery contained in Article 6(3) of the American Convention on Human Rights,[69] which addresses trafficking in a very narrow way by stating: 'No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.'[70] Considering children, a trafficking-related instrument was adopted in 1994, namely the Inter-American Convention on international traffic in minors.[71] 'International traffic in minors' is defined in Article 2(b) as 'the abduction, removal or retention, or attempted abduction, removal or retention, of a minor

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65 Dir 2011/36/EU, Art 2(3).

66 OSCE, *Ministerial Council Decision No. 2/03 combating trafficking in human beings*, Annex, MC.DEC/2/03, 2 December 2003.

67 SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution, 5 January 2002, entered into force 15 November 2005.

68 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017.

69 American Convention on Human Rights, 'Pact of San Jose, Costa Rica', 22 November 1969, entered into force 18 July 1978.

70 See, however, important case-law on trafficking under Art 6, as developed by the Inter-American Court of Human Rights, for instance, in *Workers of the Hacienda Brasil Verde v. Brazil*, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318, 20 October 2016. See also, Inter-American Commission on Human Rights, *Human rights of migrants, refugees, stateless persons, victims of human trafficking and internally displaced persons: Norms and standards of the Inter-American Human Rights System* (OAS 2015).

71 Inter-American Convention on International Traffic in Minors (Convención Interamericana sobre Tráfico Internacional de Menores), OAS No. 79, 18 March 1994, entered into force 15 August 1997.

for unlawful purposes or by unlawful means'. Article 2(c) lists a broad range of unlawful purposes, including, 'among others, prostitution, sexual exploitation, servitude or any other purpose unlawful in either the State of the minor's habitual residence or the State Party where the minor is located'. Interestingly, the Convention also uses means to define 'traffic' in children, such as 'kidnapping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons or institution having care of the child' (Art 2(d)). Nevertheless, the principal purpose of that instrument is less on comprehensive anti-trafficking measures but more about establishing an effective system of cross-border mutual assistance and return of children.[72]

D. ISSUES OF INTERPRETATION

1. Definition of trafficking in human beings

4.34 The Explanatory Report to the CoE Convention against Trafficking states that in order to effectively combat trafficking and assist victims:

> it is of fundamental importance to use a definition of trafficking in human beings on which there is international consensus. The definition of trafficking in human beings in Article 4(a) of the Convention is identical to the one in Article 3(a) of the Palermo Protocol. Article 4(b) to (d) of the Convention is identical to Article 3(b) to (d) of the Palermo Protocol. Article 3 of that protocol forms a whole which needed to be incorporated as it stood into the present Convention.[73]

4.35 As a consequence, the three-element approach to defining trafficking in human beings (action, means, exploitative purpose) from the Palermo Protocol bears relevance for the CoE treaty as well. The Explanatory Report notes that it was 'understood by the drafters that, under the Convention, Parties would not be obliged to copy verbatim into their domestic laws the concepts of Article 4', as long as the concepts are domestically covered 'in a manner consistent with the principles of the Convention and offered an equivalent framework for implementing it'.[74] At the same time, the Explanatory Report stresses that in relation to the three defining elements, 'trafficking in human beings is a combination of these constituents and not the constituents taken in isolation', meaning that for 'there to be trafficking in human beings ingredients from each of the three categories (action, means, purpose) must be present together'.[75] In conclusion, and building on its wording, Article 4(a) of the Convention has to be interpreted in a way which declares all three elements – 'action', 'means' and 'exploitative purpose' as constituent and mandatory elements of the trafficking definition, which necessarily

72 There is no dedicated binding anti-trafficking instrument in the African region. The African Charter on Human and Peoples' Rights, 1 June 1981, entered into force 21 October 1986, only refers to the general prohibition of the 'slave trade' (Art 5), whereas the African Charter on the Rights and Welfare of the Child, 1 July 1990, entered into force 29 November 1999, obliges State Parties to prevent 'the abduction, sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child' as well as 'the use of children in all forms of begging' (Art 29).

73 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 72.

74 Ibid., para 70.

75 Ibid., para 75.

requires them to be fulfilled altogether.[76] Furthermore, it follows from the context and relationship between Article 4(a) and (c) of the Convention, the latter diverging from the general definition by removing one element in the case of child trafficking, implying an exception to the rule only.[77] In addition, this interpretation can be drawn from the purpose of the Convention to establish common anti-trafficking standards for consistent domestic implementation and practice.[78] However, in case of a lack of one of the constituent elements in national legislation, GRETA, the Convention's core monitoring mechanism, has regularly recommended only a review of the implications of the missing element,[79] while refraining so far from explicitly declaring the lack of one of the constituent elements of the definition ('actions, means') as non-compliant with Article 4.[80]

4.36 Nevertheless, on a more general level, GRETA has repeatedly voiced concern about misconceptions of human trafficking, as well as efforts which could be seen as attempts to use and instrumentalise anti-trafficking measures, for instance, for the purpose of stricter migration control. In the wake of the European refugee protection crisis of 2015, GRETA issued public statements, calling:

> upon State Parties to the Council of Europe Convention against Trafficking to uphold their commitment to protecting victims of trafficking and to ensure that migration policies and measures to combat migrant smuggling do not put at risk the lives and safety of trafficked people and do not prejudice the application of the protection and assistance measures provided by the Convention.[81]

GRETA has insisted that conceptually, smuggling of migrants must be understood separately from trafficking. Smuggling is about giving benefits in exchange for illegal entry into a country, irrespective of any further exploitative purposes; it runs against interests of States to protect their borders, but is not directed against the interests of smuggled persons.[82] Trafficking, on the other hand, aims at the exploitation of persons, and does not necessarily involve the crossing of borders. In practice, such distinction might not always be that clear-cut, especially in situations of 'mixed migration'.[83] However, in relation to take appropriate responses,

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76 The wording 'shall mean (…)' 'by means of (…)' 'for the purpose of exploitation' indicates that none of the elements is optional only, which is further supported by both the drafting history of the Palermo Protocol and of the CoE Convention, see section B above. In the same vein, and in relation to Article 4 ECHR, the European Court of Human Rights consistently considers trafficking 'only if all the constituent elements (action, means, purpose) of the international definition of human trafficking are present', see *S.M. v. Croatia*, para 290.

77 Albeit a problematic one, see below on the definition of child trafficking.

78 See the references to the Explanatory Report above. See also the obligation for State Parties to criminalise trafficking (Art 18), based on Art 4.

79 Only in the case of the third element ('exploitative purpose'), GRETA has also 'urged' Parties in some instances to add further examples of purposes to the list of purposes, see below, section D.1(c).

80 In such cases, GRETA would explicitly 'urge' a Party to amend legislation. See also the Commentary on Art 38 for GRETA's country evaluation methodology.

81 GRETA, *Statement on the occasion of the World Day against Trafficking in Persons*, 30 July 2015.

82 GRETA, *5th General Report on GRETA's Activities*, February 2016, 33. For an overview of the Migrant Smuggling Protocol see, for instance, Gallagher, 89.

83 The notion of migration-asylum-nexus is discussed in the migration policy discourse under the heading 'mixed migration' since the 1990s to describe the blurring of forced and voluntary migratory movements at all stages of the migratory process. See Stephan Scheel, Vicki Squire, 'Forced Migrants as "Illegal Migrants"' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) 188 et seq.

conceptual separation of smuggling and trafficking is essential.[84] In 2015, GRETA devoted the thematic section of its fifth General Report to the issues of 'identification and protection of victims of trafficking among asylum seekers, refugees and migrants'[85] in order to highlight specifically migration-related obligations under the CoE Convention against Trafficking.

4.37 As mentioned already in the introduction, GRETA has observed a broad variety of implementation challenges concerning the definition of human trafficking in the domestic context. Although by now, all States Parties to the Convention have adopted a definition of trafficking in the national legislation, there are some deviations of the concept of trafficking (analysed below) as well as other issues of inconsistency and lack of clarity of concept, which hamper the uniform application of the trafficking definition at the national level. On the one hand, there is quite often more than one (typically criminal law) document dealing with trafficking in a country. For instance, other legislation, as well as national strategies and action plans or National Referral Mechanisms (NRM) may contain definitions and standards for anti-trafficking measures, but not necessarily in a uniform way.[86] On the other hand, countries with strong decentralised systems of government may struggle in ensuring consistent definitions across separate state entities.[87] Moreover, the complexity of the trafficking definition often leads to overlaps with other criminal offences,[88] particularly in relation to the means element (e.g., abduction, threat, fraud) and concerning the purpose of trafficking. And, eventually, in terms of evidence, it might be 'tempting' for police and prosecutors in terms of expected success in securing a conviction to investigate an offence as, for example, threat or physical assault or pimping, and not as trafficking which requires a more complex chain of evidence, often even involving international co-operation. However, this may lead to a lack of identification of victims, lack of access to services and to distorted statistics on all of these aspects.

(a) The 'action' element

4.38 Turning to the three elements of the trafficking definition, specifically the 'action' element, Article 4 refers to the 'recruitment, transportation, transfer, harbouring or receipt of persons', which should 'encompass the whole sequence of actions that leads to exploitation of the victim'.[89] The discussion of the origins of the trafficking definition has shown the relevance of the movement of the victim in order to understand a trafficking situation. Taking an individual out of their usual environment and placing him/her in insecure circumstances contributes to creating situations of vulnerability. The acts themselves, such as renting a car or an apartment,

84 See also Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 77: 'Thus trafficking means much more than mere organised movement of persons for profit.'

85 GRETA, *5th General Report*, 33.

86 GRETA, *Report on Ukraine*, I GRETA(2014)20, para 45 (inconsistency between the definition in the Criminal Code definition and Anti-Trafficking Law); GRETA, *Report on Armenia*, I GRETA(2012)8, para 45 (inconsistency between Criminal Code and Regulation on the functioning of the NRM).

87 See on this for instance GRETA, *Report on the United Kingdom*, I GRETA(2012)6, paras 64–78; GRETA, *Report on Bosnia and Herzegovina*, I GRETA(2013)7, para 42.

88 See, e.g., GRETA, *Report on Belarus*, I GRETA(2016)14, paras 173–174 (law on trafficking also relevant for trafficking-related offences, such as exploitation or facilitation of prostitution, use of slave labour, abduction, production of child abuse images); GRETA, *Report on Austria*, I GRETA(2011)10, paras 137 and 143 (relationship between human trafficking provision and other offences such as cross-border prostitution trade and exploitation of foreign persons).

89 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 78. It is sufficient to prove only one of such actions, see Stoyanova, 34.

are typically not criminal activities. They gain relevance only in combination with the other elements, the use of certain means for the purpose of exploitation. It is important to note that for the commission of the offence of trafficking, the actual exploitation of the victim is not required, it is sufficient to prove the intention of the perpetrator.[90] The Explanatory Report to the CoE Convention against Trafficking explicitly states that 'trafficking in human beings is consequently present before the victim's actual exploitation'.[91] Therefore, the action element should not be confused with the action in the context of the exploitation itself. There are several sets of international standards and domestic provisions of criminal law, labour law and child protection law dealing with sexual, economic and other types of exploitation, irrespective of trafficking, which should be applied accordingly, including through criminal law concepts such as accomplice to an offence.[92] But if the given context reveals actions taken and means used by the perpetrator to bring a person in a state of dependency and vulnerability (moving locations, separation from parents, promising fake jobs), with the intention of further exploitation, then a trafficking situation has been established, which is distinct from the future or even actual exploitation.

4.39 The drafting history has also shown that there was not much discussion about the action element in the Palermo Protocol nor the CoE Convention against Trafficking drafting process. Some guidance may be derived from a joint study undertaken by the CoE and the UN in 2009, on the relationship of trafficking in organs and trafficking in human beings, which contains interpretation on the three human trafficking elements.[93] Concerning 'recruitment', a broad understanding was proposed, including any activity including through information technology[94] leading from engagement and commitment to eventual exploitation. 'Transportation' may be any kind of transport irrespective of cross-border movement.[95] Further, 'transfer' should relate to the formal or non-formal transfer of control over an individual. Additionally, 'harbouring' may include housing a person, be it during travel or at the final destination.[96]

4.40 GRETA has not observed many challenges in state practices concerning the inclusion of the action element within domestic trafficking definitions, except in the case of Norway, where the action was not a mandatory element of the criminal law definition of trafficking. However, as criticised above, GRETA did not consider this to violate the Convention through insufficient incorporation of the trafficking definition.[97]

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90 Council of Europe, ibid., para 87; Gallagher, 34. Concerning the definition of the Palermo Protocol, see also, UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations 2004) 268–9, para 33: 'The offence defined in article 3 of the Protocol is completed at a very early stage. No exploitation needs to take place'.

91 Council of Europe, ibid., para 87.

92 For further discussion on the trafficking-related action element and (non-trafficking related) accomplice to an offence, see Stoyanova, 43.

93 CoE/UN, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs* (CoE/UN 2009).

94 See also the reference to the CoE Convention on Cybercrime, Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 79.

95 Ibid., para 80.

96 See CoE/UN, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs* (CoE/UN 2009) 78.

97 GRETA, *Report on Norway*, I GRETA(2013)5, para 40, and GRETA, *Report on Norway*, II GRETA(2017)18, 21 June 2017, para 151.

(b) The 'means' element

4.41 The common aspect of the various examples listed under the 'means' element of Article 4 of the CoE Convention against Trafficking concerns the deliberate manipulation of the will of the victim of trafficking. This may be achieved basically through four ways: coercion (threat or use of force, abduction or other forms of coercion), deception (or fraud), abuse of power or of vulnerability and exchanging benefits for gaining control over a person. The coercive types relate to certain criminal offences, which are typically punishable in criminal codes also irrespective of a trafficking context. As far as 'abuse of power' is concerned, the Palermo Protocol's drafting history showed that this concept originated from a more formal abuse of authority, which, however, appears to be closely related to the exchange of benefits for gaining control over a person under slavery-like circumstances. Concerning 'abuse of vulnerability', it was understood by the Palermo Protocol drafters as 'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved'.[98] The Explanatory Report to the CoE Convention against Trafficking expands on that by adding that:

> the vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.[99]

4.42 Although very broad in defining the state of hardship that creates vulnerabilities, this explanation confirms that mere existence of such a situation is not sufficient, but that the perpetrator also has to actively abuse it for one's purposes.[100] A generalised threshold of deception or coercion is not defined.[101] Also subject to interpretation is the 'timing' of the use of means,[102] for instance, regarding the relevant time for proving the deceptive or coercive process – should it be closer to the action (e.g., in relation to the recruitment), or closer to the exploitation (for instance, when working conditions turn to the worse)? In agreement with Stoyanova, in order to keep a distinct meaning both for the means element in the course of the trafficking process and for trafficking as such vis-à-vis the exploitation, the relevant time for the use of means should be seen as taking place closer to the actions initiating the trafficking than the exploitation.[103]

4.43 When examining state practice concerning the 'means' element, GRETA has generally emphasised the need to include the means element comprehensively, in all its forms, in domestic definitions.[104] On occasion, GRETA has recommended amendments for closer

98 UNODC, *Legislative Guide*, 269, para 34 (cited after A/55/383/Add.1, para 63).
99 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 83.
100 See also on the threshold aspect of the means element, Stoyanova, 54.
101 Ibid., 54.
102 Ibid., 50.
103 Ibid., 52: 'Therefore, as the trafficking definition is framed, the addition of the 'means' element requires an assessment of a set of circumstances different from the abusive circumstances under which migrants are exploited.'
104 See, for instance, GRETA, *Report on Germany*, I GRETA(2015)10, para 46 (abuse of power missing); GRETA, *Report on Ireland*, II GRETA(2017)28, para 194 (abuse of vulnerability missing); GRETA, *Report on Sweden*, I GRETA(2014)11, para 47 (abduction missing).

alignment to Article 4 of the CoE Convention against Trafficking.[105] However, GRETA has also come across domestic trafficking definitions which did not contain the means element at all as a mandatory component of the trafficking concept.[106] Usually, governments justify such deviation by claiming to make trafficking easier to prove.[107] GRETA, nevertheless, asks those countries to review their definition, voicing concerns about possible negative implications such as confusion with other criminal offences, difficulties for mutual legal assistance or the interpretation of the consent of victims,[108] but refrains from 'urging' Parties to amend legislation, which would indicate a violation of the Convention.

(c) The 'purpose' element

4.44 In relation to the 'purpose' element, as explained already before, the wording of Article 4 of the CoE Convention against Trafficking speaks of trafficking *for the purpose* of specific types of exploitation only. Hence, it is not a requirement that such exploitation has actually taken place.[109] Apart from prosecutorial challenges to prove the will on the side of the offender, the purpose element creates some further hurdles for interpretation and practical implementation.

4.45 Article 4 of the Convention contains a list of exploitative purposes, namely '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'. There is no international law concept of 'exploitation' as such,[110] which would establish common criteria for all such forms. Attempts have been made to describe them through a 'continuum of exploitation', at least in labour relation contexts, which would allow to better capture both the evolution of an exploitative situation and its seriousness ('mere' violation of labour law regulations or outright criminal law-related slavery-like practices).[111] However, the question remains to what extent such an approach could be generalised to cover all forms of exploitative services, ranging from sexual exploitation to worst forms of child labour. Moreover, there is no agreed threshold for defining the seriousness of exploitation.[112]

4.46 Some guidance can be taken from the examples provided in the Convention definition, as well as the Explanatory Report and the drafting history, which refer to several international

105 See GRETA, *Report on France*, II GRETA(2017)17, para 57 (transfer of control concept) and GRETA, *Report on Georgia*, II GRETA(2016)8, para 162 (domestic concept too restrictive).

106 See GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 65; GRETA, *Report on Belgium*, I GRETA(2013)14, para 53; GRETA, *Report on France*, I GRETA(2012)16, para 52; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 38; GRETA, *Report on Slovenia*, I GRETA(2013)20, para 40; GRETA, *Report on Switzerland*, I GRETA(2015)18, para 37.

107 See, for instance, the argument by Belgium, GRETA, *Report on Belgium*, I GRETA(2013)14, para 52.

108 GRETA, *Report on Belgium*, I GRETA(2013)14, para 53.

109 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 87.

110 See Stoyanova, 68: 'The dilemma of how to conceptualize exploitation needs to be ultimately resolved at national level' while describing in the following possible further conceptual approaches.

111 See Klara Skrivankova, 'Defining exploitation in the context of trafficking – what is a crime and what is not' in Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2017) 109. See also efforts by the European Union Fundamental Rights Agency to define 'severe labour exploitation', EU Agency for Fundamental Rights, *Severe Labour Exploitation: Workers Moving Within or Into the European Union. State's Obligations and Victim's Rights* (FRA 2015).

112 Stoyanova, 72, has suggested to include proportionality and severity tests for such purpose.

documents by the UN and ILO.[113] In relation to 'forced labour', instruments such as the ICCPR (Art 8 ICCPR), the ILO Convention No. 29 concerning Forced or Compulsory Labour and its Protocol of 2014 to the Forced Labour Convention, the ILO Convention No. 105 concerning the Abolition of Forced Labour and the ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour should be recalled. More concretely, ILO Convention No. 105 defines 'forced or compulsory labour' as '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'.[114]

4.47 As far as 'slavery or practices similar to slavery' are concerned, reference should be made to the Slavery Convention[115] and the Supplementary Convention on the Abolition of Slavery, as well as the prohibition of slavery declared by the Universal Declaration of Human Rights (Art 4). In contrast to slavery, servitude 'does not involve the notion of ownership' and can be described as the obligation to perform services under coercion.[116] In the case-law related to Article 4 ECHR, developed by the European Court of Human Rights (ECtHR), the Court identifies characteristics of servitude as some form of restriction on freedom of movement,[117] and the 'victim's feeling that his or her condition is permanent and that the situation is unlikely to change'.[118] With regard to domestic servitude, the ECtHR has held that it is an offence that 'involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance'.[119] There is no international law definition, however, of the 'exploitation of the prostitution of others or other forms of sexual exploitation', leading in case of the latter the Explanatory Report to state that 'which is therefore without prejudice to how State Parties deal with prostitution in domestic law'.[120] In relation to 'organ removal', the CoE Convention against Trafficking in Organs provides definitions on 'trafficking in human organs', 'human organs' and 'illicit removal of organs'.

4.48 Important case-law by the ECtHR in relation to trafficking and its definition has evolved. In 2010, the Court acknowledged in its landmark case ruling of *Rantsev v. Cyprus and Russia* that trafficking in human beings – although not explicitly mentioned – falls also under the scope of Article 4 of the European Convention on Human Rights (prohibiting slavery, servitude, forced or compulsory labour).[121] Consequently, the Court's decisions established positive obligations of State Parties to the ECHR, such as to create an anti-trafficking legislative framework for addressing infringements under Article 4,[122] to investigate possible situations and take

113 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, paras 87–96.
114 Art 2(1) of the ILO Convention No. 29. For an interpretation of 'forced labour' by the European Court of Human Rights, see below.
115 Slavery Convention, 60 LNTS 254, 25 September 1926, entered into force 9 March 1927.
116 William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 207.
117 *Chowdury and Others v. Greece*, para 123; see also *Siliadin v. France*, App no 73316/01 (ECtHR, 26 July 2005).
118 See *C.N. and V. v. France*, App no 67724/09 (ECtHR, 11 October 2012) para 91.
119 *C.N. v. the United Kingdom*, App no 4239/08 (ECtHR, 13 November 2011) para 80.
120 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 88. In *S.M. v. Croatia*, para 300, the ECtHR (GC) considered 'forced prostitution' as a form of 'forced or compulsory labour'.
121 *Rantsev v. Cyprus and Russia*, para 282.
122 Expanding further on the earlier case of *Siliadin v. France* concerning lack of criminalising framework for slavery and servitude.

operational measures for prevention and protection of victims.[123] In *Chowdury and Others v. Greece*, the Court stressed that in:

> order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3 (a) of the Palermo Protocol and Article 4 (a) of the CoE Convention.[124]

Further, in *Chowdury and Others v. Greece*, the Court considered the exploitative situation of seasonal workers from Bangladesh at strawberry farms in Greece not as a form of servitude[125] but as a case of 'human trafficking and forced labour'.[126]

4.49 The list of exploitative purposes of Article 4(a) comes 'at a minimum'; it is clear from this wording (and the drafting history) that it is not meant to be exhaustive, but rather flexible in order to address possible future types of exploitation. Still, as the Explanatory Report states: 'National legislation may therefore target other forms of exploitation but must at least cover the types of exploitation mentioned as constituents of trafficking in human beings'.[127] Consequently, GRETA, in its monitoring practice, pays detailed attention to the purpose element of the definition, in most cases urging governments to review domestic provisions if not all types of purposes of the CoE definition are included.[128] In some cases, GRETA recommended – not at the level of 'urge' – explicit inclusion also of types of exploitation contained in Dir 2011/36/EU, such as exploitation of criminal activities.[129] At the same time, GRETA reports reveal discussions on less common types of exploitative purposes, such as exploitative sham marriages[130] or child surrogacy situations.[131] In relation to trafficking for the purpose of labour exploitation, GRETA has observed difficulties in the legal qualification of situations as trafficking and/or labour law violations and stressed the need for capacity building and effective

123 See, for instance, *Chowdury and Others v. Greece*. See also the explanatory statement on the ECtHR's case-law in GRETA's report on Greece, GRETA, *Report on Greece*, I GRETA(2017)27, para 47.

124 *Chowdury and Others v. Greece*, para 88.

125 Which would require 'the victim's feeling that his or her condition is permanent and that the situation is unlikely to change', which was not considered the case in relation to seasonal workers, *Chowdury and Others v. Greece*, para 99. See also the case of *C.N. and V. v. France*.

126 *Chowdury and Others v. Greece*, para 100 (with earlier references also to GRETA's General Reports); however, the relationship between these two concepts was not fully clarified in this context; see also Vladislava Stoyanova, 'Sweet Taste with Bitter Roots – Forced Labour and Chowdury and Others v Greece' (2018) 1 *European Human Rights Law Review*, 73.

127 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 85.

128 In relation to servitude, see, for instance, GRETA, *Report on Poland*, II GRETA(2017)29, para 164; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 154; GRETA, *Report on France*, I GRETA(2012)16, para 57 (subsequently included in legislation); GRETA, *Report on Sweden*, I GRETA(2014)11, para 48. Concerning slavery, see, for instance: GRETA, *Report on Norway*, I GRETA(2013)5, para 42; GRETA, *Report on Hungary*, I GRETA(2015)11, para 48; GRETA, *Report on Iceland*, I GRETA(2014)17, para 48; GRETA, *Report on Montenegro*, I, GRETA(2012)9, para 43 (subsequently included in legislation). Concerning forced labour, see, for instance, GRETA, *Report on Malta*, I GRETA(2012)14, para 44 (subsequently included in legislation); GRETA, *Report on Switzerland*, I GRETA(2015)18, para 36.

129 See, for instance, GRETA, *Report on Bulgaria*, II, GRETA(2015)32, para 183; GRETA, *Report on Latvia*, II GRETA(2017)2, para 157 (GRETA welcoming inclusion).

130 GRETA, *Report on Latvia*, II GRETA(2017)2, para 160.

131 GRETA, *Report on Belarus*, I GRETA(2016)14, para 41.

labour inspections.[132] Moreover, GRETA engaged with State Parties on a discussion about trafficking-related concepts, such as 'modern slavery', in order to assess implications for the implementation of the Convention's standards.[133]

2. The consent of the victim

4.50 As discussed in the context of the drafting process of Article 3 of the Palermo Protocol and Article 4 of the CoE Convention against Trafficking, the question of the relevance of any eventual consent of the victim in the trafficking process developed into one of the most controversial issues – mainly due to a lack of a coherent, convincing conceptual approach. Considering that the means element of the trafficking definition (Art 4(a) of the Convention) provides examples of manipulation of the will of the victim, thus, nullifying the value of any expression of will on the side of the victim, it appears as stating the obvious in Article 4(b), when declaring any 'consent of a victim […] to the intended exploitation […] irrelevant where any of the means set forth in subparagraph (a) have been used'.

4.51 The Convention's Explanatory Report does not offer much guidance regarding added value of Article 4(b): 'the question of consent is not simple and it is not easy to determine where free will ends and constraint begins'.[134] Still, the Explanatory Report refers to some practical examples, concluding that while persons may agree to certain services under certain conditions, this may not be seen as an agreement to abuse, which is why any such eventual agreement should not matter.[135] In the 1983 *Van der Mussele v. Belgium* case, the ECtHR, in relation to forced labour under Article 4 ECHR, had already attached only 'relative weight' to an eventual 'prior consent' argument, taking 'into account all the circumstances of the case'.[136]

4.52 In its country assessments, GRETA has taken up the argument of evidential ease and repeatedly asserted:

> [There are] benefits in stating explicitly in legislation that consent is irrelevant to determining whether the crime of human trafficking has occurred. Setting out this pivotal principle in law could facilitate its use by investigators, prosecutors and judges when dealing with cases of human trafficking and to obtaining a more consistent approach. Indeed, consent is an important factor at different stages of human trafficking cases, for instance: if victims refuse to self-identify as they consider that they consented to exploitation; when taking a decision on whether to investigate and prosecute a case as [trafficking in human beings] where the victim apparently consented to exploitation; when deciding on the penalty for offenders where there are assertions of consent. GRETA considers that stating explicitly the irrelevance of the consent of a victim of trafficking to the intended exploitation could improve the implementation of the anti-trafficking provisions.[137]

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132 GRETA, *7th General Report on GRETA's Activities*, March 2018, 32.

133 GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 25.

134 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 97.

135 Ibid., para 97.

136 *Van der Mussele v. Belgium*, App no 8919/80 (ECtHR, 23 November 1983), para 37; see also the reference in *Chowdury and Others v. Greece*, para 90.

137 See, for instance, GRETA, *Report on Austria*, II GRETA(2015)19, para 164. See also the reported amendment of legislation in order to explicitly address consent in the case of Portugal, GRETA(2017)4, para 18.

4.53 GRETA's level of response for the omission of an expressive provision on the consent issue has varied, ranging from noting its absence while referring to domestic case law,[138] to 'considering' that governments should change legislation for explicit mention[139] and even 'urging' some State Parties to do so.[140]

3. Definition of child trafficking

4.54 Although Article 4(c) offers a specific definition, particular conceptual challenges remain in relation to child trafficking. In deviating from the general trafficking definition, Article 4(c) declares that any actions taken under Article 4(a) 'for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article'. In short, in the case of children,[141] only two elements (action, exploitative purpose) are required to fulfil the child trafficking definition; the means element is not mandatory to be proven. While at first glance this may look as making it comparatively easier to establish a trafficking-related crime against a child',[142] in practice, on the contrary, it further blurs the concepts of trafficking and of exploitation of children. Over the last decades, several international law standards addressing various forms of exploitation have emerged, such as ILO Conventions on (worst forms of) child labour, or, on the regional level, the CoE Lanzarote Convention. Consequently, questions arise such as whether parents demanding their children to perform child labour services or parents arranging marriages for their children should eventually also be considered child traffickers, or whether online grooming for child abuse images (including when done among teenagers) constitutes child trafficking or not.

4.55 As discussed in the drafting history, there is no coherent concept on child trafficking discernible, on which the definitions contained in the relevant treaties could be built. Early drafts of the Palermo Protocol definition included some means elements in the child trafficking definition as well, but were marred by ongoing discussions about the equally vague concept of consent. Some of the means in the general trafficking definition, such as 'abuse of power or of a position of vulnerability', or 'benefits to achieve the consent of a person having control over another person' seem to relate directly to typical parent-child relations. However, according to the child trafficking definition finally adopted, none of them apparently matter anymore for proving child trafficking. And the Explanatory Report to the CoE Convention against Trafficking provides no further explanation to the differences in the definitions other than just repeating the content of the Convention provision.[143]

4.56 The implications of such blurred lines and weak conceptualisation of child trafficking are far-reaching. It raises questions of overlap or complementarity of State Parties obligations under UN, ILO or regional standards, questions of division of labour between international

138 GRETA, *Report on the Netherlands*, I GRETA(2014)10, para 52.
139 See, for instance, the case of Italy (despite the reference to general criminal law principles of Italian authorities), GRETA, *Report on Italy*, I GRETA(2014)18, para 50.
140 As in the case of Cyprus, GRETA, *Report on Cyprus*, I GRETA (2011)8, para 41.
141 Defined as 'any person under eighteen years of age', Art 4(d) of the CoE Convention against Trafficking.
142 Gallagher, 324.
143 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 98.

institutions and programmes[144] and of monitoring (e.g., in relation to GRETA and the 'Lanzarote Committee' supervising the Lanzarote Convention on child sexual exploitation and abuse). In addition, it draws concerns as well – given the still predominant approach in practice to deal with trafficking as a crime, less as a human rights concern – of criminalisation of certain groups and communities, possibly weakening rights-based child protection approaches to child labour and exploitation within the family context, such as in the case of child begging.[145]

4.57 Consequently, a narrow interpretation of the child trafficking definition is supported.[146] First, the relevance of trafficking as a distinct concept should be recalled, which can be described as a set of significant efforts and preparatory measures in order to create or maintain situations of dependency and vulnerability intended to eventually lead to exploitation, but which, nevertheless, are different from the actual types of exploitation. Typically, such pre-exploitation measures become visible through the 'action' and 'means' elements of the trafficking definition. However, in the context of child trafficking one of the most distinguishing features of trafficking – the means element – does not constitute a mandatory criterion for establishing the offence. Therefore, and, second, this should not be understood as to preclude investigators and prosecutors from seeking relevant evidence which would prove that perpetrators have used certain means also in the context of children, for instance through typical recruitment methods ('lover boys'), or by threatening parents in order to gain control of children. This can be supported by the argument that the wording of Article 4(c) just makes it possible to speak of trafficking in the case of children '*even* if it does not involve any of the means' *(emphasis added)*. *E contrario*, this does not prohibit collecting evidence on means used by the perpetrators on children. It would rather help to make the thin lines between the trafficking process and the actual exploitation more visible. Third, along general considerations in relation to the severity of types of exploitation (such as slavery or forced labour), not every exploitative situation of children necessarily indicates a child trafficking case.[147]

4.58 Two further interlinked clarifications, in terms of the scope of child trafficking, should be made. The first relates to what extent illegal child adoption practices should be considered

144 On a possible complementarity between international concerns about the abuse of children as child soldiers and child trafficking, see Gus Waschefort, 'Child soldiering in relation to human trafficking' in Piotrowicz, Rijken, Uhl, 135.

145 See, the important distinction drawn by Healy: 'Begging is not always simply related to poverty; and begging is not always a form of trafficking committed by a criminal network', while asserting that 'regardless of how parents in question are treated by the law, a consensus does exist in relation to child begging as a violation of child rights and, therefore, as a child protection concern', see Claire Healy, 'Exploitation through begging as a form of trafficking in human beings – over-estimated or under-reported?' in Piotrowicz, Rijken, Uhl, ibid., 164–5.

146 See also Gallagher, 50, in relation to general concerns about an 'overly broad interpretation of the definition of trafficking' and at 49, stating 'general agreement that not all undesirable practices involving the exploitation of individuals could or should be trafficking'; Mike Dottridge and Ann Jordan, 'Children, Adolescents and Human Trafficking: Making sense of a complex problem', Issue paper 5 (American University, Washington College of Law 2012), 12; Helmut Sax, 'Child trafficking – a call for rights-based integrated approaches' in Piotrowicz, Rijken, Uhl, 253.

147 See Dottridge and Jordan, 15, in relation to distinguishing trafficking from child labour: 'Without condoning other harmful situations in which children work, confine the use of the term 'trafficking' to the most abusive cases, in which the appropriate remedy is to move the child or adolescent out of the control of the abuser, rather than to improve the young person's working conditions.' See also, Sax, 254.

trafficking and the second concerns the distinct concept of the 'sale of children'.[148] As discussed in the drafting history, in parallel to the development of the Palermo Protocol, the UN was also engaged in the drafting of the OPSC 'on the sale of children, child prostitution and child pornography'. The latter, however, focuses on 'sale of children' as transfer of a child 'for remuneration or any other consideration' (Art 2 OPSC), and it 'is not necessarily linked to the purpose of exploitation by those who pay for the child, as is the case for child trafficking'.[149] Article 3 OPSC also addresses the sale of a child for the purpose of adoption of a child 'in violation of applicable international legal instruments on adoption', which is a clear reference especially to the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption.[150] Consequently, illegal child adoption practices should be dealt with under those specific instruments, including distinct criminalisation in domestic law. Only situations of adoption of children with a purpose to exploit those children may fall under the CoE Convention against Trafficking.[151]

4.59 A stock-taking exercise by GRETA on findings from the first evaluation round revealed in 2014 major deficiencies of State Parties to comply with the Convention's standards in relation to children. The lack of identification of and assistance to trafficked children ranks on top of all violations assessed.[152] This led to the decision to make child trafficking one of the monitoring priorities for the second evaluation round.[153] This focus has helped to reveal some conceptual difficulties in implementing the child trafficking definition. This relates, for instance, to having, first of all, a specific definition of child trafficking, which should go beyond a mere aggravating circumstance.[154] Furthermore, GRETA urged a Party to remove additional

148 For instance, illegal adoption as a slavery-like exploitative practice, to which the Interpretative Note from the Palermo Protocol drafting process (see UNODC, *Travaux préparatoires*, 347) may hint through its reference to the Supplementary Convention on the Abolition of Slavery – however, as Gallagher has explained, this reference only leads to a circular argument, as the 1956 Convention, again, refers to the requirement of an exploitative purpose, see Gallagher, 41.

149 UNICEF, *Handbook on the Optional Protocol on the sale of children, child prostitution and child pornography* (UNICEF Innocenti Research Centre 2009) 10.

150 Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 1870 UNTS, 29 May 1993, entered into force 1 May 1995.

151 The same line of argument/exploitative purpose test should be applied to matters of early/child marriage; see further on these distinctions, Sax, 254. In the case of Serbia, domestic criminal law provisions deal with 'trafficking in children' under 16 years of age for adoption, defined as 'abducting a person less than 16 years of age for the purpose of adoption contrary to the laws in force, mediating in such adoption, buying, selling, handing over, transporting, accommodating or concealing such a person for that purpose', GRETA, *Report on Serbia*, II GRETA(2017)37, para 174. GRETA expressed concern only in relation to the reduced age limit to 16 years, but did not address the blurred relationship between trafficking in general and 'trafficking for adoption'.

152 GRETA, *4th General Report*, 33.

153 GRETA, *6th General Report on GRETA's Activities*, March 2017, 33–65. See also the inclusion of GRETA monitoring findings in the CoE Strategy for the Rights of the Child 2016–2021, see Council of Europe, *Council of Europe Strategy for the Rights of the Child (2016-2021)* (Council of Europe 2016), 18 and 17, and in the CoE Action Plan on Protecting Refugee and Migrant Children in Europe (2017–2019), see Council of Europe, *Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017–2019)* (Council of Europe 2017).

154 With GRETA urging Greece to ensure consistency with Art 4(c), GRETA, *Report on Greece*, I GRETA(2017)27, para 53.

requirements of proof[155] as incompatible with the Convention and requested a review of legislation on aggravating circumstances which differentiated between different age groups of children.[156]

4. Definition of victim

4.60 The explicit inclusion of a definition of a victim of trafficking constitutes an original addition to the CoE Convention against Trafficking, not found in the Palermo Protocol. Article 4(e) states that 'victim' shall mean 'any natural person who is subject to trafficking in human beings as defined in this article'. The Explanatory Report only mentions the drafters' intention 'to define the concept' of the victim, as there are 'many references in the Convention to the victim' and refers to the three elements of the trafficking definition (with the exception of children).[157]

4.61 The drafters considered this addition as an added value of the CoE definition, despite some disagreement on the actual substance of the victim 'concept'. Still, it can be seen as an important statement in support of a broad approach to consider victims as anyone affected by trafficking, in contrast to a narrower concept as often used in the context of compensation claims (e.g. 'damaged party'). GRETA has urged countries to remove requirements such as proof of 'physical assault'[158] in compensation procedures. Rather, taking into account the debate during the Convention's drafting stage, and reading Article 4(e) together with Article 10 (Identification of the victims) and Article 13 (Recovery and reflection period), it should be sufficient to establish '"reasonable grounds" to believe that a person has been victim of trafficking in human beings' (Art 10). Passing such a test should, for instance, be 'sufficient reason not to remove [victims] until completion of the identification process establishes conclusively whether or not they are victims of trafficking' – there is no 'absolute certainty' required.[159] In some countries, a debate started about time limits of being considered a victim of trafficking, when exploitation had already occurred some time ago.[160] However, in light of Article 12(2) of the Convention, State Parties should provide assistance measures based on taking 'due account of the victim's safety and protection needs', which would indicate access to assistance as long as needs exist.

4.62 Apart from the substance, procedural aspects do matter in relation to the recognition of victims of trafficking. The Convention does not specifically prescribe the process of how being recognised as a victim of trafficking, leaving discretion to State Parties to further define it within certain parameters, for instance, involving 'relevant support organisations' in the identification process.[161] Many State Parties have adopted formalised NRMs for identification

155 See the Criminal Code of Belarus adding the requirement of 'prior knowledge that the person is a child', GRETA, *Report on Belarus*, I GRETA(2016)14, para 44.

156 See the initial distinction made in Austria between children below and above the age of 14 years (subsequently amended), GRETA, *Report on Austria*, II GRETA(2015)19, para 16.

157 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, paras 99–100.

158 See such requirements under the German Crime Victim Compensation Act, GRETA, *Report on Germany*, I GRETA(2015)10, paras 177 and 181.

159 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 132.

160 See the discussion on so-called 'historic victims' in the UK, as described in GRETA's report (including references to domestic case-law), GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 159.

161 See CoE Convention against Trafficking, Art 10(1).

of victims, referral and assistance, for instance, including it in own victim definitions,[162] and in some cases, establishing quite complex procedures for granting formal victim status, including designated authorities, time limits, criteria for reasonable grounds and conclusive decisions test and reviews.[163] In such cases, GRETA stresses the particular need for outreach activities in order not to rely on victim self-identification,[164] especially in relation to children.

162 See, for instance, in the Armenian document on the NRM, GRETA, *Report on Armenia*, II GRETA(2017)1, 20 March 2017, para 96; with criteria in the Annex of the Trafficking Framework Protocol in Spain, GRETA, *Report concerning the implementation of the CoE Convention against Trafficking by Spain and Government's comments*, Evaluation Round I, GRETA(2013)16, 27 September 2013, para 147.

163 See the extensive procedure in the UK, GRETA, *Report on the United Kingdom*, II GRETA(2016)21, paras 141–167; in the case of Ukraine, victims have to submit an application to the local authorities for victim status, see GRETA, *Report on Ukraine*, I GRETA(2014)20, para 129.

164 See GRETA, *Report on Ukraine*, I GRETA(2014)20, para 146.

ARTICLE 5

PREVENTION OF TRAFFICKING IN HUMAN BEINGS

Helmut Sax

1 Each Party shall take measures to establish or strengthen national co-ordination between the various bodies responsible for preventing and combating trafficking in human beings.

2 Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.

3 Each Party shall promote a Human Rights-based approach and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to in paragraph 2.

4 Each Party shall take appropriate measures, as may be necessary, to enable migration to take place legally, in particular through dissemination of accurate information by relevant offices, on the conditions enabling the legal entry in and stay on its territory.

5 Each Party shall take specific measures to reduce children's vulnerability to trafficking, notably by creating a protective environment for them.

6 Measures established in accordance with this article shall involve, where appropriate, non-governmental organisations, other relevant organisations and other elements of civil society committed to the prevention of trafficking in human beings and victim protection or assistance.

A. INTRODUCTION

5.01 'An ounce of prevention is worth a pound of cure', runs a common saying, often quoted in human rights work. In a similar vein, the drafters of the Council of Europe Convention on Action against Trafficking in Human Beings[1] 'examined the question of prevention of trafficking and considered it one of the most important aspects of the future European Convention'.[2] Article 5 starts off Chapter II of the Convention on 'prevention, cooperation and other measures', which, along with a wide range of general prevention measures, covers measures aimed at reducing the demand for exploitative services (Art 6) as well as preventive measures concerning border control (Art 7) and related aspects of the integrity and security of travel or identity documents (Arts 8, 9). Taken together, they constitute the 'prevention' cluster among the popular '4 p's categorization of anti-trafficking implementation measures, next to 'protection', 'prosecution' and 'partnership'.

5.02 The focus of Chapter II and its Articles is primarily on prevention at the policy level, that is efforts to prevent trafficking from occurring in the first place, different from secondary preventive interventions (e.g., identification and referral to safe shelter, Arts 10 and 12, and risk assessment prior to return to prevent re-trafficking, Art 16) and tertiary preventive measures to enable victims to recover (Arts 12, 13). Clearly, prevention programmes must be adapted to the trafficking profile of a particular country (the predominant types of exploitation, recruitment methods, risk groups, support mechanisms in place and so on), and they will also differ between countries of origin, transit and destination.

5.03 The various paragraphs of Article 5 combine policy measures at different levels in order to ensure a comprehensive prevention set of measures, addressing the normative (human rights-based approach, gender mainstreaming, child sensitivity), structural (national coordination, the involvement of civil society) and the substantial dimension of prevention (effective policies and programmes, identifying vulnerable groups, enabling legal migration, creating a protective environment for children).

B. DRAFTING HISTORY

5.04 At the beginning of the drafting process, the prevention of trafficking in human beings received significant attention. Already during the 1st CAHTEH meeting in September 2003, delegations stressed key elements of preventive action, such as coordination of actors in their prevention efforts, including civil society, reducing demand for any sorts of services from trafficked persons and addressing situations of vulnerability proactively and sustainably, not just through awareness-raising among potential victims, but also by, for instance, stronger integration of women into the labour market.[3]

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 27.

3 CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, para 27.

5.05 The actual drafting and agreement of Article 5's text took place at the 2nd and 5th meetings of the CAHTEH, leading to an almost final text by July 2004. Among the first issues to be addressed ranked the question of the placement of measures designed to reduce demand for trafficking in human beings. Already between the first two meetings in 2003, the approach switched from having Articles 5 (prevention) and 6 (demand reduction) as separate provisions to combining both into a single Article. A provisional decision at the 2nd meeting kept the issues distinct. This was confirmed at the 5th meeting, when arguments were made for a dedicated Article 6 in 'view of the importance of demand in the trafficking process'.[4] In terms of the substance of the provisions, the topic of migration turned out to be the most controversial subject, as far as responsibilities between countries of origin and of destination and their respective scope were concerned.

5.06 Other than that, the CAHTEH discussed prevention in the context of Article 5 in relation to levels of coordination of preventive measures and worked out a wide-ranging non-exhaustive list of policies and programmes[5] for research, information, awareness-raising, training and socioeconomic initiatives targeting persons in vulnerable situations on the one hand and those that potentially identify and assist victims on the other. Further listings, however, of various empowerment measures designed specifically for women and children (such as 'expand women's business skills and employment opportunities', 'initiatives for sustainable development from a gender perspective', establishment of 'hotlines' for advice for women and children) contained in early drafts of the Convention[6] were not approved for the final text. At the 2nd meeting, the CAHTEH decided to declare certain principles – a human rights-based approach, gender mainstreaming and 'a child-sensitive approach' – to act as guidance for the implementation of all the policies and programmes mentioned (see Art 5 para. 3), with the additional reference to create a protective environment specifically for children (para. 5).[7] Further details of these concepts were inserted in the Explanatory Report. The attention of the CAHTEH was also drawn to the role of civil society in prevention matters, with some debate on terminology and domestic regulations of this sector.

1. National coordination and the role of civil society

5.07 More specifically, early drafts required states quite broadly to 'take measures to establish and strengthen international, national, regional and local co-operation and co-ordination'. Delegations, however, raised several concerns about terminological issues (differences between 'co-operation' and 'coordination', the meaning of 'regional'), potential overlap with other Convention chapters, and which actors would have to take responsibility. In the end, references both to 'co-operation' and to 'regional and local' were deleted in draft Article 5, thus,

4 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 69.

5 Expanding further on prevention measures contained already in Art 9 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

6 See draft Art 5(8), cited after CAHTEH, *Revised preliminary draft European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 5–6.

7 CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH(2003)RAP2, 26 January 2004, paras 38 and 47.

emphasising in particular domestic coordination, 'since international co-operation was specifically covered in Chapter VI'.[8]

Some of the CAHTEH's delegates also underlined that 'it should not be compulsory for states to establish new authorities responsible for combating trafficking in human beings and that consideration should first be given to whether existing authorities could take on the new functions'.[9] Furthermore, it was stressed that coordination is required not only for combating trafficking but also for prevention and that it should also involve civil society. **5.08**

As far as coordination and the role of civil society in prevention are concerned, the important contribution of non-governmental organisations (NGOs) and other relevant actors, such as media, was underlined by a majority of the CAHTEH participants during the drafting, although some delegations stated that 'it was important for NGOs to be approved in order to avoid the risk of their infiltration by criminal organisations' or 'to be involved only when appropriate'.[10] In the end, an almost identical wording to Article 9(3) of the Palermo Protocol was adopted by delegations, while referring also to civil society involvement 'under the conditions provided for by the Parties' national law'.[11] Nevertheless, at the 6th meeting, the CAHTEH agreed to include an additional general provision about State Parties' being encouraged to establish 'strategic partnerships' with civil society. In order to underline that such cooperation should 'extend to all matters covered by the convention: prevention, protection of and assistance for victims and criminal proceedings', drafters decided at the 7th meeting not to merge such commitment with Chapter II that deals with prevention exclusively, but to keep it as a separate provision (final Art 35) in chapter VI concerned with cooperation.[12] **5.09**

2. Policies and programmes and overarching principles for their implementation

Similar to Article 9 of the Palermo Protocol, Article 5 of the CoE Convention against Trafficking contains a 'non-exhaustive list of preventive measures',[13] although an early draft tried to add further detail by requesting State Parties to follow three distinct tracks for prevention, each focusing on a particular target group: first, on a general level, to embark on research and address the general public through information, 'mass media campaigns' and preventive 'social and economic initiatives'. Second, in relation to 'potential victims of trafficking', to engage in awareness-raising, education, and, again, 'information including media campaigns'. And, third, to provide the same type of measures also 'for professionals concerned by trafficking'.[14] However, drafters felt distinctions between these target groups difficult to sustain, especially 'to determine who was a potential victim' vis-à-vis the whole population, leading eventually to a merging of all such policies and measures into one **5.10**

8 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 59.
9 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 28.
10 Ibid., para 45.
11 Ibid.
12 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, paras 27–31.
13 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 34.
14 See draft Art 5(2), 5(3) and 5(4) cited after CAHTEH, *Revised preliminary draft European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 5.

paragraph 2 of Article 5.[15] Furthermore, references to engaging in 'mass media campaigns' were deleted as drafters felt it 'inappropriate' for a legally binding instrument.[16]

5.11 An early revised preliminary draft text of Article 5 of November 2003 provided for a further wide-ranging set of preventive measures specifically addressing the situation of women and children. It included action to be taken in the fields of education, training, expansion of 'women's business skills and employment opportunities' and personal capacity building through information services (mentioning 'public service advertisements, radio, TV, newspapers and establishment of 'hotlines'), up to 'initiatives for sustainable development from a gender perspective'.[17] However, discussion at the 2nd CAHTEH meeting revealed some disagreement about the added value of this provision in terms of clarity of concepts such as 'sustainable development' in a trafficking context, while others preferred clearer distinction between measures relevant for women and those for children. Consequently, draft paragraph 8 was dropped, with some elements included in paragraphs 3 (gender dimension) and 5 (protective environment for children) as well as in the final Explanatory Report (such as preventive measures addressing 'extreme poverty').[18]

5.12 This debate is partly reflected in Article 5(3), which highlights three overarching principles and approaches to guide implementation of all prevention policies and programmes, namely a 'human rights-based approach', 'gender mainstreaming' and 'a child-sensitive approach'. The first and second of them were agreed already at the 2nd CAHTEH meeting, as '[m]ost of the delegations stressed that it was essential for all the preventive measures to be human-rights-based. Other delegations also considered it important to adopt a gender perspective in preventive action'.[19] On the latter, drafters recalled gender equality to also require positive measures for its achievement, extending beyond mere non-discrimination of women and referred to the CoE Committee of Ministers' Recommendation No. R (98) 14 to Member States on gender mainstreaming.[20] There was no specific discussion on prevention efforts targeting children at this stage. Only at the 5th meeting, did the CAHTEH agree on a separate paragraph 5 requiring State Parties to create a 'protective environment' for children, a term further specified in the Explanatory Report.[21]

5.13 It is worth noting that drafters emphasised the relevance of these three principles and approaches not just in the development and implementation of preventive action, but also in assessing the impact and effectiveness of the measures taken, which was to be understood as an 'assessment by each party of prevention policies and programmes and not assessment via the monitoring mechanism provided for in Chapter VII of the Convention'.[22] Thus, the need for

15 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, paras 34–36.
16 Ibid., para 34; CAHTEH, *Projet de Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains: Contribution de la délégation de la Suisse*, CAHTEH(2004)1 Addendum II, 29 January 2004, 4.
17 See draft Art 5(8) cited after CAHTEH, *Revised preliminary draft European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 6.
18 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 37.
19 Ibid., para 38.
20 Ibid.
21 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 65; see further discussion in section D.6 below.
22 Ibid., para 63.

domestic impact assessment of measures was underscored, in line also with the general concern of the drafters to ensure the effectiveness of prevention measures.[23]

3. Enabling legal migration

5.14 An early draft of the CoE Convention against Trafficking required State Parties to 'take such legislative and other measures as may be necessary to ensure safe migration …',[24] a wording which led to significant controversies in the drafting process. Questions arose on the scope of responsibilities of countries ('ensure' or 'enable' 'safe' or 'legal' migration, information through which public authorities/'relevant offices', the role of the private sector).[25] Furthermore, eventual differences between countries of origin and of destination, but also cross-border cooperation needs were discussed. The relationship with other human rights standards such as Article 19 of the (Revised) European Social Charter (providing for rights of migrant workers and their families to protection and assistance, including measures 'against misleading propaganda relating to emigration and immigration'), as well as relations with European Union (EU) Member States, were part of the debate.[26]

5.15 The debate at the 2nd CAHTEH meeting moved between entire deletion of this paragraph and retaining it, eventually leading to two proposed options for further discussion. The first option was shorter than the final version of paragraph 4 and focused on obligations of countries of destination. It said: 'Each Party shall take such legislative or other measures as may be necessary to ensure the dissemination of accurate information on the conditions enabling the regular entry in and stay on its territory.' The second option addressed legal migration more broadly, with accurate information dissemination as just one example of implementation:

> Each Party shall take such legislative or other measures as may be necessary to enable migration to be carried out legally, in particular through dissemination of accurate information by visa, passport, immigration and other relevant offices, on the conditions enabling the regular entry in and stay on the territory of another Party.[27]

A significant number of delegations supported the first option, but after discussion at the 5th meeting, the CAHTEH decided for a modified version of the second option, explaining:

> so as to allow each party to take appropriate measures as necessary for enabling migration to be done legally. In particular the relevant offices should disseminate accurate information on the conditions enabling legal entry into and legal residency on national territory. The reference to relevant offices was flexible and adaptable to each party's internal arrangements. It included services such as visa and immigration services.[28]

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23 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 34.

24 See draft Art 5(6) cited after CAHTEH, *Revised preliminary draft European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 6.

25 The 2nd CAHTEH meeting report also refers to a participant's observation 'that the convention was concerned with trafficking in human beings, not promoting or preventing migration', see CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 43.

26 Ibid., para 44.

27 CAHTEH, *Revised Draft European Convention on Action against Trafficking in Human Beings at the 2nd Meeting*, CAHTEH(2003)MISC7, 10 December 2003, 4.

28 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 64.

5.16 In September 2004, a group of 127 NGOs issued their comments on the then draft Convention. As far as prevention measures are concerned, they called on the states participating in the drafting process to include provisions requiring states to ensure respect for 'the right to seek and enjoy asylum and other forms of international protection' and 'to take specific and concerted individual and cooperative measures to address the root causes of trafficking and provide and increase avenues for safe, legal migration'.[29]

C. ARTICLE IN CONTEXT

1. Article 5 and other Convention provisions of the CoE Convention against Trafficking

5.17 The CoE Convention against Trafficking devotes an entire chapter to the prevention of trafficking of human beings, with its introductory Article 5 setting the scene. As it will be further discussed in section D below, this Article offers a far-reaching conceptual and legal framework for prevention, while the other chapter articles address more specific aspects, such as reduction of demand of services of trafficked persons (Art 6) and border measures (Art 7) along more technical matters of integrity of travel and identity documents (Arts 8, 9). The latter as well as Article 5(4) on legal migration clearly bear witness to a predominant understanding of trafficking as a cross-border phenomenon, while the core of Article 5 (and of Art 6), from guiding principles to concrete prevention policies and programmes addressing situations of vulnerability, shows relevance for any anti-trafficking effort irrespective of a transnational dimension. At the same time, due recognition has to be given to the fact that prevention measures need to look differently depending on whether they are to be implemented in countries of origin (where people are recruited) or places of destination, (where the intended exploitation is to take place).[30]

5.18 Conceptually, from a human rights perspective, the report of the Office of the UN High Commissioner for Human Rights (OHCHR) on the role of prevention in the promotion and protection of human rights distinguishes between two areas of preventive intervention: 'direct prevention or mitigation', understood as establishing 'a legal, administrative and policy framework', which seeks to prevent human rights violations and eliminate risk factors, and 'indirect prevention/non-recurrence', which investigates situations after a violation has happened, provides remedies to victims and prevents recurrence.[31] Further differentiation is provided in, for instance, public health discourses,[32] which consider prevention to encompass primary, secondary and tertiary prevention dimensions, with the latter two corresponding to 'indirect prevention' as discussed above. Applied to the CoE Convention against Trafficking, measures foreseen under Article 5 fall largely under primary prevention, dealing with the

29 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Joint Statement of 127 Non-Governmental Organisations*, CAHTEH(2004)17 Addendum X, 27 September 2004, paras 11 and 21.

30 See also CAHTEH's concern for comprehensive prevention policies addressing local, regional, national and international levels of action, in both countries of origin and destination: CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, para 32.

31 UN OHCHR, *Report on the Role of Prevention in the Promotion and Protection of Human Rights*, UN Doc. A/HRC/30/20, 16 July 2015, paras 9 and 10.

32 See for instance, World Health Organization, *Public health policy and legislation instruments and tools: an updated review and proposal for further research* (WHO 2012).

fundamental principles, a general framework for the coordination of efforts and prevention policies targeting specialists as well as the general public and groups in vulnerable situations. In terms of secondary prevention, however, the Convention Chapter III on victim protection has an important role to play as well. Trafficking may have already taken place, but it is equally important to identify potential victims (Art 10 of the Convention) and refer them to appropriate assistance in order to limit recurrence and avoid, for example, allowing certain recruitment practices to spread. Similarly, immediate access of unaccompanied children to legal guardianship should be seen also as a priority measure not least for prevention of trafficking and exploitation of children. Finally, rehabilitative assistance services such as under Article 12 of the Convention may be regarded as tertiary prevention measures to limit further negative impact of the individual trafficking experience and allow trafficked persons to embark on life afresh.

5.19 After all, the systemic, cooperative dimension of prevention must be emphasised. Much like protection and assistance, prevention may not be reduced to the responsibility of one state agency or training institution alone, but, instead, requires cooperation and coordination among a variety of stakeholders in order to be effective. As discussed in the *travaux préparatoires*, drafters struggled where to place state obligations on cooperation for prevention. In the end, an entire Chapter VI was devoted to international cooperation, including for prevention, which thus extends far beyond a more traditional understanding of cooperation focusing on police and justice matters. Article 32 explicitly speaks of international cooperation 'for the purpose of preventing […] trafficking in human beings', while the whole purpose of cooperation on endangered or missing persons, including children (Art 33), can be seen as secondary prevention efforts, similar to information sharing under Article 34 for criminal investigations. Moreover, civil society actors should be accepted as strategic partners for the implementation of the Convention (Art 35) – a message strengthened for prevention, specifically in Article 5(6). Outside Chapter VI, Article 29 requests State Parties to adopt coordination measures, which may include the establishment of dedicated coordination bodies.

2. Article 5 of the CoE Convention against Trafficking and other international and European standards

5.20 The essential elements of Article 5 of the CoE Convention against Trafficking, such as engagement in research, information, social and economic initiatives, cooperation with civil society, alleviation of situations causing vulnerability of women and children, as well as reduction of demand fostering the exploitation of persons (Art 6 of the Convention), were all mentioned in Article 9 of the Palermo Protocol.

5.21 One should also point out the overall phrasing of the two prevention objectives in Article 9(1), which not only mentions 'prevent and combat trafficking in persons' (lit a), but also secondary prevention measures, protecting victims 'from revictimization' (lit b) – thus, underlining the inherent link of prevention with protection measures. Moreover, the UN instrument directly refers to 'poverty, underdevelopment and lack of equal opportunity' as underlying circumstances and factors creating situations which may lead to trafficking in human beings (para 4).

5.22 In terms of legal commitments entered by State Parties, an important difference in the wording between the two instruments should be highlighted: while Article 9(2) of the Palermo

Protocol requires states in a rather vague way to 'endeavour to undertake measures', Article 5 of the CoE Convention against Trafficking creates a binding obligation ('shall establish and/or strengthen') to effectively devise trafficking prevention policies and programmes.[33]

5.23 The International Labour Organization (ILO) has set up a comprehensive legal framework addressing various labour-related forms of exploitation which contain further important obligations for State Parties, with implication also for the context of prevention of trafficking for forced labour. The Protocol of 2014 to the Forced Labour Convention, 1930,[34] requires governments to commit to awareness-raising activities, including to educate and inform 'employers, in order to prevent their becoming involved in forced or compulsory labour practices', to support 'due diligence[35] by both the public and private sectors to prevent and respond to risks of forced or compulsory labour', to undertake efforts to ensure equal protection of all workers across all sectors of the economy and to strengthen labour inspection services, as well as to protect 'persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process' (Art 2 of the Forced Labour Protocol). As far as the domestic work sector is concerned, the ILO Domestic Workers Convention[36] sets minimum standards, based on a human rights approach (Art 3(1) of the Domestic Workers Convention), not only, for example, for decent working conditions, but also for effective protection of 'domestic workers, including migrant domestic workers, recruited or placed by private employment agencies, against abusive practices' (Art 15). This includes a regulatory framework for private employment agencies. In addition, it requires measures to ensure that:

> migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, […] prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies
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> (Art 8 of the Domestic Workers Convention).[37]

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33 Although Gallagher observes that the overall wording of some prevention aspects (see paras 4 and 5) of the Palermo Protocol in Art 9 is formulated in 'mandatory and not merely hortative language', 'unlike other, "softer" victim protection provisions', Anne T Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010) 416.

34 P029, 11 June 2014, entered into force on 9 November 2016. Art 1(3) of the 2014 Protocol reaffirms the 1930 definition of forced labour, but also adds that 'the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour'.

35 See also, UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of human rights and transnational corporations and other business enterprises, John Ruggie,'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework'*, A/HRC/17/31, 21 March 2011, Principle 15:

> In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: …
>
> (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights" …

Furthermore, see also Principle 17 on human rights due diligence as an operational principle.

36 Convention concerning decent work for domestic workers (ILO No 189), 2955 UNTS 407, 16 July 2011, entered into force 5 September 2013 (thereinafter Domestic Workers Convention).

37 See also, in relation to migrant workers, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3, 18 December 1990, entered into force 1 July 2003. Art 68 of

5.24 On the EU level, the Directive 2011/36/EU[38] devoted its Article 18 to the prevention of trafficking, proclaiming a 'holistic and integrated approach adopted by the Directive, which seeks to address prevention, protection and prosecution, as well as partnership'.[39] It covers the areas of demand reduction, information and awareness-raising, research and education and training for 'officials likely to come into contact with victims or potential victims of trafficking in human beings, including front-line police officers, aimed at enabling them to identify and deal with victims and potential victims of trafficking in human beings'.[40] Thus, once again, prevention is linked with identification and victim assistance. Preventive measures should be taken 'where appropriate in co-operation with relevant civil society organisations and other stakeholders', and the EU Directive specifically mentions action 'through the internet' as one means to achieve its prevention objectives (para 2). Although the EU Directive sets detailed standards for protection and assistance to trafficked children, there is no comparable primary prevention provision similar to Article 5(5) of the CoE Convention against Trafficking (creating a 'protective environment' for children).[41]

D. ISSUES OF INTERPRETATION

1. A trafficking prevention framework

5.25 Prevention of trafficking in human beings entails strategies and measures, which need to extend beyond, for instance, the production of video clips for prospective labour migrants or girls at school. Article 5 of the CoE Convention against Trafficking establishes a comprehensive legal framework for policies and interventions for the prevention of trafficking. As a first step, an understanding of the factors and conditions leading to trafficking processes ('root causes') is essential for any counter-action. At the same time, 'there is not yet universal agreement on the complex matter of causes of trafficking'.[42] Poverty and inequality have already been mentioned as frequently named key factors contributing to trafficking, and the Explanatory Report itself claims as 'widely recognised that improvement of economic and social conditions in countries of origin and measures to deal with extreme poverty would be the most effective way of preventing trafficking'.[43] However, it is questionable whether placing the prevention burden mainly on countries of origin can be justified. Taking the trafficking

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this Convention requires, for instance, 'States Parties, including States of transit, [to] collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation.'

38 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

39 OHCHR et al, *Prevent, Combat, Protect: Human Trafficking – Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (2011) (thereinafter Joint UN Commentary on the EU Directive) 91.

40 Dir 2011/36/EU, Art 18(3).

41 See also, Joint UN Commentary on the EU Directive, 94. Requirements to appoint a legal guardian for trafficked children if there is a conflict of interest between parents and the child (Dir 2011/36/EU, Art 14(2)) and in cases of unaccompanied child victims of trafficking (Dir 2011/36/EU, Art 16(3)) should be seen as important measures to prevent (further) trafficking of children.

42 Gallagher, 414.

43 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 103.

definition of Article 4 of the Convention as a starting point, next to actions and the abusive means for keeping victims of trafficking in situations of dependency, the third element of an exploitative purpose also needs to be fulfilled. Indeed, the business model of trafficking relies on profits from exploitation notably in places of destination. The 2002 UN OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking[44] consider demand for services from trafficking as one root cause, while also recommending to 'take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice' (Guideline 7).

5.26 As far as implications for prevention are concerned, Gallagher has proposed three key areas for intervention, namely (1) reduction of demand for services from trafficked persons including to strengthen public procurement legislation, for instance, (2) addressing vulnerabilities of certain social groups ranging from migrants and refugees to victims of gender-based violence and (3) strengthening measures against corruption and legal impunity including respect for due diligence standards of mission personnel working for international agencies.[45] Others, such as Dottridge, have challenged anti-trafficking policies *per se* for ignorance or acceptance of 'collateral damage' and unintended consequences including of prevention efforts, such as restrictions on migration and international protection, which limit safe and legal migration.[46] Furthermore, they question the concept that entire social categories, such as women, children, minorities or migrants, can be regarded as 'vulnerable', instead of drawing attention to more specific groups and targeting interventions for empowerment.[47] In addition, vulnerability discourses may lead away from critical questions about discrimination and stereotypes of particular groups in society, such as children, and, ultimately, from a critical assessment of protection of their human rights.[48] Stoyanova emphasises the preventive function of effective regulatory frameworks, the establishment of which ranks also among the positive obligations under Article 4 of the European Convention on Human Rights,[49] and which should not be limited to criminal legislation, but include many more regulatory areas, such as labour law, regulation of private employment agencies and migration law, as well as human rights obligations related to all these matters.[50] In every case, an essential element of the obligation to prevent trafficking lies in governments' responsibility to respond to trafficking lawfully and

44 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc. E/2002/68/Add. 1, 20 May 2002.

45 Gallagher, 415–53.

46 It is important to underline human rights-based limitations to restrictions under the principle of proportionality, as emphasised by the UN Human Rights Committee in relation to freedom of movement: 'Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected', Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of movement)*, CCPR/C/21/Rev.1/Add.9, 2 November 1999.

47 Mike Dottridge, 'Collateral damage provoked by anti-trafficking measures' in Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2017) 346 and 349.

48 See for instance, Helmut Sax, 'Child trafficking – a call for rights-based integrated approaches' in Piotrowicz, Rijken, Uhl, ibid., 252.

49 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered – Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 370.

50 Ibid., 369–87. Reference should be made in this context also to important case-law of the Inter-American Court of Human Rights: in the *Workers of the Hacienda Brasil Verde v. Brazil*, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318, 20 October 2016, the Court concluded that Art 6 of the American Convention on Human Rights (corresponding to Art 4 of the ECHR) includes a state obligation

without discrimination.[51] As stated in the Convention's Explanatory Report on Article 40, 'the exercise of fundamental rights should not be prevented on the pretext of taking action against trafficking in human beings', with Article 40(4) explicitly mentioning international human rights law, international humanitarian law and international refugee law.

5.27 In reality, none of the factors and root causes mentioned so far provides sufficient explanation by itself to answer the question of what leads to trafficking in human beings and how to prevent it. Rather a combination of them, taking into account their interrelated, intersecting dimensions, can guide understanding and further effective preventive action. Consequently, on a process-oriented level, State Parties' engagement and investment in anti-trafficking research, on policies addressing socioeconomic conditions, gender and age discrimination, social groups at risk of marginalisation (and trafficking), impact assessment of policies, respect for the rule of law and prevention of corruption, as well as accountability mechanisms for human rights violations, become an imperative for any further policy development.[52] It is against this background that GRETA has consistently evaluated the extent of engagement of State Parties in supporting data collection and research activities,[53] as well as highlighting areas in need for further analysis.[54] In relation to important 'root causes' assessed by GRETA in various country situations, key factors that have been identified include aspects related to poverty and school drop-out,[55] gender inequality and violence against women,[56] and absence of employment opportunities.[57]

5.28 Next to the requirement to invest in understanding the 'root causes' of trafficking as part of a comprehensive trafficking prevention framework, Article 5(3) of the Convention sets three guiding principles framing these efforts 'in the development, implementation and assessment

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to eliminate legislation tolerating slavery or servitude and adopt a comprehensive prevention strategy, which, for instance, also addresses child labour and child's access to free basic education.

51 Gallagher, 453.

52 As stated by the the *Recommended Principles and Guidelines on Human Rights and Human Trafficking*: 'effective prevention strategies should be based on existing experience and accurate information', Guideline 7.

53 For instance, GRETA recalls the need for the collection of statistical data disaggregated (by at least gender, age, type of exploitation) in order to allow authorities to determine the scale of trafficking and appropriate responses for groups affected by trafficking, while at the same time 'respecting the rights of data subjects to personal data protection', GRETA, *Report on the Slovak Republic*, I GRETA(2011)9, para 63. For a critical assessment of a collection of personal data of trafficked persons, see Baerbel Heide Uhl, 'Assumptions built into code' – datafication, human trafficking and human rights – a troubled relationship?' in Piotrowicz, Rijken, Uhl, 407–15.

54 See for instance, in relation to Ukraine:

> Areas where more research is needed in order to shed light on the extent and new trends of human trafficking in Ukraine and inform policy makers include trafficking for the purpose of labour exploitation, trafficking of foreign nationals to Ukraine for different types of exploitation, trafficking for the purpose of removal of organs and trafficking within Ukraine.

GRETA, *Report on Ukraine*, I GRETA(2014)20, para 84.

55 See, for instance GRETA, *Report on Albania*, I GRETA(2011)22, para 95; GRETA, *Report on Croatia*, I GRETA(2011)20, para 76; GRETA, *Report on Moldova*, I GRETA(2011)25, para 96; GRETA, *Report on Portugal*, I GRETA(2012)17, para 98; GRETA, *Report on Ukraine*, I GRETA(2014)20, para 116.

56 See, for instance GRETA, *Report on Albania*, II GRETA(2016)6, para 74; GRETA, *Report on Belarus*, I GRETA(2017)16, para 106; GRETA, *Report on Belgium*, II GRETA(2017)26, para 78; GRETA, *Report on Croatia*, II GRETA(2015)33, para 68; GRETA, *Report on Latvia*, II GRETA(2017)2, para 81.

57 See, for instance GRETA, *Report on Croatia*, I GRETA(2011)20, para 76; GRETA, *Report on Portugal*, I GRETA(2012)17, para 98; GRETA, *Report on Ukraine*, I GRETA(2014)20, para 116.

of all the policies and programmes': promoting a human rights-based approach, using gender mainstreaming and taking a child-sensitive approach (with additional concern for 'children's vulnerability to trafficking' in para 5).[58] The substantive content of these policies and programmes is further explained by way of a list of examples in the preceding paragraph 2. It starts with reference to research, the importance of which was discussed above, followed by information and awareness-raising activities, broader socioeconomic measures and training for professionals. Particular attention is paid to prevention in the context of migration, to 'enable migration to take place legally', which includes (but is not limited to) information activities (para 4). These requirements are matched by state obligations for national coordination (para 1) and involvement 'where appropriate' of civil society in prevention efforts (para 6).

5.29 In short, Article 5 provides for a comprehensive set of positive obligations for the prevention of trafficking in human beings, with three dimensions: (1) it contains general principles guiding the overall approach based on human rights, gender mainstreaming and child sensitivity; (2) requires substantial preventive action including research and analysis on underlying factors of trafficking within a State Party's jurisdiction as well as ongoing impact assessment of measures taken, identification of situations of vulnerabilities, policies and programmes for general awareness-raising, empowerment of groups at risk, including an enabling and protective environment for children, training of specialists for identification and assistance and specific consideration to enabling legal migration; as well as (3) structures for coordination and cooperation, including with relevant civil society stakeholders.

2. National coordination

5.30 Article 5(1) speaks deliberately of 'national coordination' of actors, leaving the international dimension of coordination and cooperation to Chapter VI. Measures should 'promote a multidisciplinary co-ordination approach',[59] and, in terms of:

> bodies responsible for preventing and combating trafficking', the Explanatory Report declares that this 'paragraph makes it a requirement to co-ordinate all the sectors whose action is essential in preventing and combating trafficking, such as the agencies with social, police, migration, customs, judicial or administrative responsibilities, non-governmental organisations, other organisations with relevant responsibilities and other elements of civil society.[60]

Consequently, when setting up a 'national referral mechanism' (NRM) for cross-sectoral identification of victims and referral to specialised services, State Parties should also incorporate coordination of prevention activities into the mandate of such mechanism.[61]

5.31 In *Chowdury and others v. Greece*, the European Court of Human Rights (ECtHR) considered Greece in violation of its obligations under Article 4 ECHR.[62] Despite a report of the Greek

58 See below section D.6 for further analysis of these obligations.
59 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 102.
60 Ibid.
61 See, Theda Kröger, Jasna Malkoc and Baerbel Heide Uhl, *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons*. A Practical Handbook (OSCE/ODIHR 2004), 49; for further analysis on NRMs, see also the Commentary on Art 12 of the CoE Convention against Trafficking.
62 *Chowdury and Others v. Greece*, App no 21884/15 (ECtHR, 30 March 2017).

Ombudsman about the exploitative situation on Greek strawberry fields, debates in Parliament and inspections ordered by three ministries, the situation of the seasonal field workers did not improve. The Court consequently made direct references to Article 5 of the CoE Anti-Trafficking Convention and obligations to strengthen national coordination as preventive measures and concluded that in this case 'operational measures taken by the authorities were not sufficient to prevent human trafficking'.[63]

5.32 In the course of its country evaluations, GRETA has repeatedly addressed the need for closer coordination among stakeholders for prevention purposes, for instance, in the framework of strategies and action plans on Roma inclusion or addressing domestic violence. In the context of prevention of trafficking for the purpose of labour exploitation, GRETA has noted the need to initiate 'joint inspections by labour inspectors and other agencies, such as the police, migration or border agencies, tax agencies and social inspection', which 'enables a multi-disciplinary approach and the pooling of information'.[64] Furthermore, GRETA recommended closer coordination and cooperation on prevention between authorities, trade unions and the private sector,[65] frequently referring also to the UN Guiding Principles on Business and Human Rights. As far as children are concerned, the concept of a 'protective environment' (para 5) clearly requires coordination in order to make such a system approach effective, and GRETA has noted the importance of aligning anti-trafficking policies for children with social protection policies.[66] Similarly, the use of the internet and social media for recruiting children into exploitation has been identified by GRETA as another area for improved coordination and cooperation, in this case involving the education system and internet service providers.[67]

3. Effective policies and programmes

5.33 The provision in Article 5(2) aims at devising and implementing a set of substantial prevention measures at policy and programme level, by way of an indicative list of actions to be taken, 'by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes'. As underlined in the Explanatory Report, this should be understood as a comprehensive mandate to State Parties, as preventive measures may 'vary in character and may have short-, medium-, or long-term effects'.[68] 'Research' is taken as an example for addressing the methodological aspects of prevention. At the same time, it may also play an important role in situation analysis, impact assessment and monitoring and evaluation of measures taken.[69] On the other hand, 'information, awareness-raising and

63 Ibid., paras 110 and 115.

64 GRETA, *7th General Report on GRETA's activities* (March 2018), para 143, with further references to country examples.

65 See for instance: GRETA, *Report on Austria*, II GRETA(2015)19, para 70; GRETA, *Report on Belgium*, II GRETA(2017)26, para 64; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 85; GRETA, *Report on Croatia*, II GRETA(2015)33, para 55; GRETA, *Report on Denmark*, II GRETA(2016)7, para 57; GRETA, *Report on Moldova*, II GRETA(2016)9, para 62; GRETA, *Report on Norway*, II GRETA(2017)18, paras 51 and 68; GRETA, *Report on Serbia*, II GRETA(2017)37, para 61; GRETA, *Report on the Slovak Republic*, II GRETA(2015)21, para 63; GRETA, *Report on Sweden*, II GRETA(2018)8, para 76.

66 GRETA, *6th General Report on GRETA's activities* (March 2017), para 93.

67 Ibid., para 91.

68 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 103.

69 Ibid.: 'research on combating trafficking is essential for devising effective prevention methods'. See also the discussion on relevance of research for prevention in section D.1.

education campaigns are important short-term prevention measures', while 'social and economic initiatives tackle the underlying and structural causes of trafficking and require long-term investment'.[70]

5.34 Earlier attempts in the drafting phase to specify prevention measures for specific target groups, in particular for those considered to belong to groups at risk of being trafficked (awareness-raising) and those belonging to professional groups likely to get into direct contact with possible victims, such as police, social workers and doctors,[71] did not materialise in the final text; instead, both groups are mentioned together in paragraph 2.

5.35 It should be reiterated that Article 5(2) contains positive obligations for states to act preventively, in the meaning of the interpretation by the ECtHR of Article 4 ECHR to 'take operational measures to protect victims, or potential victims, of trafficking', as long as they 'were aware, or ought to have been aware' of situations at risk of trafficking and failed 'to remove the individual from that situation or risk'.[72] The lack of effective measures to prevent trafficking within the meaning of Article 5 of the CoE Convention against Trafficking despite situations well known to the authorities was considered a violation also of Article 4 of the ECHR in *Chowdury and Others v. Greece*.[73]

5.36 In its country evaluations, GRETA has repeatedly underlined the obligation of State Parties to identify those risk sectors of the economy where trafficking might occur,[74] such as in the agricultural sector,[75] domestic work including domestic work in diplomatic households[76] and *au pair* work[77] and care services,[78] fishing industries,[79] construction, hotels, catering and entertainment services.[80] Linked to this, GRETA frequently recommended cooperation with trade unions and the private sector in the development of effective prevention policies.[81]

5.37 Other notable areas of recommendations by GRETA in the area of prevention under Article 5 include: addressing the negative stereotyping and stigmatisation of sex workers who became victims of trafficking for the purpose of sexual exploitation,[82] public awareness-raising in

70 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 103.
71 Ibid.
72 *Rantsev v. Cyprus and Russia*, App no 25965/04 (ECtHR, 7 January 2010), para 286; see also *C.N. v. the United Kingdom*, App no 4239/08 (ECtHR, 13 November 2011), para 67. Still, in its case-law the Court has indicated that positive obligations 'must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities', in light of 'difficulties involved in policing modern societies and the operational choices which must be made in terms of priorities and resources', see *Rantsev v. Cyprus and Russia*, para 287.
73 *Chowdury and Others v. Greece*, para 115.
74 See GRETA's analysis in relation to trafficking for labour exploitation, GRETA, *7th General Report on GRETA's activities*, paras 111–135.
75 GRETA, *Report on Spain*, II GRETA(2018)7, para 90.
76 GRETA, *Report on Austria*, I GRETA(2011)10, para 73; GRETA, *Report on Austria*, II GRETA(2015)19, paras 84–86.
77 GRETA, *Report on Norway*, II GRETA(2017)18, paras 50–51.
78 GRETA, *Report on Ireland*, II GRETA(2017)28, paras 73 and 79.
79 GRETA, *Report on Ireland*, II GRETA(2017)28, paras 68–70 and 79.
80 GRETA, *Report on Iceland*, I GRETA(2014)17, para 101.
81 See for instance GRETA, *Report on Serbia*, II GRETA(2017)37, para 61; GRETA, *Report on Sweden*, II GRETA(2018)8, para 76.
82 GRETA, *Report on Croatia*, II GRETA(2015)33, para 69.

relation to the trafficking of children for different types of exploitation such as begging, forced marriage and forced criminality,[83] public awareness-raising about the risk of fraudulent job offers through the internet and social media,[84] expanding the mandate of labour inspectors to include the possibility for unannounced on-site visits,[85] establishing and monitoring of a regulatory framework on private employment agencies,[86] awareness-raising and preventive policies addressing internal trafficking within a country,[87] international cooperation on awareness-raising between countries of origin and of destination,[88] and training of all relevant officials on detection and identification of trafficking.[89]

5.38 As far as prevention of trafficking for the purpose of organ removal is concerned, GRETA underlined the importance of robust and transparent domestic regulation concerning the removal and transplantation of human organs, availability of training for healthcare professionals and other professionals in transplantation matters including staff of health insurance companies and ensuring a thorough investigation of each case where there is information or suspicion of trafficking for the purpose of organ removal.[90] Moreover, GRETA regularly invites State Parties to consider signing or acceding to the CoE Convention against Trafficking in Human Organs.[91]

5.39 In terms of social groups whose members have been identified to be at high risk of trafficking, GRETA has repeatedly addressed the situation of Roma communities in Europe. It stressed the need to develop and strengthen outreach programmes, including cultural mediation, with the involvement of all relevant institutions and Roma communities themselves, to improve their access to education, housing, labour market and overall integration in society.[92] Similarly,

83 GRETA, *Report on Spain*, II GRETA(2018)7, para 100; GRETA, *Report on Sweden*, II GRETA(2018)8, para 83.

84 GRETA, *Report on Armenia*, II GRETA(2017)1, para 60; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 51; GRETA, *Report on Latvia*, II GRETA(2017)2, para 65; GRETA, *Report on Armenia*, II GRETA(2017)1, para 52.

85 GRETA, *Report on Armenia*, II GRETA(2017)1, para 60; GRETA, *Report on Belgium*, II GRETA(2017)26, para 64; GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 106.

86 GRETA, *Report on Armenia*, II GRETA(2017)1, para 60; GRETA, *Report on Austria*, II GRETA(2015)19, para 70; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 51; GRETA, *Report on Croatia*, II GRETA(2015)33, para 55; GRETA, *Report on Ireland*, II GRETA(2017)28, para 79; GRETA, *Report on Serbia*, II GRETA(2017)37, para 61.

87 See, GRETA, *Report on Hungary*, I GRETA(2015)11, para 110.

88 GRETA, *Report on Cyprus*, I GRETA(2011)8, para 104; GRETA, *Report on Montenegro*, I GRETA(2012)9, para 123; GRETA, *Report on Norway*, I GRETA(2013)5, para 109.

89 GRETA, *Report on Armenia*, II GRETA(2017)1, para 60; GRETA, *Report on Ireland*, II GRETA(2017)28, para 79; GRETA, *Report on Romania*, II GRETA(2016)20, para 54; GRETA, *Report on Serbia*, II GRETA(2017)37, para 61; GRETA, *Report on the Slovak Republic*, II GRETA(2015)21, para 63.

90 GRETA, *Report on Albania*, II GRETA(2016)6, para 75; GRETA, *Report on Armenia*, II GRETA(2017)1, para 79; GRETA, *Report on Malta*, II GRETA(2017)3, para 63; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 74; GRETA, *Report on Poland*, II GRETA(2017)29, para 87; GRETA, *Report on Norway*, II GRETA(2017)18, para 57; GRETA, *Report on Portugal*, II GRETA(2017)4, para 91.

91 CoE Convention against Trafficking in Human Organs, CETS No. 216, 25 March 2015, entered into force 1 March 2018.

92 See, in particular, GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 70; GRETA, *Report on Bulgaria*, I GRETA(2011)19, paras 120, 128; GRETA, *Report on Croatia*, II GRETA(2015)33, para 71; GRETA, *Report on Italy*, I GRETA(2014)18, para 116; GRETA, *Report on Romania*, I GRETA(2012)2, para 106.

GRETA has stressed vulnerabilities in relation to migrants and asylum seekers and recommended the development of social and economic initiatives targeted at these groups.[93]

4. Human rights-based approach, gender mainstreaming, child-sensitive approaches

5.40 The Convention expects State Parties to follow three main cross-cutting approaches and principles in its prevention efforts, namely the promotion of a human rights-based approach, the 'use of gender mainstreaming' and a 'child-sensitive approach' (Art 5(3)). None of these concepts is defined by the Convention itself.

5.41 As far as a human rights-based approach is concerned, it is derived from well-established international and regional legally-binding instruments, such as the International Bill of Rights[94] and the ECHR.[95] Guided by principles of universality and inalienability of rights, their indivisibility, interdependence and inter-relatedness, of non-discrimination and equality, participation and inclusion, and of accountability and the rule of law, they create a comprehensive normative framework for implementation, which aims to empower rights holders and hold accountable duty bearers, foremost State Parties to these instruments. Contrary to charity- or needs-based approaches, individuals, including victims of trafficking, do not merely deserve assistance but 'are *entitled* to assistance'[96] under a rights-based approach. The CoE Trafficking Convention was conceived as such a human rights instrument: numerous provisions of the Convention – starting with the Preamble and the purposes of the Convention (in Art 1(1 lit b)) and continuing with specific references to rights related to assistance (Art 12) and compensation (Art 15) and the establishment of a monitoring mechanism supervising the implementation of the Convention (Chapter VII) – all bear witness to the intention of the drafters to create a legal instrument to guarantee human rights to trafficked persons, empower them and hold governments accountable.[97] The case-law of the ECtHR has confirmed human rights obligations under Article 4 of the ECHR, which can be seen to be derived directly from the CoE Convention against Trafficking, including its Article 5 on prevention measures.[98]

5.42 GRETA's country assessments deal with a human rights-based approach rather implicitly in the context of prevention, including when it discusses awareness-raising and empowerment of various groups, such as women, children, minorities or migrants, the prohibition of discrimination, ensuring prevention policies based on evidence through data collection and research, recommending regular assessment of the impact of interventions and effective monitoring and

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93 See for instance, GRETA, *Report on Serbia*, II GRETA(2017)37, para 82.

94 Comprising of the Universal Declaration of Human Rights (UNGA Resolution 217 A (III), 10 December 1948), the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, entered into force 23 March 1976 and the International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966, entered into force 3 January 1976.

95 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 5, 4 November 1950, entered into force 3 September 1953 (and its further Protocols).

96 For an in-depth analysis of the human rights-based approach, see Julia Planitzer, *Trafficking in Human Beings and Human Rights – The Role of the Council of Europe Convention on Action against Trafficking in Human Beings* (Neuer Wissenschaftlicher Verlag 2014) 22 (*Emphasis added in the original*).

97 See for further interpretation on this also the Commentaries on the Preamble and Art 1 of the CoE Convention against Trafficking; on the relationship between international law on human trafficking and on human rights, see, Stoyanova, *Human Trafficking and Slavery Reconsidered*, as well as Gallagher, *The International Law of Human Trafficking*.

98 Again, see *Chowdury and Others v. Greece*, para 110.

accountability mechanisms. Further, GRETA decided in 2018 to make access to justice for victims of trafficking the leading theme for its third evaluation round, starting in 2019, with particular attention to victims' access to information, reporting and complaint procedures and compensation.

5.43 Concerning the gender dimension of prevention measures, the Explanatory Report to the Convention describes gender mainstreaming as '[o]ne of the main strategies for bringing about proper equality between women and men', with further references to international and regional documents on the subject.[99] Moreover, it quotes from a CoE document defining gender mainstreaming as 'the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and all stages, by the actors normally involved in policy making'.[100] This is explicitly reaffirmed in Article 17 of the Convention, which mandates State Parties to 'promote gender quality and use gender mainstreaming' across victim protection and assistance (Chapter III). In the context of prevention, it has been clearly established that '[b]oth poverty and inequality have strong gender dimensions',[101] ranging from exposure to gender-specific forms of violence or stigma attached to persons engaged in sex work to access to education, to the labour market and to political representation.

5.44 In the context of prevention, the gender dimension of trafficking has received attention by GRETA on different aspects. GRETA has commented on the lack of disaggregation of statistical data, on gender-based stereotypes both in relation to sexual and labour exploitation,[102] on the intersection of gender and age, such as lack of awareness-raising of exploitation among men and boys,[103] and on domestic violence against women as a factor contributing to situations of increased vulnerability for trafficking.[104]

5.45 As explained in the drafting history, an explicit reference to children among the principles for prevention measures was included only at a late stage. The inclusion of a 'child-sensitive approach'[105] in paragraph 3, nevertheless, can be seen as a statement of principle by the drafters of the equal importance attached to the gender and age dimension of trafficking. There is no further interpretative guidance offered in the Explanatory Report at this place, although children receive further strong attention and explanation in Article 5(5). Since child trafficking became a priority theme for GRETA's country evaluations during its second evaluation round, GRETA has devoted a separate section of all its reports to the prevention of child trafficking.[106]

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99 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 104.
100 Ibid.
101 Gallagher, 420.
102 See GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 103; GRETA, *Report on Spain*, I GRETA(2013)16, para 127.
103 GRETA, *Report on Sweden*, II GRETA(2018)8, para 64; GRETA, *Report on the United Kingdom*, I GRETA(2012)6, para 174.
104 GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 103; GRETA, *Report on Malta*, I GRETA(2012)14, para 92; GRETA, *Report on the Republic of Moldova*, I GRETA (2011)25, para 88.
105 Interestingly, the Explanatory Report uses the term 'child-rights approach' in para 104 when commenting on Art 5(3).
106 Findings of which will be discussed in the section on Art 5(5) in section D.6.

5. Article 5(4) of the CoE Convention against Trafficking: 'Enable migration to take place legally'

5.46 As previously mentioned, the inclusion of this provision proved possibly the most controversial of all aspects during the drafting of Article 5. Migration issues and government control over immigration remain among the most sensitive matters of state sovereignty, but international legal regimes require balancing the protection of rights and national interests. As Stoyanova has phrased it: 'victims as migrants are subject to the national immigration laws the main goal of which is to control the entry and stay of foreigners, which might lead to difficult and sometimes conflictual relation between immigration law, criminal proceedings and protection needs'.[107] Several reports voice concern regarding restrictive immigration systems and their impact on trafficking in human beings. For instance, in 2004 the EU Experts Group on Trafficking in Human Beings had already asserted that restrictive migration regimes do not decrease migration, but rather leave 'migrants more vulnerable to irregular forms of migration, including smuggling and trafficking for labour and other forms of exploitation'.[108] EU Member States should therefore 'increase the opportunities for legal, gainful and non-exploitative labour migration'.[109] Restrictive migration policies 'encourage the growth of the trafficking business'.[110]

5.47 The Explanatory Report states that paragraph 4 'places an obligation on Parties to take appropriate measures as necessary to enable people to emigrate and immigrate lawfully'.[111] It continues by stressing mainly the information aspects of such measures, concerning 'accurate information about legal opportunities for migration, employment conditions and their rights and duties' of 'would-be immigrants', noting that this provision 'is aimed at counteracting traffickers' misinformation so that people recognise traffickers' offers for what they are and know better than to take them up'. Such intention is in line with a similar pre-existing human rights provisions contained in Article 19(1) of the 1996 (Revised) European Social Charter,[112] although the latter envisages many further protection and assistance standards for migrant workers and their families, ranging from the non-discrimination principle to family reunification and language support.

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107 Stoyanova, 2 and 380.

108 EU Group of Experts on Trafficking in Human Beings, *Report of the Experts Group on Trafficking in Human Beings*, Brussels, 22 December 2004, 65. For further documents recommending to increase legal migration in order to prevent trafficking in human beings see Kadri Soova (PICUM), *Role of restrictive migration policies in increasing the vulnerability of migrants to irregularity, exploitation and trafficking* (presentation held at the OSCE 15th Alliance against Trafficking in Persons Conference, Vienna, 6–7 July 2015), 4 and GAATW, *Beyond Borders: Exploring links between trafficking and migration*, GAATW Working Paper Series 2010, 30. See also, European Union, *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, 29 November 2002, 14981/02 Annex, para 7(5): 'It is necessary to examine ways of increasing opportunities of legal, gainful and non-exploitative labour migration in order to reduce the usage of irregular means.'

109 EU Group of Experts on Trafficking in Human Beings, *Report of the Experts Group on Trafficking in Human Beings*, 86.

110 Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Appraoch* (Martinus Nijhoff Publishers 2006), 100.

111 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 105.

112 European Social Charter, ETS No. 163, 3 May 1996, entered into force 1 July 1999. Art 19(1) requires Parties to undertake: 'to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration'.

5.48 The CoE Convention against Trafficking only refers to measures to 'enable migration to take place legally' and does not use wording that would immediately suggest that legal migration possibilities should be increased. Hence, Article 5(4), at first sight, does not establish an obligation of State Parties to increase legal migration possibilities. Nevertheless, in *Rantsev v. Cyprus and Russia*, the ECtHR stated, as a positive obligation, the need to establish a comprehensive legislative and administrative framework not only to punish traffickers but also for victim protection and prevention,[113] including in the context of immigration regimes. In respect to such preventive framework, Cyprus violated Article 4 ECHR, since 'the regime of artiste visas in Cyprus did not afford to Ms Rantsev practical and effective protection against trafficking and exploitation'.[114] The visa system in place for 'cabaret artistes' made the visa holder dependent on their employer; cabaret managers were required to make the application for the artiste, had to lodge a bank guarantee to cover potential future costs associated with artistes whom they employed and had to notify the authorities when an artiste left employment.[115] In another context, GRETA has also commented critically on rights to residence being linked to only one single employer, which makes the employee dependent on this placement and may increase the risk of exploitation.[116] Moreover, GRETA has proposed the easing of policies of strict quotas for work permits, the shortening of waiting times for such permits and the lowering of their costs.[117]

5.49 More specifically on information about migrating, GRETA has recommended that state authorities should provide foreign nationals who intend to travel to that country with information, in a language that they can understand, of the risks of trafficking, information about their rights and where to get such information and assistance.[118] Similarly, authorities should ensure that all foreigners already employed in the country are systematically informed about their rights and dangers of trafficking and that they are given the possibility to contact, in a language they understand, an office or a person who can assist them in case of problems with their employers.[119] In its 7th General Report 2017, focusing on trafficking for the purpose of labour exploitation, GRETA highlighted several examples of good practice in this regard, such as counselling centres for undocumented migrants, a network of 'labour attachés' posted at embassies in countries where most nationals work abroad and the dissemination of information material in various languages.[120]

5.50 Concerning the operational responsibility for implementing these measures, the Convention speaks vaguely of 'relevant offices' only. In line with the discussion at the drafting stage, the Explanatory Report states that such determination will generally be left to State Parties to

113 *Rantsev v. Cyprus and Russia*, para 285, referring explicitly to the CoE Convention against Trafficking.
114 Ibid., para 293.
115 Ibid., paras 291–292.
116 GRETA, *Report on Malta*, II GRETA(2017)3, para 55.
117 GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 106.
118 GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 110; GRETA, *Report on Norway*, I GRETA(2013)5, para 121.
119 See GRETA, *Report on Iceland*, I GRETA(2014)17, para 111; GRETA, *Report on Malta*, I GRETA(2012)14, para 98; GRETA, *Report on San Marino*, I GRETA(2014)19, para 72.
120 GRETA, *7th General Report on GRETA's activities* (2018), paras 117–120.

decide in line with their domestic structures, but the 'drafters had in mind mainly but not exclusively visa and immigration services'.[121]

6. A protective environment for children

5.51 Article 5(5) further elaborates on what is termed 'a child-sensitive approach' in Article 5(3) by requesting State Parties to 'take specific measures to reduce children's vulnerability, notably by creating a protective environment for them'. The Explanatory Report provides further insights into what should be understood by this at that time quite forward-looking concept of a 'protective environment' for children: it consists – 'as promoted by UNICEF' – of eight components:

> protecting children's rights from adverse attitudes, traditions, customs, behaviour and practices; government commitment to and protection and realisation of children's rights; open discussion of, and engagement with, child protection issues; drawing up and enforcing protective legislation; the capacity of those dealing and in contact with children, families and communities to protect children; children's life skills, knowledge and participation; putting in place a system for monitoring and reporting abuse cases; programmes and services to enable child victims of trafficking to recover and reintegrate.[122]

5.52 It should be noted that this is not about an outdated approach built on paternalistic attitudes, but it follows a child rights-based approach to child protection,[123] which comprehensively entails setting up a legal framework, capacity building, monitoring and (of particular importance) the direct involvement of children.[124] Conceptually, it contains several elements of another prominent framework, namely an 'integrated child protection systems approach',[125] which has also been promoted by the CoE[126] and the EU.[127] It aims at effective collaboration between all system components (governance, prevention and protection services, resources, accountability) and relevant actors for child protection (such as social services, health, education). In terms of prevention in an anti-trafficking context, such systems and environment approach may include protective legislation, awareness-raising about trafficking and

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121 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 105. See also, UNICEF, *Child Protection Resource Pack: How to Plan, Monitor and Evaluate Child Protection Programmes* (UNICEF New York 2015) 25.

122 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 106. A 'protective environment' has also been described as 'elements that protect children from discrimination, violence, exploitation, abuse and neglect', and which is 'comprised of members of the family, community and society as well as laws, policies, regulatory frameworks, services, structures, institutions, and decision-making mechanisms. These elements act individually and collectively to protect children', see UNICEF, Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe, 2006, 11.

123 From which perspective it is difficult to sustain a generic assumption of children equalling vulnerability to trafficking, without any further individualisation, as, however, expressed by para 5.

124 In this regard, see the interpretation of the UN Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12 (20 July 2009), para 118, on child participation: 'Particular attention needs to be paid to ensuring that marginalized and disadvantaged children, such as exploited children, street children or refugee children, are not excluded from consultative processes designed to elicit views on relevant legislation and policy processes.'

125 UNICEF, *Child Protection Resource Pack*, 24. See also Article 19, UN Convention on the Rights of the Child.

126 See Council of Europe, *CoE Strategy for the Rights of the Child (2016–2021) – Children's human rights*, 2016, para 28.

127 See European Commission, *Coordination and co-operation in integrated child protection systems: 9th European Forum on the rights of the child – Reflection paper*, 2015.

(child rights) education for children, parents and other stakeholders, training for professionals, proactive measures to reach out to disadvantaged groups of children and parenting/family support, social policies addressing poverty, child-friendly access to justice (e.g., through Ombudsman institutions for children) and opportunities for direct involvement of former child victims of trafficking in development and evaluation of prevention measures.[128]

5.53 As noted above, GRETA made child trafficking, including prevention, a priority theme for its second evaluation round, following an internal stocktaking which had revealed protection of children from trafficking as the single greatest challenge when implementing the CoE Convention against Trafficking.[129] In relation to the prevention of child trafficking, main concerns identified by GRETA include: insufficient identification of children in vulnerable situations, such as children in rural areas at risk of child labour, children placed in care institutions, children in street situations or children left behind by parents who have gone abroad to work;[130] public awareness of child trafficking for different types of exploitation,[131] stronger efforts to prevent online recruitment of children;[132] lack of an integrated protective environment for separated or unaccompanied child migrants and asylum-seekers (e.g., need for registration upon arrival, the appointment of a legal guardian, access to safe, child-adapted accommodation with qualified staff, cooperation with general child protection services, access to education and healthcare)[133] and establishing policies to prevent children going missing from institutions;[134] training on trafficking for frontline professionals working with children (such as the staff of asylum seekers' reception centres and care homes, legal guardians, foster parents);[135] and, efforts to ensure prompt registration of all children upon their birth.[136]

7. Involvement of civil society

5.54 As a final element of a comprehensive prevention approach to trafficking in human beings, the Convention addresses the role of civil society in prevention. Such actors may not only provide safe shelter and other services directly to victims of trafficking but should be given the opportunity to bring in their expertise in policy development and other consultation processes.

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128 See European Commission, *Reflection paper*, Principle 3; Helmut Sax, 'Child Trafficking – a Call for Rights-based Integrated Approaches' in Piotrowicz, Rijken, Uhl, 257.

129 GRETA, *4th General Report on GRETA's activities* (2015), 33.

130 See, GRETA, *Report on Armenia*, II GRETA(2017)1, para 72; GRETA, *Report on Romania*, I GRETA(2012)2, para 107.

131 GRETA, *Report on Spain*, II GRETA(2018)7, para 100; GRETA, *Report on Sweden*, II GRETA(2018)8, para 83.

132 GRETA, *Report on Romania*, II GRETA(2016)20, para 71; GRETA, *Report on Spain*, II GRETA(2018)7, para 100.

133 GRETA, *Report on Belgium*, II GRETA(2017)26, para 73; GRETA, *Report on Greece*, I GRETA(2017)27, para 125; GRETA, *Report on Norway*, II GRETA(2017)18, para 56; GRETA, *Report on Serbia*, II GRETA(2017)37, para 73; GRETA, *Report on Sweden*, II GRETA(2018)8, para 83.

134 GRETA, *Report on Sweden*, II GRETA(2018)8, para 83.

135 GRETA, *Report on Portugal*, II GRETA(2017)4, para 85; GRETA, *Report on Spain*, II GRETA(2018)7, para 100; GRETA, *Report on Sweden*, II GRETA(2018)8, para 83.

136 GRETA, *Report on Albania*, II GRETA(2016)6, para 60; GRETA, *Report on Armenia*, I GRETA(2012)8, para 105; GRETA, *Report on Bosnia and Herzegovina*, I GRETA (2013)7, para 86; GRETA, *Report on Romania*, II GRETA(2016)20, para 70; GRETA, *Report on Cyprus*, II GRETA(2015)20, para 52; GRETA, *Report on Greece*, I GRETA(2017)27, para 125; GRETA, *Report on Ukraine*, I GRETA(2014)20, para 117. See also *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Guideline 7.9: 'Adopting measures to reduce vulnerability by ensuring that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons.'

While State Parties maintain responsibility for regulating public space for civil society, also in light of the Convention's encouragement for strategic partnerships with civil society,[137] the Explanatory Report uses quite strong wording ('must, as appropriate') to urge such involvement of civil society actors.[138] In the case of *J. and Others v. Austria*, the ECtHR considered the authorities in compliance with their positive obligations to protect trafficked persons, in light of specialised assistance provided by a qualified NGO for trafficked persons, which is publicly funded.[139]

5.55 GRETA has generally welcomed the inclusion of civil society organisations in preventive anti-trafficking efforts, such as collaboration in coordination bodies, for awareness-raising and training activities,[140] and for migrants counselling services,[141] while critically noting the absence of trade unions as important civil society stakeholders in several countries.[142]

5.56 Finally, civil society actors in direct contact with victims, based on trusted relationships, are in a unique position to strengthen also direct involvement of (former) victims of trafficking in consultation processes. Participatory research and feedback mechanisms available to trafficked persons, including on services delivered to them, are still underdeveloped, limiting the effectiveness of policies and measures including for prevention purposes.[143] GRETA has not yet systematically addressed direct involvement of formerly trafficked persons in its evaluation reports. However, promising practices have been reported from some countries, such as the assignment of former victims of trafficking to NGO-run mobile teams used for outreach to groups at risk of trafficking.[144]

137 CoE Convention against Trafficking, Arti 35.
138 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 107.
139 *J. and Others v. Austria*, App no. 58216/12 (ECtHR, 17 April 2017), para 111.
140 GRETA, *6th General Report on GRETA's activities*, para 87. See also, for instance, collaboration with NGO counselling centres in awareness-raising in Germany, GRETA, *Report on Germany*, I GRETA(2015)10, para 104.
141 GRETA, *7th General Report on GRETA's activities*, paras 106, 110 and 117.
142 Ibid., para 104.
143 See also, Dottridge, 'Collateral damage provoked by anti-trafficking measures' in Piotrowicz, Rijken, Uhl, 352.
144 GRETA, *Report on Spain*, II, GRETA(2018)7, para 159.

ARTICLE 6

MEASURES TO DISCOURAGE THE DEMAND

Julia Planitzer

To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including:

a research on best practices, methods and strategies;
b raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings;
c target information campaigns involving, as appropriate, *inter alia*, public authorities and policy makers;
d preventive measures, including educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being.

A. INTRODUCTION

By introducing a separate, free-standing article on discouraging the demand that fosters all forms of exploitation of persons, the drafters of the Council of Europe (CoE) Convention on the Action against Trafficking in Human Beings[1] wanted to 'underline the importance of tackling demand in order to prevent' trafficking in human beings.[2] Whereas Article 5 **6.01**

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).
2 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 108.

(Prevention of trafficking in human beings) lays out the general principles of prevention (e.g., the promotion of a human rights-based approach), Article 6 explains in more detail, what needs to be done in order to discourage demand. At the beginning of the drafting process, Article 6 formed part of Article 5 and was later expanded to a separate, free-standing article. As a minimum, the State Parties should implement measures that include the following four areas: (1) research; (2) raising awareness of the role of media and civil society in identifying demand as a root cause of trafficking; (3) information campaigns; and (4) preventive measures including educational programmes on gender equality.

6.02 The United States (US) recommended addressing the 'demand for prostitutes' during the negotiations of the Palermo Protocol,[3] but did not further pursue this proposal as including prostitution as a form of sexual exploitation would potentially block consensus. However, at the final stage of negotiations of the Palermo Protocol, the US delegation submitted a document proposing to add text on prevention, including demand, which was accepted with only a minor change without further discussion.[4] Wijers describes the 'demand-provision' concisely as a 'compromise between those who wanted to have all sex work defined as trafficking and those who distinguished between trafficking and sex work'.[5] The compromise refers to the two lobbying blocs of non-governmental organisations (NGOs) engaged in the drafting process of the Palermo Protocol: (1) the Human Rights Caucus, headed by the International Human Rights Law Group, the Global Alliance Against Traffic in Women and the Asian Women's Human Rights Council, lobbying to distinguish between trafficking and sex work and (2) the International Human Rights Network headed by the Coalition Against Trafficking in Women.[6] Beyond the divided debates, the Office of the United Nations High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking[7] recommends, in Principle 4, that preventive measures shall address demand as a root cause.[8]

6.03 In the US's initial recommendation for the Palermo Protocol, they framed demand as 'demand for prostitutes' and thereby followed the abolitionist definition of demand, which explains demand as 'male buyers of commercial sex services provided by female sex workers, persons

3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

4 Dita Vogel and Norbert Cyrus, 'Demand Reduction in Anti-trafficking Debates' (2017) 18 *ERA Forum*, 383. For an overview of the process on including the term 'demand' in the Palermo Protocol see Norbert Cyrus, *The Concept of Demand in Relation to Trafficking in Human Beings. A Review of Debates since the late 19th Century* (DemandAT Working Paper No 2, 2015) 73 et seq. Cyrus states that 'the initiative for the inclusion of the demand provision in the UN Trafficking Protocol traced back to the debates on the public handling of prostitution in the USA'. See also Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 434 et seq.

5 Marjan Wijers, *Demand, Prostitution Regimes and Human Rights* (commentary in the framework of DemandAT 2017) 1.

6 Melissa Ditmore and Marjan Wijers, 'The Negotiations on the UN Protocol on Trafficking in Persons' (2003) 4 *Nemesis*, 80–81. For an overview of the two lobbying blocs see also Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books 2010) 27–9 and Jo Doezema, 'Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiations' (2005) 14(1) *Social & Legal Studies*, 67–8.

7 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.

8 Additionally, Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 7.1 recommends analysing the factors that generate demand for exploitative commercial sexual services and exploitative labour.

who work in the sex trade industry (…) and states that 'tolerate' prostitution'.[9] However, obligations to discourage the demand under the Palermo Protocol refer to all forms of exploitation.[10] In comparison to the Palermo Protocol, the CoE Convention against Trafficking lists specific minimum measures that have to be implemented and thereby clarifies, to a certain extent, the term 'demand'.

B. DRAFTING HISTORY

6.04 Article 6 was first discussed under the umbrella of prevention of trafficking in human beings. In the 1st meeting of the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH), the committee agreed that the Convention should contain measures to discourage the demand that fostered all forms of exploitation, particularly of women and children. The measures should involve, if appropriate, NGOs working in victim protection and support.[11] Already at the 2nd meeting of the CAHTEH, it was discussed to make measures to discourage the demand a specific article. The International Labour Organisation's suggestion to remove the reference to 'especially women and children' was not followed.[12] Furthermore, at an early stage, the Netherlands criticised the wording as 'too general and too abolitionist in tone', emphasising that the meaning of demand is unclear. The Netherlands suggested to include 'forced' in front of prostitution in Article 4, so to make clear that the measures should discourage the demand of 'involuntary prostitution'.[13]

6.05 Draft Article 6 defined four areas of measures: (1) information and mass media campaigns; (2) research; (3) awareness raising among media; and (4) measures on gender equality, including educational programmes for boys and girls. These four clusters, to a large extent, remained unchanged during the drafting process until the 5th CAHTEH meeting, which led to amendments both on the wording[14] and the sequence of the paragraphs.[15] Furthermore, it was decided that the Convention's Explanatory Report should stress that the measures relate to all exploitative purposes: sexual exploitation; forced labour or services; slavery and practices similar to slavery; servitude; and removal of organs.[16]

9 Julie Ham, *Moving beyond 'supply and demand' catchphrases: assessing the uses and limitations of demand-based approaches in anti-trafficking* (Global Alliance Against Traffic in Women 2010) 13.

10 Palermo Protocol, Art 9(5); see also Gallagher, *The International Law of Human Trafficking*, 438.

11 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 35.

12 CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Sweden and by the observer of the International Labour Office (ILO)*, CAHTEH(2003)8 rev 2, Addendum I, 1 December 2003, 9.

13 CAHTEH, *Draft European Convention on Action against Trafficking in Human Beings: Contribution by the delegation of Austria, Netherlands and by the observer of UNICEF*, CAHTEH(2004)1, 26 January 2004, 7.

14 Prior to the 5th CAHTEH meeting, several amendments were suggested. Norway, for instance, suggested to include also 'administrative' measures besides other measures (CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004, 18.

15 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 77.

16 Ibid., para 73.

6.06 At the beginning of the drafting process, the proposed measures were formulated as examples ('each Party shall adopt (…) measures *such as*:').[17] The CoE's Committee on Equal Opportunities for Women and Men recommended making it clearer that not only the implementation of measures is obligatory, but also the implementation of measures in four described areas is obligatory. Hence, it suggested replacing 'such as' with 'including'.[18] Using the term 'including' specifies the obligation to adopt or strengthen measures by adding a list of four areas that have to be covered by the implementation of these measures. Consequently, the measures listed are to be understood as 'minimum measures'.[19] This leads to the conclusion that the State Parties' measures to discourage demand have to comprise measures from all four areas as a minimum.[20]

C. ARTICLE IN CONTEXT

1. Article 6 of the Convention and Article 9(5) of the Palermo Protocol

6.07 Article 6 of the Convention is clearly based on Article 9(5) of the Palermo Protocol. The Convention further expands on Article 9(5) of the Palermo Protocol by formulating four mandatory clusters of measures (research, awareness raising, information campaigns and educational programmes). Hence, in comparison to the Palermo Protocol, Article 6 considerably limits the margin of discretion of which measures should be implemented and therefore, the threshold for the State Parties to fulfil its obligations under Article 9(5) of the Palermo Protocol is lower than the one under Article 6. By adding measures, Article 6 manages to shed more light on the term 'demand'.

2. Relations to other Articles of the Convention

6.08 Article 5 and Article 6 both deal with prevention, but they focus on different target groups. Article 5 foresees measures 'for persons vulnerable to trafficking'[21] and 'to reduce children's vulnerability'.[22] On the other hand, Article 6 is directed towards those who might potentially use or buy services delivered by trafficked persons.

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17 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, 45 [emphasis added by author].

18 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings*: *Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 4.

19 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 108 and CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, 81.

The sentence 'the type of measures required is left to Parties' discretion (…)' was removed from the draft explanatory report, (see CAHTEH, *Draft explanatory report concerning provisions which have been examined in second reading*, CAHTEH(2004)20, 23 September 2004, 10).

20 The draft explanatory report referred to the four areas as 'examples of such measures'. This was rephrased by referring to the list of 'minimum measures'. By exchanging 'examples' with 'minimum measures', it can be concluded that it was intended to have at least one measure for each of the four areas implemented. See, CAHTEH(2004)20, para 57.

21 CoE Convention against Trafficking, Art 5(2).

22 Ibid., Art 5(5).

6.09 During the drafting process of Article 6, the CoE's Committee on Equal Opportunities for Women and Men suggested making 'such behaviour [using services of trafficked persons] a criminal offence'.[23] The European Union Member States rejected this to which the CAHTEH agreed.[24] Including the obligation to criminalise the use of services in Article 6 would have overlapped with the non-binding Article 19 (Criminalisation of the use of services of a victim).[25] Hence, there are two Articles (Art 6 and Art 19) in the CoE Convention against Trafficking that have the same purpose of discouraging the demand, but Article 6 is binding while Article 19 is not ('shall consider'). Moving Article 19 to Article 6, as suggested by the Committee on Equal Opportunities, would have turned the criminalisation of the use of services of a victim into a binding provision. The arguments against making the criminalisation of the use of services a binding provision prevailed during the drafting of the provision: prevention should take precedence over punishment.[26]

3. Relations with provisions in other standards

6.10 The wording of the Palermo Protocol and hence also of the CoE Convention against Trafficking is echoed by several binding and non-binding documents of the United Nations (UN) and the Organization for Security and Co-operation in Europe (OSCE). The UN Global Plan of Action to Combat Trafficking in Persons calls to increase prevention efforts in 'countries of origin, transit and destination by focusing on the demand that fosters all forms of trafficking' and further specifies by adding 'and the goods and services produced as a result of trafficking in persons'.[27]

6.11 Article 18(1) of the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[28] mirrors the heading of Article 6, but is less detailed than Article 6 and refers to 'measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings'. It furthermore solves the issue around the question whether exploitation leads to trafficking (as stated in Art 6) or rather the other way round[29] by changing the wording: Member States shall implement measures that 'reduce the demand that fosters all forms of exploitation *related* to trafficking'.[30]

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23 CAHTEH(2004)23, 4.

24 CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, para 15.

25 See on the final vote of the delegations concerning formulating Art 19 as legally binding, CAHTEH, *8th meeting – Meeting Report*, ibid., para 60.

26 Ibid., para 58.

27 UNGA, *United Nations Global Plan of Action to Combat Trafficking in Persons*, Resolution 64/293 of 12 August 2010, UN Doc A/Res/64/293, Annex, Article 21. See also the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2171 UNTS 227, 25 May 2000, entered into force 18 January 2002) referring to the need to raise public awareness to reduce consumer demand. The OSCE Action Plan uses the wording of the Palermo Protocol but adresses countries of origin and destination: OSCE, Decision No. 557: *OSCE Action Plan to Combat Trafficking in Human Beings*, 462nd Plenary Meeting, PC.DEC/557, 24 July 2004, 9–10.

28 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

29 Wijers, *Demand, Prostitution Regimes and Human Rights*, 1.

30 Dir 2011/36/EU, Art 18(1). [emphasis added by author].

D. ISSUES OF INTERPRETATION

1. Interpretation of 'demand'

6.12 A review of debates around various forms of trafficking in human beings, including labour exploitation, showed that 'demand' is not clearly defined but is used differently. Nevertheless, 'demand' is used increasingly to explain the existence of trafficking and to justify responses to it.[31] The 2008–2011 UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, summarises 'demand' as 'desire and preference for a particular commodity, labour or service, without respect for international human rights law, including fundamental labour rights. This desire is usually expressed in the form of money which supplies income for traffickers and their associates'.[32] The OHCHR's Recommended Principles and Guidelines on Human Rights and Human Trafficking frame the term 'demand' as 'employer demand' for cheap and exploitable labour and 'consumer demand' for goods and services produced or provided by trafficked persons.[33] The level of consumer demand also includes corporate buyers, for instance, businesses buying from other businesses in manufacturing.[34] Next to employer and consumer demand, there is also a 'demand generated by exploiters' and others involved in the trafficking cycle.[35] Finally, the UN Inter-Agency Coordination Group against Trafficking in Persons came to the conclusion that although it is unclear what constitutes 'demand', a much more detailed definition might not be needed. The UN Inter-Agency Coordination Group against Trafficking in Persons argued that what is needed is a 'broader consensus about the full set of options that can be taken to effectively discourage demand both directly and indirectly, along with a willingness to implement, monitor and evaluate the measures concerned'.[36]

6.13 In a cross-border context, it could be argued that the obligation to implement measures to discourage demand primarily rests with the country within which the exploitation takes place.[37] Nevertheless, the obligation rests not exclusively on those countries, but goes further as 'supply generates its own demand' and the 'availability of cheap and exploitable labour can itself help generate demand'.[38]

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31 Madalina Rogoz et al, *Demand Arguments in Different Fields of Trafficking in Human Beings* (DemandAT Working Paper No. 13, 2017) 33.

32 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/23/48, 13 March 2013, para 84.

33 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations, New York and Geneva 2010), 97 referring to Bridget Anderson and Julia O'Connell-Davidson, *Trafficking: A Demand-led Problem? A Multi-country Pilot Study* (Save the Children, 2002) 18 and 54.

34 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/23/48, 13 March 2013, para 13.

35 Inter-Agency Coordination Group against Trafficking in Persons, *The next decade: Promoting common priorities and greater coherence in the fight against human trafficking* (ICAT 2012) 7.

36 Inter-Agency Coordination Group against Trafficking in Persons, *Preventing Trafficking in Persons by Addressing Demand* (ICAT paper series- Issue 2, 2014) 9.

37 Gallagher, *The International Law of Human Trafficking*, 438.

38 Inter-Agency Coordination Group against Trafficking in Persons, *Preventing Trafficking in Persons by Addressing Demand* (ICAT paper series- Issue 2, 2014) 8.

6.14 Framing trafficking in human beings as 'demand-driven' can lead to sharing the state's responsibility of addressing trafficking with other actors, such as companies and consumers, although the responsibility to implement obligations related to trafficking in human beings including prevention and discouraging demand rests with the state. Hence, the focus could be shifted to businesses, individuals buying goods or the client using services, although the state is supposed to act. However, under the above-mentioned term of 'employer demand'[39] and the corporate responsibility to respect human rights and the states duty to ensure this, the responsibility to tackle the demand caused by the private sector is to a certain extent already shared.

6.15 The state is the principal duty-bearer and has the primary obligation to respect, protect and fulfil human rights.[40] Part of these obligations is the obligation of states to protect individuals from acts committed by businesses, hence to prevent these acts. This obligation is further defined in the UN Human Rights Council's legally non-binding 'Protect, Respect and Remedy' – Framework of Special Representative of the Secretary General Ruggie.[41] First, the framework describes the state's duty to protect against human rights abuses by third parties, including businesses. Second, the corporate responsibility to respect human rights. The responsibility of a business is to respect human rights, which includes the requirement that businesses must act with due diligence to avoid violating human rights.[42] Third, as part of a states' duty to protect, they have to ensure access to effective remedies in case of abuses. Remedies can include state-based judicial and non-judicial grievance mechanisms. At the same time, companies have to contribute to the access to remedy and should establish or participate in effective operational-level grievance mechanisms.

6.16 There are several measures a state should implement in order to ensure that the private sector acts with due diligence and thereby contributes to discouraging demand.[43] Even an obligation of states to impose obligations on corporations to implement measures that prevent trafficking in human beings can be established.[44] Legislation that obliges companies to report on their efforts to reduce trafficking and on enhanced transparency in their supply chains can add to

39 Mike Dottridge, *Emerging Good Practice by State Authorities, the Business Community and Civil Society in the Area of Reducing Demand for Human Trafficking for the Purpose of Labour Exploitation* (Council of Europe 2016) 3.

40 See for instance OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, HR/PUB/06/12 (2006), para 48.

41 UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework'*, A/HRC/17/31, 21 March 2011 and UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Protect, Respect and Remedy: A Framework for Business and Human Right*s, A/HRC/8/5, 7 April 2008.

42 Olivier de Schutter, Anita Ramasastry, Mark B Taylor and Robert C Thompson, *Human Rights Due Diligence: The Role of States* (2012) 8.

43 de Schutter et al, ibid., 60 identify four approaches on how states can ensure human rights due diligence by businesses: (1) Due diligence as regulatory compliance; (2) companies receive incentives and benefits; (3) encouraging business due diligence through transparency and disclosure mechanisms; and (4) a mix of the three approaches.

44 Nicola Jägers and Conny Rijken, 'Prevention of Human Trafficking in Labor Exploitation: The Role of Corporations' (2014) 12(1) *Northwestern Journal of Human Rights*, 47, paras 37–40.

preventing trafficking,[45] in particular, when certain requirements such as functioning monitoring of the implementation are fulfilled.[46] Furthermore, recently, an area that is increasingly discussed is public procurement and how the state can tackle trafficking when buying goods and services.[47] Using national action plans on business and human rights can contribute to preventing trafficking for the purpose of labour exploitation.[48]

6.17 The following explains in more detail the different forms of measures and discusses the Group of Experts on Action against Trafficking in Human Beings (GRETA) assessment of obligations on demand. GRETA's monitoring work shows certain basic indicators on the measures to discourage demand. First, GRETA stresses that the obligation to discourage demand is a positive obligation of the State Parties,[49] hence, states have an obligation to actively 'adopt and reinforce measures'.[50] Furthermore, measures have to cover all forms of exploitation[51] and have to be implemented in partnership with various actors, including the private sector, civil society and employers.[52] Research is described as an essential measure to discourage client demand effectively.[53] As being a specific point of the minimum measures, one can deduct that the obligation to conduct research covers all forms of measures including legislative, social or educational measures. In the reports of GRETA, research is rarely mentioned, and when it is, it is discussed in two contexts. First, as a recommendation to base future actions on awareness raising on research.[54] Second, GRETA recommends research in order to assess the effects of legislation that penalises the purchase of sexual services and its effects to reduce the demand for services provided by victims of trafficking.[55]

2. Legislative measures to discourage the demand

6.18 States influence demand by legal structures on a range of matters including immigration, access to the labour market and economic development.[56] For instance, restriction of legal migration

45 Dottridge, 12.
46 Julia Planitzer, 'Trafficking in Human Beings for the Purpose of Labour Exploitation: Can Obligatory Reporting by Corporations Prevent Trafficking?' (2016) 4 *Netherlands Quarterly of Human Rights*, 338–9.
47 See for instance UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/70/260, 3 August 2015, para 40; Olga Martin-Ortega, Opi Outhwaite, William Rook, 'Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible Public Procurement of Electronic Goods' (2015) 19(3) *The International Journal of Human Rights*, 341–68; OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains* (Vienna, February 2018).
48 Dottridge, 11.
49 See for instance GRETA, *Report on Andorra*, I GRETA(2014)16, para 50; GRETA, *Report on Ukraine*, I GRETA(2014)20, para 103.
50 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No 197, para 108.
51 See for instance GRETA, *Report on Malta*, II GRETA(2017)3, para 70.
52 See for instance GRETA, *Report on Germany*, I GRETA(2015)10, para 109; GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 94.
53 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No 197, para 110.
54 See GRETA, *Report on Albania*, I GRETA(2011)22, para 90; GRETA, *Report on Denmark*, I GRETA(2011)21, para 103.
55 GRETA, *Report on Ireland*, II GRETA(2017)28, para 96; GRETA, *Report on Serbia*, II GRETA(2017)37, para 94.
56 Gallagher, *The International Law of Human Trafficking*, 439.

channels can contribute to an increase of trafficking in human beings.[57] Demand can be discouraged by increasing the protection of rights of migrant workers or increasing the enforcement of labour law.[58] However, there are gaps, and the former UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, therefore, recommends states 'to put regulatory and supervisory mechanisms in place whenever they encourage or facilitate any forms of labour migration, as the absence of such mechanisms has had the effect of facilitating trafficking persons'.[59] These mechanisms should protect the rights of migrant workers.[60] Relevant legislation to discourage demand has to protect everyone, including children or persons working in informal and unregulated workplaces. A labour market regulated by itself creates exploitation, and factors such as a lack of established procedures for collective bargaining can lead to exploitation.[61] Hence, tackling demand requires comprehensive measures including ensuring access to effective remedies for workers, regardless of their residence status.[62]

6.19 GRETA's discussion on relevant legislative measures is, to a large extent, taken up by the question of criminalising the use of services.[63] However, besides criminalising the use of services, GRETA's reports discuss also further legal measures, in particular concerning labour law: Germany referred to the adoption of a law introducing a general minimum wage of 8.50 Euros per hour as a measure to discourage demand.[64] Further examples are guidelines for the employment of domestic workers in diplomatic households[65] and tightening the regulation of businesses through licensing, combined with labour inspection and enforcement powers.[66] In relation to sexual exploitation, GRETA recommends implementing measures that 'should be balanced and not lead to the criminalisation of victims of trafficking'.[67]

3. Measures against demand on 'all forms of exploitation'

6.20 GRETA stresses in the monitoring reports that all forms of exploitation have to be covered by the measures,[68] since several of the State Parties have thus far focused their actions on sexual exploitation and discouraging demand for sexual services only.[69] GRETA recommends, in particular, implementing demand-related measures to prevent labour exploitation in various sectors, including tourism, construction, domestic work, agriculture and the food processing

57 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/23/48, 13 March 2013, para 80.
58 UN General Assembly, A/HRC/23/48, paras 38–39.
59 UN General Assembly, A/HRC/23/48, para 85(d).
60 See OHCHR's *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Guideline 7.7.
61 UNGA, *Report of the Special Rapporteur on trafficking*, A/HRC/23/48, paras 53 and 85(d).
62 Inter-Agency Coordination Group against Trafficking in Persons, *Preventing Trafficking in Persons by Addressing Demand* (2014) 13.
63 For a more detailed analysis of the criminalisation of the use of services, see CoE Convntion against Trafficking, Art 19.
64 GRETA, *Report on Germany*, I GRETA(2015)10, para 106.
65 GRETA, *Report on Ireland*, II GRETA(2017)28, para 254.
66 GRETA, *Report on Switzerland*, I GRETA(2015)18, para 102.
67 GRETA, *Report on Spain*, I GRETA(2013)16, para 129; GRETA, *Report on Italy*, I GRETA(2014)18, para 110.
68 See for instance, GRETA, *Report on France*, I GRETA(2012)16, para 110; GRETA, *Report on the United Kingdom*, I GRETA(2012)6, para 182.
69 See for instance, GRETA, *Report on Iceland*, I GRETA(2014)17, para 186; GRETA, *Report on Georgia*, II GRETA(2016)8, para 83.

and the textile industry. Furthermore, trafficking in supply chains and outsourced services, such as cleaning, are identified as relevant areas.[70] GRETA also identifies the issues of trafficking for the purpose of organ transplantation[71] and begging[72] as forms of exploitation deserving action to discourage demand.

6.21 The lack of application and enforcement of labour standards can be an incentive for trafficking for the purpose of labour exploitation.[73] Hence, one method for discouraging demand for services of trafficked persons for the purpose of labour exploitation, including for exploitation in domestic work, is to increase the efforts of labour inspection (and the resources available to carry out effective inspections).[74] A comprehensive approach to discourage demand also includes measures 'to promote awareness among businesses, strengthen corporate social responsibility and require businesses to report publicly on measures to reduce trafficking in human beings or forced labour in their supply chains'.[75]

4. Awareness raising measures and educational programmes

6.22 For all activities in relation to awareness raising, information campaigns and educational programmes, GRETA has recommended ensuring that future actions 'should be designed in the light of the assessment of previous measures and be focused on the needs identified'.[76] Furthermore, these measures should also tackle combating stereotypes and prejudices towards victims of trafficking, in particular, women and Roma, as asserted in the case of Romania.[77] Gender equality and non-discrimination are important topics for education in schools[78] and should include questions of dignity and integrity of human beings.[79] These educational programmes might be dealt with by other authorities and not explicitly initiated as measures against trafficking in human beings,[80] but nevertheless, these measures are relevant for the implementation of Article 6(d).

5. Co-operation in implementing measures

6.23 GRETA stresses that the implementation of measures should take place 'in partnership with civil society and the private sector'.[81] In more detail, this includes, for instance, co-operation

70 See for instance GRETA, *Report on Greece*, I GRETA(2017)27, paras 109 and 112.
71 GRETA, *Report on Armenia*, II GRETA(2017)1, para 79; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 71; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 74.
72 See for instance GRETA, *Report on Albania*, II GRETA(2016)6, para 81.
73 Inter-Agency Coordination Group against Trafficking in Persons, *Preventing Trafficking in Persons by Addressing Demand* (2014) 11.
74 GRETA, *Report on the United Kingdom*, I GRETA(2012)6, para 182; GRETA, *Report on Italy*, I GRETA(2014)18, para 110; GRETA, *Report on Spain*, I GRETA(2013)16, para 129.
75 GRETA, *Report on Sweden*, II GRETA(2018)8, para 96; GRETA, *Report on Spain*, II GRETA(2018)7, para 120.
76 GRETA, *Report on Montenegro*, I GRETA(2012)9, para 102; GRETA, *Report on Albania*, I GRETA(2011)22, para 90.
77 GRETA, *Report on Romania*, I GRETA(2012)2, para 99. See also GRETA, *Report on Albania*, I GRETA(2011)22, para 90.
78 See for instance GRETA, *Report on Montenegro*, I GRETA(2012)9, para 102.
79 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No 197, para 110.
80 GRETA, *Report on Serbia*, I GRETA(2013)19, para 120 concerning civic education classes on gender equality and non-discrimination.
81 See for instance, GRETA, *Report on Denmark*, II GRETA(2016)7, para 70.

with the business community and trade unions as well as agreements between authorities, trade unions and employers organisations.[82] In relation to the private sector, measures should be 'in line with the UN Guiding Principles on Business and Human Rights'[83] and GRETA recommends measures such as reporting obligations of companies on their measures to reduce trafficking in their supply chains.[84] Furthermore, the implementation of an incentive system for companies that decide to adopt codes of conduct to publish and implement them is recommended.[85]

82 GRETA, *Report on Switzerland*, I GRETA(2015)18, para 102.
83 GRETA, *Report on Latvia*, II GRETA(2017)2, para 92.
84 GRETA, *Report on Sweden*, II GRETA(2018)8, para 96.
85 GRETA, *Report on Poland*, II GRETA(2017)29, para 99.

ARTICLE 7

BORDER MEASURES

Julia Planitzer

1 Without prejudice to international commitments in relation to the free movement of persons, Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in human beings.

2 Each Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with this Convention.

3 Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4 Each Party shall take the necessary measures, in accordance with its internal law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5 Each Party shall adopt such legislative or other measures as may be necessary to permit, in accordance with its internal law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Convention.

6 Parties shall strengthen co-operation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

A. INTRODUCTION

7.01 After the 11 September 2001 attacks, migration became a matter of potential security risk for many governments. States decided that migration needed to be effectively managed or else it may become a threat to national security. At the same time, States argued that measures used to tighten border security, for instance, stricter visa requirements, were invaluable to combating

transnational crimes, such as trafficking. Consequently, also trafficking in human beings became understood in the context of a border security problem.[1]

7.02 In light of the increased migration flows in the European region in recent years, the response of many States has been securitisation of borders. At the same time, strengthened border controls can make migrants' journeys more dangerous.[2] However, the purpose of Article 7 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[3] is to prevent trafficking in human beings and strengthen border controls which should enhance the prevention and detection of human trafficking.

B. DRAFTING HISTORY

7.03 Articles 7, 8 (Security and control of documents) and 9 (Legitimacy and validity of documents) of the CoE Convention against Trafficking correspond to Articles 11, 12 and 13 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[4] In the beginning, it was not clear whether these provisions should be copied as such from the Palermo Protocol or be deleted completely.[5] The added value of including these provisions would be the possibility to monitor their implementation by the Group of Experts on Action against Trafficking in Human Beings (GRETA), a mechanism the Palermo Protocol lacks.[6]

7.04 The non-governmental organisations (NGOs) lobbied during the drafting process to amend the wording of Article 7 to require the State Parties to ensure that the measures such as border controls are carried out in a manner consistent with the rights to seek and enjoy asylum.[7] Despite these efforts, the CAHTEH decided that due to the reference to the principle of

1 Rebecca Miller and Sebastian Baumeister, 'Managing Migration: Is Border Control Fundamental to Anti-Trafficking and Anti- Smuggling Interventions?' (2013) 2 *Anti-Trafficking Review*, 17.

2 IOM, *Assessing the risks of migration along the central and eastern Mediterranean routes: Iraq and Nigeria as Case Study Countries* (2016) 9; cited after Claire Healy, *The Strength to Carry On: Resilience and Vulnerability to Trafficking and Other Abuses among People Travelling along Migration Routes to Europe* (ICMPD 2019) 20.

3 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

4 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

5 CAHTEH, *European Convention on Action against Trafficking in Human Beings: Revised Draft at its 2nd meeting*, CAHTEH(2003)MISC7, 10 December 2003, 6 and CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH(2003)RAP 2, 26 January 2004, para 48.

6 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, paras 79–84.

7 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Contribution by Non-Governmental Organisations, Additional Comments by Amnesty International and Anti-Slavery International*, CAHTEH(2004)17 Addendum IV, 30 August 2004, 13 and CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Joint Statement of 127 Non-Governmental Organisations*, CAHTEH(2004)17 Addendum X, 27 September 2004, para 21. See also the Parliamentary Assembly of the CoE Committee on Equal Opportunities for Women and Men supporting this in, CAHTEH, *Draft Convention of the Council of Europe Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 4 November 2004, 5.

non-refoulement in Article 40(4) of the CoE Convention against Trafficking, no further reference would be necessary.[8]

C. ARTICLE IN CONTEXT

7.05 In comparison to Article 11(5) of the Palermo Protocol, the CoE Convention against Trafficking increases the level of obligation for the State Parties. Under Article 7(5) of the CoE Convention against Trafficking, the State Parties 'shall adopt such legislative or other measures' in order to allow the denial of entry or revocation of visas of persons implicated in the commission of trafficking, whereas under the Palermo Protocol, the State Parties 'shall consider' taking these steps.

7.06 Securitisation of border management to prevent and detect trafficking in human beings needs to be set in context with Article 5(4) and Article 10 of the CoE Convention against Trafficking. Article 5(4) asserts that the State Parties shall enable migration to take place legally, as 'severely restrictive immigration policies are more likely to fuel organised, irregular migration than to stop it'.[9] While Article 5(4) obliges the State Parties to 'to enable people to emigrate and immigrate lawfully',[10] Article 7 works on a different level and reinforces already established migration regimes by strengthening border controls.

D. ISSUES OF INTERPRETATION

1. Analysis of Article 7(1) of the CoE Convention against Trafficking

7.07 Article 7(1) of the CoE Convention against Trafficking clearly states that strengthening border controls to prevent and detect trafficking in human beings must be without prejudice to international commitments in relation to the free movement of persons.[11] The Office of the United Nations High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking[12] indicate that States should consider 'protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right'.[13] However, as the freedom of

8 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH (2005)RAP8, 16 March 2005, para 17.

9 Anne Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and Treaties' (2002) 12 *Forced Migration Review*, 28. See also Healy, *The Strength to Carry On*, 236. In addition, GRETA stresses to 'ensure that migration policies and measures to combat migrant smuggling do not put at risk the lives and safety of trafficked people', see GRETA, *5th General Report on GRETA's Activities*, February 2016, para 100.

10 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 105.

11 CoE Convention against Trafficking, Art 7(1). Major international human rights treaties have enshrined the right to freedom of movement, for instance, International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, entered into force 23 March 1976, Art 12. See also the Protocol No. 4 to the ECHR, ETS No 46, 16 September 1963, entered into force 2 May 1968, Arts 2–4 and the Protocol No. 7 to the ECHR, ETS No 117, 22 November 1984, entered into force 1 November 1988, Art 1.

12 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.

13 Ibid., Guideline 1.5.

movement is not an absolute right, it can be restricted, for instance, on the grounds of national security or public order.[14] The 'denial of exit or entry visas or permits – whether generally applicable or only in relation to a group of persons identified as being especially vulnerable to trafficking' would nevertheless be an example of an anti-trafficking measure that negatively impacts established rights.[15]

7.08 GRETA has shown concern regarding victims of trafficking going undetected and unidentified by relevant authorities during the visa process. In GRETA's first evaluation round, it asked State Parties which measures they have implemented in order to avoid issuing visas, 'when there are reasonable grounds to believe that a person may be a victim of THB or implicated in THB'.[16] Issuing visas should be based on an individual decision and circumstance.

7.09 Throughout the Convention drafting process, NGOs lobbied for an amendment of the text of Article 7 to include a specific reference to the right to seek and enjoy asylum from persecution and other forms of international protection[17] since enhanced border measures could form an obstacle to the right to seek asylum.[18] This potential conflict between strengthening border controls while 'nominally upholding the right to asylum' was already raised in the context of the Palermo Protocol.[19] The OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders explain that:

> States shall ensure that measures aimed at addressing irregular migration and combating transnational organized crime (including but not limited to smuggling of migrants and trafficking in persons) at international borders, shall not adversely affect the enjoyment of the human rights and dignity of migrants.[20]

GRETA has emphasised that border measures concentrating on detecting undocumented migrants are unlikely to benefit efforts to detect and identify victims of trafficking.[21]

2. The role of commercial carriers in the context of border measures

7.10 Article 7(2) obliges the State Parties to adopt measures to prevent commercial carriers from being used for trafficking in human beings. The type of measure is left to the State Parties'

14 See for instance ICCPR, Art 12(3).
15 OHCHR, *Human Rights and Human Trafficking*, Fact Sheet No. 36 (United Nations 2014) 50.
16 GRETA, *Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties, First evaluation round*, GRETA(2010)1 rev4, Question 28.
17 CAHTEH(2004)17 Addendum IV, 13 and CAHTEH(2004)17 Addendum X, para 21.
18 CAHTEH(2004)23, 5 and Parliamentary Assembly, *Draft Council of Europe Convention on Action against Trafficking in Human Beings*, Opinion 253(2005), 26 January 2005, para 14(ii).
19 Gallagher, 'Trafficking, smuggling and human rights: tricks and treaties', 28.
20 OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (United Nations 2014), Principle A.5.
21 GRETA, *Report on Bosnia and Herzegovina*, I GRETA(2013)7, para 96.

discretion. GRETA recommends that, in general, Parties should develop awareness within transport companies for enhanced detection of trafficking victims.[22]

7.11 Based on Article 11 of the Palermo Protocol, Article 7(3) obliges commercial carriers to ensure that passengers abroad are in possession of the travel documents required for entry into the receiving State.[23] According to Article 7(4) of the CoE Convention against Trafficking, Parties must implement sanctions on the carrier in case they violate their obligation to check travel documents.

7.12 The obligation to impose sanctions on carriers impacts on the overarching aim of Article 7 of the CoE Convention against Trafficking, the prevention of trafficking. Research shows that carrier sanctions are harmful to international legal and human rights obligations and increase the risk of persons in search of protection.[24] Consequently, such sanctions can drive asylum flows underground and 'irregularise' movement towards the European Union meaning that protection seekers need to rely on smuggling services. In some cases, protection seekers, in their attempts to reach safety, fall prey to traffickers.[25]

3. Strengthening border controls to prevent and detect trafficking in human beings

7.13 In several GRETA reports, it is recommended that the State Parties make further efforts to detect and prevent trafficking through border control measures.[26] This recommendation is usually linked to a suggestion to provide regular trainings for relevant State officials in order to improve their abilities to detect potential cases of trafficking in human beings and identify trafficked persons.[27] GRETA recommends introducing a checklist to facilitate the detection of trafficking risks as part of States visa application and processing procedure as it would improve the relevant authority's ability to detect possible victims of trafficking.[28] In addition, the State

22 GRETA, *Report on Belgium*, II, GRETA(2017)26, para 94; GRETA, *Report on France*, II GRETA(2017)17, para 126; GRETA, *Report on Ireland*, II GRETA(2017)28, para 105; GRETA, *Report on North Macedonia*, II GRETA(2017)39, 96.

23 See on the emergence of carriers sanctions in international instruments, Tilman Rodenhäuser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control' (2014) 26 *International Journal of Refugee Law*, 226 et seq.

24 Theodore Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' (2017) 19 *European Journal of Migration and Law*, 310. See on the risk of carrier sanctions on refugees' entitlement to special protection Violeta Moreno-Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 *European Journal of Migration and Law*, 350.

25 Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 468.

26 See for instance GRETA, *Report on Belgium*, II GRETA(2017)26, para 94; GRETA, *Report on Norway*, I GRETA(2013)5, para 121; GRETA, *Report on Romania*, I GRETA(2012)2, para 109.

27 See for instance GRETA, *Report on Greece*, I GRETA(2017)27, para 128; GRETA, *Report on Hungary*, I GRETA(2015)11, para 121; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 82; GRETA, *Report on Malta*, I GRETA(2012)14, para 98.

28 See for instance GRETA, *Report on Cyprus*, I GRETA(2011)8, para 104; GRETA, *Report on Italy*, I GRETA(2014)18, para 119; GRETA, *Report on Iceland*, I GRETA(2014)17, para 112; GRETA, *Report on Malta*, II GRETA(2017)3, para 71.

Parties should provide written information to migrants informing them about the risks of trafficking and about their rights and where to get assistance if needed.[29]

(a) Providing trainings to relevant State officials

7.14 Trainings in the context of Article 7 of the Convention are not limited to border guards. They should include all relevant officials, in particular, law enforcement officials, immigration officials, staff working in refugee centres, child and youth welfare institutions, diplomatic and consular staff[30] and custom officials.[31]

7.15 Generally, trainings should be conducted regularly and follow a human rights and a victim-centred approach[32] and underscore the difference between human trafficking and smuggling of migrants.[33] Part of the trainings should be trafficking indicators[34] and clear instructions on how to proceed when someone is detected or identified as a victim of trafficking.[35]

(b) Detecting potential victims among asylum-seekers and unaccompanied or separated children

7.16 GRETA regularly calls on the State Parties to step up their efforts to identify possible victims of trafficking among vulnerable groups, such as migrants and asylum seekers, including unaccompanied and separated children, who are particularly susceptible to exploitation.[36] Although the number of unaccompanied and separated children arriving in the State Parties has considerably increased in recent years, there has been 'little or no information on the identification of trafficked persons among unaccompanied and separated children'.[37] In order to improve the identification of trafficked or potentially trafficked persons among migrants, a proactive approach is necessary.[38] Setting up clear procedures for identification with operational indicators and referrals to competent organisations are highly relevant.[39] In the context

29 GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 110; GRETA, *Report on Italy*, I GRETA(2014)18, para 119; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 82; GRETA, *Report on Poland*, I GRETA(2013)6, para 131; GRETA, *Report on Spain*, I GRETA(2013)16, para 138; GRETA, *Report on United Kingdom*, I GRETA(2012)6, para 200.

30 GRETA, *Report on Austria*, I GRETA(2011)10, para 91.

31 GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 127; GRETA, *Report on Belgium*, I GRETA(2013)14, para 120.

32 GRETA, *Report on Spain*, I GRETA(2013)16, para 137.

33 GRETA, *Report on Bosnia and Herzegovina*, I GRETA(2013)7, para 96.

34 GRETA, *Report on* Ukraine, I GRETA(2014)20, para 124; GRETA, *Report on Andorra*, I GRETA(2014)16, para 60.

35 GRETA, *Report on Spain*, I GRETA(2013)16, para 137.

36 See for instance GRETA, *Report on Albania*, II GRETA(2016)6, paras 84 and 86; GRETA, *Report on Croatia*, II GRETA(2015)33, paras 81 and 93; GRETA, *Report on Italy*, II GRETA(2018)28, paras 119 and 141; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 87; GRETA, *Report on North Macedonia*, II GRETA(2017)39, para 97; GRETA, *Report on Slovenia*, II GRETA(2017)38, para 87.

37 GRETA, *6th General Report on GRETA's*, May 2018, para 109.

38 GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 127; GRETA, *Report on Italy*, II GRETA(2018)28, paras 141 and 158.

39 GRETA, *Report on Hungary under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings*, GRETA(2018)13, 23 March 2018, para 58. GRETA, *Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings*, GRETA(2016)29, 30 January 2017, para 72.

of Hungary, GRETA urged the State to allow NGOs with experience in identification of and assistance to victims of trafficking, to have regular access to transit zones.[40]

7.17 GRETA has expressed concern that the lack of co-ordination between different national authorities, such as relevant border officials, 'increases the risk of migrant and asylum-seeking children, particularly those who are unaccompanied, falling victim to trafficking'.[41] In the context of mixed migration movements, the United Nations Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, recommends implementing a new protection scheme based on an individual assessment in co-operation with civil society organisations 'as soon as migrants arrive'.[42] Screening and referrals should be individualised. In addition to international and child protection schemes, identification and referral procedures for trafficked persons should be established.[43]

40 GRETA, *Report on Hungary under Rule 7*, GRETA(2018)13, para 58.

41 GRETA, *6th General Report*, para 109.

42 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/38/45, 14 May 2018, para 69.

43 Ibid., para 73 (a). See on this also OHCHR and Global Migration Group, *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, 2018, Principle 5, Guideline 5, 29.

ARTICLE 8

SECURITY AND CONTROL OF DOCUMENTS

Julia Planitzer

Each Party shall adopt such measures as may be necessary:

a To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

b To ensure the integrity and security of travel or identity documents issued by or on behalf of the Party and to prevent their unlawful creation and issuance.

A. INTRODUCTION

8.01 Measures under Article 8 of the Council of Europe (CoE) Convention on the Action against Trafficking in Human Beings[1] should contribute to preventing trafficking in human beings by improving the security standards of travel or identity documents. In order to implement Article 8 of the Convention, the State Parties have to, for example, introduce minimum standards to improve security of passports and other travel documents, including stricter technical specifications and additional security requirements such as more sophisticated preventive features that make counterfeiting, falsification, forgery and fraud more difficult.[2] Based on European Union (EU) regulations, the EU Member States among the State Parties have to, for instance, implement biometric passports,[3] which is also implemented by non-EU Member States.[4]

8.02 According to Europol, 'passports are the most frequently detected type of fraudulent document (air, land and sea routes combined), followed by visas, identity cards and residence permits'. In

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (CoE Convention against Trafficking or Convention).

2 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 119.

3 See for instance GRETA, *Report on Greece*, I GRETA(2017)27, para 130; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 83; GRETA, *Report on Netherlands*, I GRETA(2014)10, para 130.

4 See for instance GRETA, *Report on Bosnia and Herzegovina*, I GRETA(2013)7, para 97; GRETA, *Report on Switzerland*, I GRETA(2015)18, para 116.

the EU, most detections of fraudulent documents take place on air routes.[5] Due to higher security standards of documents, other strategies are applied in order to circumvent forging passports. Large numbers of genuine passports are collected and used for a person when the passport shows reasonable resemblance or are borrowed for the border crossing and later returned to the rightful owner.[6] Trafficked persons may also, for instance, enter the EU with their own passport legally and then may be provided with fraudulent identity documents in the country of destination by the traffickers.[7]

B. DRAFTING HISTORY

8.03 As shown in the context of Article 7 (Border measures), it was not clear at the beginning whether Articles 7–9 of the CoE Convention against Trafficking, which correspond to Articles 11–13 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[8] should be copied or deleted completely.[9] One argument for deleting Articles 7–9 was that the chapter on prevention should rather focus on economic and social policies aimed at addressing root causes instead of migration control.[10] The majority of States voted for keeping these articles as having them included in the Convention would allow for monitoring which the Palermo Protocol lacks.[11]

8.04 Article 8 of the CoE Convention against Trafficking is almost verbatim Article 12 of the Palermo Protocol and Article 12 of the Protocol against the Smuggling of Migrants by Land, Sea and Air.[12] However, at the 8th Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting, the Committee agreed on minor amendments. The initial draft of the first sentence of Article 8 ('Each Party shall adopt such legislative and other measures as may be necessary, within available means') was shortened. It was agreed to delete the words 'within available means'.[13] This qualifier was added during the drafting of the Migrant Smuggling Protocol as some States expressed concerns about the possible costs of

5 UNODC, *Global Study on Smuggling of Migrants 2018* (UN 2018) 158–159.

6 Jaap-Henk Hoepman, Engelbert Hubbers, Bart Jacobs, Martijn Oostdijk, Ronny Wichers Schreur, 'Crossing Borders: Security and Privacy Issues of the European e-Passport' in Hiroshi Yoshiura, Kouichi Sakurai, Kai Rannenberg, Yuko Murayama, Shinichi Kawamura (eds), *Advances in Information and Computer Security – First International Workshop on Security, IWSEC 2006* (Springer 2006) 153.

7 INTERPOL, *European Migrants Smuggling Centre – 3rd Annual Activity Report – 2018* (2019) 17.

8 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

9 CAHTEH, *European Convention on Action against Trafficking in Human Beings: Revised Draft at its 2nd meeting*, CAHTEH(2003)MISC7, 10 December 2003, 6 and CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH (2003)RAP2, 26 January 2004, para 48.

10 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004, 18.

11 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, paras 79–84.

12 Protocol against Smuggling of Migrants by Land, Sea and Air, 2241 UNTS 507, 15 November 2000 (thereinafter Migrant Smuggling Protocol).

13 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, paras 21–23.

ensuring document control.[14] Furthermore, Article 8 of the CoE Convention against Trafficking deviates from the Palermo Protocol as Article 12(b) refers to preventing 'unlawful creation, issuance and use'. It was agreed to delete the reference to 'use', since delegations were concerned that it would be very difficult to ensure that documents were not used unlawfully.[15]

8.05 At the 8th CAHTEH meeting, the Committee discussed introducing a provision concerning travel documents of children. According to the proposal, it should be compulsory to provide children with their own personal documents, as delegations were convinced that 'children arrived in some countries on the basis of inclusion in the passports of adults who were not their parents'. However, due to a lack of legislation that requires children to have separate travel documents at the national level at the time of the drafting of the CoE Convention against Trafficking, several delegations opposed this proposal.[16]

C. ARTICLE IN CONTEXT

8.06 Article 8 of the CoE Convention against Trafficking is modelled on Article 12 of the Palermo Protocol, under which 'every Party must adopt the necessary measures to ensure quality of travel and identity documents and protect the integrity and security of such documents'.[17] Article 12 of the Palermo Protocol requires measures to ensure the adequacy of the quality and the integrity and security of documents such as passports. The language is clear that measures should include 'technical elements to make documents more difficult to falsify, forge or alter and administrative and security elements to protect the production and issuance process against corruption, theft or other means of diverting documents'.[18]

8.07 The International Civil Aviation Organization (ICAO) is a specialised agency of the UN to manage the administration and governance of the Convention on International Civil Aviation.[19] Under the mandate of the Chicago Convention, ICAO develops and maintains international standards, including Doc 9303 on 'Machine Readable Travel Documents'.[20] In 2010, all States were required to issue machine-readable passports in accordance with Doc 9303, and as of 2015, all non-machine readable travel documents have expired.[21] Several State

14 Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 512. The draft text of Art 12 of the Palermo Protocol was aligned with Art 12 of the Migrant Smuggling Protocol. See UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN 2006) 412.

15 CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, para 21.

16 Ibid., para 22. A similar recommendation was already included in the Brussels Declaration of 2002 stating that children over the age of five should have their own passport, see European Union, *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, 29 November 2002, 14981/02 Annex, para 12.

17 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 117.

18 UNODC, *Legislative Guides for the Implementation of the United Nations Convention against TransnationalOrganized Crime and the Protocols thereto* (UN 2004) 298–299, para 76.

19 Convention on International Civil Aviation, Doc 7300, signed on 7 December 1944 (thereinafter Chicago Convention).

20 ICAO, *Doc 9303 – Machine Readable Travel Documents* (7th edn, 2015). The first edition of Doc 9303 was published in 1980 and further developed. Currently, the document is available in its seventh edition which was published in 2015.

21 Ibid., 2.

Parties of the CoE Convention against Trafficking refer to the implementation of the standards set in Doc 9303.[22]

8.08 At EU level, Regulation No 2252/2004 on standards for security features and biometrics in passports and travel documents is central and aims at making passports and travel documents more secure in order to protect them against fraudulent use.[23] Security features of residence permits for third-country nationals are regulated under Regulation 2017/1954 amending Council Regulation No 1030/2002 laying down a uniform format for residence permits for third-country nationals.[24] In order to tackle considerable differences between the security levels of national identity cards issued by the EU Member States and residence permits for EU nationals residing in another EU Member State, Regulation 2019/1157 introduces certain standards. Documents that are not machine-readable should be phased out within five years.[25]

D. ISSUES OF INTERPRETATION

8.09 The drafting history of the Migrant Smuggling Protocol explains the difference between Article 8(a) and Article 8(b) of the CoE Convention against Trafficking. The underlying objective of these provisions in the Migrant Smuggling Protocol is to establish a high standard for the quality of documents in a first step (corresponding to Article 8(a) of the CoE Convention against Trafficking). Once the high standard is set, the further objective is to ensure that – in the context of the Migrant Smuggling Protocol – 'the more sophisticated documents did not fall into the hands of smugglers at any stage of the production or issuance process'.[26]

8.10 The term 'travel documents' encompasses 'any type of document required for entering or leaving a State under its domestic law'. 'Identity document' refers to any document 'commonly used to establish the identity of a person in a State under the laws or procedures of that State'.[27]

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22 See for instance, GRETA, *Report on Belarus*, I GRETA(2017)16, para 111; GRETA, *Report on Greece*, I GRETA(2017)27, para 130; GRETA, *Report on North Macedonia*, I GRETA(2014)12, para 130; GRETA, *Report on Serbia*, I GRETA(2013)19, para 144.

23 Council Regulation (EC) 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ L 385/1) as amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 28 May 2009 (OJ L 142/1).

24 Regulation (EU) 2017/1954 of the European Parliament and of the Council of 25 October 2017 amending Council Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals (OJ L 286/9).

25 Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement (OJ L188/67), 5th Recital and Art 5. This regulation addresses also the issue of breeder documents, which are documents that are required to be able to apply for a passport, including ID cards or birth certificates. Breeder documents 'make up one of the weakest links in the identity chain since breeder documents are easier to counterfeit or obtain by fraud than security-enhanced passports', see Elin Palm, 'Conflicting Interests in the Development of a Harmonized EU e-Passport' (2016) 31 *Journal of Borderlands Studies* 203, 209–10.

26 UNODC, *Travaux préparatoires*, 524.

27 Ibid., 413 and Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 117.

'[F]alsified or unlawfully altered, replicated or issued' includes not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents.[28]

8.11 Article 8(b) concerns the security and integrity of the issuance process itself. Measures should prevent that lawfully created or issued documents have been tampered with, altered or misappropriated.[29] For example, this would require that there are systems in place that ensure that blank passports are stored safely and securely.[30] Under the Palermo Protocol, the State Parties have to adopt measures that ensure that genuine documents that had been validly issued are not being used by a person other than the lawful holder.[31] Although Article 8(b) of the Convention does – in contrast to the Palermo Protocol – not refer to an unlawful usage of documents, the Explanatory Report indeed does by referring to measures to implement that guard against improper use.[32] As shown for instance in the context of Denmark, the most common type of identity document fraud encountered involves the use of genuine identity documents by imposters.[33] The imposter method is reported as a general strategy and means that a person would travel with a passport or another document belonging to another person who looks very similar.[34]

28 UNODC, *Travaux préparatoires*, 413.
29 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 118.
30 Gallagher and David, *The International Law of Migrant Smuggling*, 513.
31 UNODC, *Travaux préparatoires*, 413.
32 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 119.
33 GRETA, *Report on Denmark*, II GRETA(2016)7, para 73.
34 European Commission, DG Migration and Home Affairs, *A study on smuggling of migrants – Characteristics, responses and cooperation with third countries* (2015) 42.

ARTICLE 9

LEGITIMACY AND VALIDITY OF DOCUMENTS

Julia Planitzer

At the request of another Party, a Party shall, in accordance with its internal law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in human beings.

A. INTRODUCTION

9.01 The State Parties are required to check the legitimacy and validity of travel or identity documents issued or supposedly issued by their authorities when requested to do so by another State Party. The request is based on the suspicion that these documents are being used for trafficking in human beings.[1] Article 9 of the Council of Europe (CoE) Convention on the Action against Trafficking in Human Beings[2] requires the State Parties to proceed expeditiously and to provide a reply to the requesting Party within a reasonable time.[3]

B. DRAFTING HISTORY

9.02 As shown in the context of Articles 7 (Border measures) and 8 (Security and control of documents), delegations had different opinions about the question of whether Articles 7–9 of the CoE Convention against Trafficking, that correspond to Articles 11–13 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[4]

1 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 121.
2 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).
3 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 123.
4 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

should be copied or deleted.[5] Since monitoring these articles would be an added value in comparison to the Palermo Protocol which lacks a similar monitoring mechanism, it was decided to keep these articles.[6]

C. ARTICLE IN CONTEXT

9.03 Article 9 of the CoE Convention against Trafficking is almost identical to Article 13 of the Palermo Protocol and Article 13 of the Protocol against the Smuggling of Migrants by Land, Sea and Air.[7] Differences are limited to formal amendments: the Palermo Protocol refers to 'State Party' whereas the CoE Convention against Trafficking refers to 'Party'. '[I]n accordance with its domestic law' has been changed to 'in accordance with its internal law' in the Convention.

D. ISSUES OF INTERPRETATION

9.04 Article 9 is part of Chapter II ('Prevention, co-operation and other measures') of the CoE Convention against Trafficking, hence by ensuring co-operation between the State Parties in checking the legitimacy and validity of travel or identity documents, trafficking in human beings should be prevented, when, for instance, a person enters a State Party with presumably unlawful travel documents. Checking relevant documents upon return of trafficked persons to the state of which the person is a national or in which the person had the right of permanent residence falls under Article 16(3) and (4) of the CoE Convention against Trafficking.

9.05 Article 13 of the Migrant Smuggling Protocol 'seeks to decrease the risk of misuse and increase the probability of detection by requiring the State Parties to verify within a reasonable time whether a document purporting to have been issued by them is genuine and valid or not'.[8]

9.06 Verifying the legitimacy and validity of travel or identity documents means that the State Parties have to check the formal and material legality of the document. A document is formally illegal when the document is forged or when the document was issued by a State Party but later altered to produce a counterfeit. A document is materially illegal when the document had been issued by a State Party but on the basis of inaccurate or false information. Furthermore, in case a document is valid but used by a person that is not the rightful holder of it, the document is also considered as materially illegal.[9]

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5 See, e.g., the different positions of Italy and United Kingdom: CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contributions by delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004, 9 and 28.

6 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, paras 79–84.

7 Protocol against Smuggling of Migrants by Land, Sea and Air, 2241 UNTS 507, 15 November 2000.

8 UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN 2004) 372, para 82.

9 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 122.

ARTICLE 10

IDENTIFICATION OF THE VICTIMS

Vladislava Stoyanova

1 Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.

2 Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.

3 When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.

4 As soon as an unaccompanied child is identified as a victim, each Party shall:

a provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child;

b take the necessary steps to establish his/her identity and nationality;

c make every effort to locate his/her family when this is in the best interests of the child.

A. INTRODUCTION

10.01 Victim identification is of crucial importance since it enables victims to access all the benefits and rights attached to the status of a victim of human trafficking and presumed (possible) victim of human trafficking. Victim identification is the formal identification procedure that leads to conferral of the status of a presumed victim (i.e., a person in relation to whom there are 'reasonable ground to believe' that he or she has been a victim of trafficking in human beings) and a victim (i.e., a person in relation to whom a conclusive determination has been made). In this sense, identification by the competent national authorities needs to be distinguished from the detection of victims that could be done by various actors, including Non-Governmental Organisations (NGOs).[1] While detection is of importance, it is the formal identification procedure that is regulated by Article 10 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[2] and that will be examined in this chapter.

B. DRAFTING HISTORY

10.02 Strengthening the level of protection and assistance for all victims of trafficking was one of the main rationales for initiating the adoption of the CoE Convention against Trafficking.[3] Protection and assistance, however, cannot be ensured without first identifying who might be in need. Victim identification and its linkage with non-removal from the host state territory was one of the most hotly debated issues during the drafting process of the Convention and the relevant provisions were an object of multiple proposals and modifications.

10.03 At the time of drafting, there was an in-depth discussion as to the binding nature of the measures envisioned by Article 10(1). Some delegations observed that the provision 'could have budgetary or immigration implications and therefore wanted a non-binding wording' as the wording of the corresponding provisions in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[4] Other delegations posited for more flexibility: 'some measures should be binding while others could be optional'.[5] This approach

1 See European Migration Network, *Third Focussed Study 2013 – Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures* (MIGRAPOL, Doc 287, 2013) 11.
2 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).
3 See CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 11.
4 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).
5 CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH(2003)RAP2, 26 January 2004, para 51.

could have defeated the purpose of the whole Convention; non-binding and flexible provisions were therefore not accepted as a way forward. However, concerning this topic, the State Parties have preserved discretion in certain key areas.

10.04 Originally, Article 10 was not meant to be about identification and suspension of removal; these were meant to be covered by Article 13.[6] Initially, Article 10 rather addressed assistance measures that in the final version of the Convention are covered by Article 12. It was Germany that proposed that the articles in the Convention had to be reordered so that the chronological order of the steps was made more visible.[7] The proposal for reordering implied that the issue of identification had to be addressed before the issue of assistance. The proposal was supported by Liechtenstein, who also suggested that the title of Article 10 should be 'Identification of victims' and, importantly, that this identification had to be linked with non-removal.[8] Liechtenstein also proposed the inclusion of a specific sentence in the text, which would ensure that during the identification procedure, victims would be entitled to the minimum assistance measures. The Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) followed this approach and decided at its 5th meeting that the structure of Chapter III (Measures to protect and promote the rights of victims, guaranteeing gender equality) of the Convention had to match as closely as possible the sequence of situations a victim might encounter: identification, protection of private life, assistance, recovery and reflection period, residence permit, compensation and legal redress and repatriation.[9] This logical sequence is reflected in Chapter III of the final text of the Convention.

10.05 Overall seven contentious issues emerged from the drafting process of Article 10: quality of the identification procedure and the incorporation of procedural guarantees; the relationship between identification and criminal proceedings; the relationship between identification and the extension of recovery and reflection period; the relationship between identification and the granting of residence permits; the personal scope of the provision; relationship with EU law; and certain issues revolving around children.

1. Quality of the identification procedure

10.06 There was an agreement among the drafters that victims need to be identified. However, a specific reference to an identification procedure (i.e., 'identified in a procedure') was added late in the drafting process. It was not until the 8th CAHTEH meeting that the expression 'identified in a procedure' was added to Article 10(1).[10] This addition strengthened the provision, especially in comparison with its previous versions, which vaguely referred to collaboration between different authorities 'with a view to enabling an identification of victims'.

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6 CAHTEH, *Revised Draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 3rd meeting of the CAHTEH (3–5 February 2004)*, CAHTEH(2004)8, 12 February 2004, 11.

7 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the Observers of the European Women's Lobby, OSCE and UNICEF*, CAHTEH(2004)13, 9 June 2004, 7.

8 CAHTEH(2004)13, 9 June 2004, 14.

9 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP 5, 30 August 2004, 14.

10 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 8th meeting of the CAHTEH (22–25 February 2005)*, CAHTEH(2004)INFO10, 25 February 2005, 8.

10.07 More detailed regulations as to how the State Parties had to ensure identification of victims were considered unnecessary.[11] The incorporation of any procedural guarantees in the text of Article 10 was also rejected. Various actors, including the CoE Parliamentary Assembly,[12] insisted that a person should have a right to appeal a negative decision, before an impartial body.[13] Certain delegations referred to the case law of the European Court of Human Rights (ECtHR and made the argument that such a right can be derived therefrom. Crucially, the European Union (EU) Commission observed that such a right did not exist under the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of human trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities[14] and the Commission was unable to accept the inclusion of a right to appeal. Consequently, the CAHTEH rejected its inclusion.[15]

10.08 Besides the right to appeal, another issue concerning the quality of the identification procedure that was raised related to the evidentiary threshold required under Article 10. For example, the Norwegian delegation submitted that this threshold 'must be put very low'.[16] There was a debate as to whether the words 'sufficient' or 'reasonable' should be used. From the debate it was not clear whether the threshold of 'sufficient' was perceived as more demanding than 'reasonable'.[17] For an extensive period of time during the drafting, these expressions were proposed as alternatives until eventually, the drafters decided to use 'reasonable grounds to believe' as reflected in the final text of Article 10.

2. Relationship between identification and criminal proceedings

10.09 The relationship between the identification procedure as regulated by Article 10 and any criminal proceedings against alleged traffickers (i.e., the initiation, the conduction or the completion of such proceedings) was also discussed. The CAHTEH was explicit that Article

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11 As Norway observed:

> [i]t is important that the Parties have systems that ensure properly processing of the victims' case. Furthermore it is important to ensure co-ordination among the organizations involved. However, it is not advisable to make regulations in a convention that instruct the Parties how they shall ensure the abovementioned features.

CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Norway and by the observer of Mexico*, CAHTEH(2003)8 rev 2, Addendum II, 1 December 2003, 5.

12 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2005)23, 4 November 2004, 5; see also Parliamentary Assembly, Opinion No. 253 (2005) on the Draft Council of Europe Convention on Action against Trafficking in Human Beings, 26 January 2005, para 14; Parliamentary Assembly, Opinion No. 1695(2005) on the Draft Council of Europe Convention on Action against Trafficking in Human Beings, 18 March 2005, para 8.

13 CAHTEH, *Contribution by Non-Governmental Organisations Additional Comments by Amnesty International and Anti-Slavery International*, CAHTEH(2004)17 Addendum IV, 30 August 2004, 3; See also CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Joint Statement of 127 Non-Governmental Organisations*, CAHTEH(2004)17, 27 September 2004, 4.

14 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of human trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261/19) (thereinafter Council Directive 2004/81/EC).

15 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report* CAHTEH(2005)RAP8, 16 March 2005, 13–14.

16 CAHTEH(2004)13, 9 June 2004, 18.

17 Ibid., 31.

10(2) was independent of any criminal proceedings,[18] and this is also reflected in the final version of the Explanatory Report to the Convention[19] and in the position of the Group of Experts on Trafficking in Human Beings (GRETA).[20] However, some difficulties still persist as to the dependence of the identification on any criminal proceedings. The source of these difficulties can be linked with the discretion left for the State Parties as to how to organise the identification procedure.[21]

10.10 In addition, during the drafting process, the reference to Article 18 (Criminalisation of trafficking in human beings) of the Convention in the text of Article 10(2) also raised questions regarding the independence of the identification procedure. The CoE Parliamentary Assembly proposed that '[i]n order to avoid any possible confusion, it would be better to delete the reference to Article 17 [Article 18 in the final text] of the Convention'.[22] The EU Commission categorically rejected this proposal, but it was approved by the CAHTEH and the reference to Article 18 was retained.[23]

10.11 At this stage, it is important to highlight the clarification offered by Germany as to why timely and effective identification of victims was also in the interest of the prosecution. Germany pointed out that 'trafficking is a crime where the witness very often has the crucial role in criminal proceedings. His or her testimony is crucial to get a conviction'.[24] In light of this clarification, it is understandable why states might be reluctant to strictly isolate identification from any exigencies of the criminal law. If formal identification is isolated from any criminal proceedings and does not therefore serve their purposes, the effectiveness and the success of these proceedings might be undermined.

3. Relationship between identification and the extension of a 'recovery and reflection' period

10.12 The interconnection between Article 10 and Article 13 (Recovery and reflection period) was also a point of deliberation. Notably, Liechtenstein proposed explicitly linking the two provisions to the following effect:

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18 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5.

19 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, paras 134–135.

20 GRETA, *Report on Sweden*, I GRETA(2014)11, para 142. In this report on Sweden, GRETA expressed in para 128 its concern that 'the criminal law-based approach to victim identification leaves victims of [trafficking in human beings] without formal identification and outside of the scope of the protection measures provided for under the Convention'. See also GRETA, *Report on Ireland*, I GRETA(2013)15, para 165 where GRETA urged the national authorities to guarantee that 'in practice identification is dissociated from the suspected victim's co-operation in the investigation'.

21 The EU Commission criticised Art 10 since the provision '(…) does not define what identification consists of, what starts identification and what ends it (…)'. CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Contribution by the delegation of the Commission of the European Communities*, CAHTEH(2004)17, Addendum II, 30 August 2004, 3.

22 CAHTEH(2005)23, 5; see also Parliamentary Assembly, Opinion No. 253 (2005) on the Draft Council of Europe Convention on Action against Trafficking in Human Beings, 26 January 2005, para 14.

23 CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, 13.

24 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers*, CAHTEH(2004)24, 19 November 2004, 12–13.

> Each Party shall provide in its internal law a minimum recovery and reflection period allowing *a victim identified in accordance with Article 10* (former article 13), to remain in the country whilst she or he recovers, as well as to escape the influence of the traffickers so that she or he can take an informed decision on co-operating with the competent authorities.[25]

10.13 This could have ensured some better consistency between the two provisions. Liechtenstein's proposal was, however, not successful, leading to a confusing relationship between Article 10 and Article 13 of the Convention.[26]

10.14 Crucial clarification emerging from the drafting history is that the recovery and reflection period under Article 13 immediately begins when there are reasonable grounds to believe that a person is a victim and not upon the completion of the identification process under Article 10. To support this clarification, the CAHTEH noted that Article 13 was concerned with persons whom there were reasonable grounds to believe to be victims and not with identified victims.[27]

4. Identification and the granting of a residence permit

10.15 Another point of contention was whether the identification procedure as envisioned by Article 10(2) would imply the granting of a residence permit. In the initial version of the provision, there was a reference to residence permits, which would enable victims to stay on the host state's territory. The possibility to issue permits was qualified with the addition 'in appropriate cases', which preserved flexibility for states. Upon the proposal of the United Kingdom (UK), such references were removed and the expression 'could stay on its territory' was reframed as 'shall not be removed from its territory'. The UK posited that 'the granting of a residence permit cannot be dependent solely on identification of a victim of trafficking'. The UK also suggested that 'the issues of identification and residence permits are not to be confused within this article, especially as the whole issue of residence permits is covered fully in Article 15 [the current Article 14]'.[28] Similarly to the position of the UK, other delegations opposed the idea that victim identification would necessarily imply the extension of a residence permit.[29] For this reason, the final version of Article 10(2) refers to 'shall not be removed from its territory'. Non-removal certainly does not imply granting of a permit.

10.16 In comparison, Article 10(1) of the Convention does refer to residence permits. However, this reference does in no way imply that identification automatically leads to the granting of a permit. The wording of Article 10(1) is much more qualified: '(…) and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention'. Ultimately, residence permits are regulated by Article 14, not by Article 10 of the Convention. This is without prejudice to the possibility of states to apply higher standards of

25 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Amendments to preamble and to articles 1 to 24 proposed by national delegations and observers*, CAHTEH(2004)14, 11 June 2004, 30.

26 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States Positive Obligations in European Law* (Cambridge University Press 2017) 102.

27 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, 19.

28 CAHTEH(2004)13, 9 June 2004, 31.

29 CAHTEH(2004)14, 11 June 2004, 27.

protection by granting permits during the identification procedure even at a stage when there are only 'reasonable grounds to believe' that a person has been a victim of trafficking in human beings.

5. The personal scope of the provision

10.17 Switzerland tried to impose restrictions on the personal scope of the provision. Specifically, Switzerland proposed that assistance for victims would be made available 'provided that the offence was committed in its territory or that the victim is one of its national or had its residence on its territory at the time of the offence'.[30] Such references to territoriality and nationality as conditions that might limit the personal scope of the provision were rejected. It was clarified that '(…) just, as, under the ECHR, the High Contracting parties accorded the rights and freedoms defined in that Convention to everyone within their jurisdiction, so here the state responsible for benefits to victims was the one in which the victim found him/herself'.[31] This clarification implies that irrespective of where the presumed victim or the victim was an object of trafficking (i.e., in another CoE Member State or a state beyond the geographical limits of CoE), once the victim is 'within the jurisdiction' of a State Party, this state has to identify and ensure assistance.

10.18 This expansive scope, however, does raise some difficult issues. For example, it might be difficult to establish to the required evidentiary threshold that the person in question was a victim of human trafficking when the trafficking occurred in the territory of another state or the territories of multiple states. In addition, the trafficking might have occurred a long time ago, and the question that arises is whether such victims with historical claims still have to be identified and assisted. This problem emerges even if the trafficking occurred in the territory of the State Party under whose jurisdiction the victim is at the time of identification.[32]

10.19 An equally important question concerns the cessation of the obligation to identify and grant assistance. At the time of drafting, this question was raised in relation to some states' concerns that they might be obliged to assist after the repatriation of the victims. The CAHTEH clarified that host states had no obligation to assist victims after they had returned to their countries of origin. Once a victim had left the country, the assistance measures were no longer applicable.[33] However, the question of the obligation to assist victims who cannot be removed since removal might be in violation of the principle of *non-refoulement*[34] or who are non-removable since the country of origin does not facilitate their readmission, remained

30 CAHTEH(2004)14, 11 June 2004, 20.

31 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, 14.

32 For a detailed discussion, see Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law*, 124.

33 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, 15.

34 Vladislava Stoyanova, 'Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights' (2011) *Göttingen Journal of International Law*; Vladislava Stoyanova, 'Victims of Human Trafficking in the Asylum Procedure. A Legal Analysis of the Guarantees for "Vulnerable Persons" under the Second Generation of EU Asylum Legislation' in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Martinus Nijhoff Publishers 2015) 58.

open.[35] To clarify, once a person has been conclusively identified as a victim, he/she continues to be eligible for the assistance measures indicated in Article 12(1), (2), (5), (6) and (7).[36] The text of the treaty is, however, silent as to the timeframe of these assistance measures. Article 12(1) refers to a victim's recovery; thus, it is possible to argue that as long as a victim is in need of recovery, the assistance measures need to be provided.[37]

6. Relationship with EU law

10.20 A major issue throughout the drafting was the coordination of the standards to be imposed by the Convention with the standards under the relevant EU law. The ongoing discussions of the Council Directive 2004/81/EC was a factor that was taken into account during the drafting process of the Convention.[38] Some EU Member States reserved their position concerning identification and suspension of deportation in light of the forthcoming adoption of the above-mentioned EU Directive in this field. Often throughout the drafting, EU law, and more specifically, the pending adoption and approval of the above-mentioned EU Directive was used as a yardstick. Given the low protection and assistance standards envisioned by this Directive, its usage as a yardstick had the effect of lowering the standards under CoE law.[39]

7. Children and their identification

10.21 The last two paragraphs of Article 10 of the Convention address children, including unaccompanied children. The United Nations Children's Fund (UNICEF) proposed the assignment of a legal guardian for unaccompanied children,[40] a proposal that was endorsed by the CAHTEH. However, in contrast to the UNICEF's proposal, the final version of Article 10(4) allows representation of a child not only by a legal guardian but also by an 'organisation or authority'. This weakens the provision. During the drafting, it was considered that support by a guardian should be ensured even for accompanied children when the parents were themselves traffickers.[41] This proposal was not incorporated into the provision given the complexity of the issues surrounding legal representation of children. It was decided to leave the issue to the national systems, which in any case has specific regulations.[42]

10.22 Greater sensitivity, however, to the problem of children whose family might pose risks to them was demonstrated during the framing of Article 10(4)(c). Upon the proposal of the EU

35 See CoE Convention against Trafficking, Art 16.

36 The measures under Art 12(3) and (4) of the CoE Convention against Trafficking are extended only to victims who are lawfully resident.

37 Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* 152.

38 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, 7.

39 For a detailed analysis of the interaction between CoE law and EU law in this area, see, Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law*, 448. A concrete example as to how Council Directive 2004/81/EC incorporates lower standards is the absence in its text of a provision similar to Art 10(2) of the CoE Convention against Trafficking.

40 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Austria, Netherlands and by the observer of UNICEF*, CAHTEH(2004)1, 26 January 2004.

41 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, 19.

42 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, 9.

Commission, it was agreed that efforts to locate the family of children should be done only when this was in the children's best interest. As the Commission clarified:

> [I]n the area of trafficking in human beings, it sometimes occurs that the family is aware or complicit in the fact that a child has been a victim of trafficking. It can then be useful to recall here the best interests of the child, which do not always imply that the child be left in the care of his/her family.[43]

C. ARTICLE IN CONTEXT

1. Relationship between Article 10 and Article 4(e)

10.23 Article 4(e) of the Convention provides that 'victim' 'shall mean any natural person who is subject to trafficking in human beings as defined in this article'. The term 'victim' as used in Article 10, needs to be distinguished from the status of a victim of a crime as granted pursuant to the applicable rules in the national criminal justice system. Normally, the formal status of a victim of a crime is granted when the person formally participates in the criminal proceedings, for example, by acting as a witness.[44] In contrast, victim identification as envisioned by Article 10 of the Convention is a procedure separate and independent from criminal proceedings, including any participation of the person in such proceedings.[45]

2. Relationship between Article 10 and Article 12

10.24 Article 12 of the Convention provides for two levels of social assistance. The minimum level that ensures accommodation, emergency medical treatment, translation and interpretation services, counselling and assistance in the context of the criminal proceedings, applies to persons in relation to whom there are 'reasonable grounds to believe' they are a victim.[46] The minimum level thus applies to the preliminary victim identification stage. The higher level of assistance[47] applies to individuals who have been conclusively determined to be victims.

10.25 The wording of Article 12(6) is particularly problematic since it states in clear terms that assistance 'to a *victim* is not made conditional on his or her willingness to act as a witness [emphasis added].' One can make an argument that by analogy assistance to presumed victims should likewise not be conditioned on their willingness to act as a witness. It would have been much more lucid if Article 12(6) was not limited to 'victims' and also covered presumed victims.

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43 CAHTEH(2004)17, Addendum II.

44 As a useful reference point, one can use the references to the different criteria used by EU Member States in determining the role of victims in the criminal justice system in the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2011/220/JHA (OJ L 315/57).

45 Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law*, 86–90.

46 See CoE Convention against Trafficking, Art 10(2).

47 Ibid., Art 12(3), (4), (5) and (6).

3. Relationship between Article 10 and Article 13

10.26 Article 13 of the Convention uses terminology (i.e., 'reasonable grounds to believe that the person concerned is a victim') that is the same as the one used in Article 10(2). Both provisions refer to a stage where there is no conclusive determination that the person concerned is a victim; thus, both provisions apply to the preliminary stage of the victim identification procedure. Both provisions aim to ensure non-removal, although they use different terminology. Article 10(2) refers to non-removal 'until the identification process as a victim of an offence provided for in Article 18 has been completed'. Since the Convention does not envision any time limits as to when the identification has to be completed, the postponement of the removal pursuant to Article 10(2) has no determinate timeframe.

10.27 In contrast, Article 13(1) refers to a period (i.e., the recovery and reflection period of minimum 30 days) in which no enforcement of an expulsion order shall be possible, which does not seem to be substantially different from non-removal. However, in comparison with Article 10(2), Article 13(1) is more robust since it also adds that '[d]uring this period the Parties shall *authorise* the persons concerned to stay in their territory' [emphasis added]. Accordingly, Article 10(2) guarantees mere tolerance on the territory; in contrast, Article 13(1) demands authorisation. How this authorisation is to take place is left at the discretion of the State Parties, although normally authorisation to stay would imply an extension of a residence permit. This is, however, not explicitly stated in the text of Article 13.[48]

10.28 Leaving aside these technical, but important distinctions between Article 10 and Article 13, the existence of two provisions, which regulate the preliminary stage of victim identification, causes confusion and potentially undermines the importance of Article 13 as a provision that guarantees a minimum period of 30 days authorised stay of the person (framed as a recovery and reflection period) without any preconditions (such as willingness to help in any investigation or criminal proceedings) as long as 'there are reasonable grounds to believe that the person concerned is a victim'.

4. Relationship between Article 10 and Article 18

10.29 Article 18 of the Convention incorporates an obligation upon the State Parties to criminalise human trafficking. Article 10(2) refers to Article 18 to define the objective of the identification process: identification 'as victim of an offence provided for in Article 18'. The reference to 'victim of an offence' might undermine the separation between the status of a presumed victim (and, indeed a victim) and the status of a victim of a crime with some formal role in the criminal proceedings. The latter category is defined by the national criminal legislation normally with reference to formal participation in criminal proceedings. The reference to 'victim of an offence' in the CoE Convention against Trafficking and its linkage with Article 18 of the same Convention might thus undermine the independence of the victim identification procedure from any criminal proceedings.

48 Art 14 of the Convention rather regulates residence permits. See Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law*, 101–10.

D. ISSUES OF INTERPRETATION

1. The identification procedure

(a) 'competent authorities'

10.30 As the Convention's Explanatory Report clarifies: 'competent authorities' means 'public authorities which may have contact with trafficking victims, such as the police, the labour inspectorate, customs, the immigration authorities and embassies or consulates'. Since all of these authorities might encounter victims, there needs to be a proper coordination among them, which is also demanded by Article 10(1) of the Convention. Successful identification might also require that national authorities take a proactive approach, conduct outreach work to identify victims and co-operate with NGOs that might detect victims.[49] However, the determination as to which national authority is to be specifically designated to identify individuals as presumed victims and as victims so that they can benefit from non-removal and other assistance measures, falls within the discretion of the State Parties.

10.31 Different approaches can be observed by different State Parties. For example, in some countries, it is the prosecutor that is authorised to grant the status.[50] This is not necessarily in violation of the Convention; however, it might lead to problematic outcomes as was made evident in *L.E. v. Greece*,[51] a judgment delivered by the ECtHR. The applicant, a Nigerian woman forced into prostitution in Greece, argued inter alia that the rejection by the prosecutor of her complaint that she was a victim had serious consequence since she was not formally recognised as a victim and was accordingly not granted a special residence permit in Greece that could have prevented her removal.

10.32 The case reveals that in light of the fact that it was the prosecutor who was mandated to formally identify, identification was conducted exclusively in relation to the criminal proceedings against the alleged perpetrators. It occurred on the same day that the prosecutor at the Athens Criminal Court instituted criminal proceedings against the alleged offenders for the crime of human trafficking and that the applicant was eventually formally recognised as a victim of human trafficking and her deportation was suspended. Greece was found in violation of its positive obligations under Article 4 of the European Convention on Human Rights (ECHR), since there was a nine-month lapse between the point in time when the applicant filed a criminal complaint against the alleged traffickers and her formal recognition as a victim of human trafficking by the prosecutor.[52]

(b) 'so that victims can be identified in a procedure'

10.33 As noted in the drafting history, the specific organisation of the procedure and the incorporation of procedural guarantees (if any) is left to the discretion of the State Parties. As a

49 GRETA, *Report on Germany*, I GRETA(2015)10, para 137; GRETA, *Report on Denmark*, I GRETA(2011)21, para 130.

50 See GRETA, *Report on Belgium* I GRETA(2013)14, 35; GRETA, *Report on Bulgaria*, I GRETA(2011)19, 35.

51 *L.E. v. Greece* App no 71545/12 (ECtHR, 21 January 2016).

52 Ibid., paras 77–78. For a detailed analysis see Vladislava Stoyanova, 'L.E. v Greece: Human Trafficking and the Scope of States' Positive Obligations under the ECHR' (2016) 3 *European Human Rights Law Review* 290.

consequence, different approaches can be observed at national level in terms of how the procedure is triggered. For instance, whether the procedure is regulated by a specific national legislation, the timeframe within which a conclusive determination is made, the applicable standard of proof,[53] the distribution of the burden of proof, possibilities for appealing a negative decision and the body mandated to identify.

10.34 In light of the case law of the ECtHR under Article 4 ECHR,[54] a powerful argument could be developed that the victim identification procedure needs to incorporate certain procedural safeguards.[55] The starting point for this argument is *Rantsev v. Cyprus and Russia*,[56] where the ECtHR held that:

> In assessing whether there has been a violation of Article 4, the relevant legal and regulatory framework in place must be taken into account [references omitted]. The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking.[57]

10.35 The victim identification procedure is certainly part of the 'regulatory framework' and if it fails to ensure 'practical and effective protection', including because of its close intertwinement with the exigencies of any criminal proceedings, it might fail to meet the standards of states' positive obligations under Article 4 ECHR.

10.36 *J. and Others v. Austria* further supports this stance since the ECtHR, in very strong terms, observed that Article 4 of the ECHR generates a positive obligation upon states to identify and support (potential) victims of trafficking and for this purpose, states have to build a legal and administrative framework.[58] The Court made it clear that the identification and the assistance of victims is independent from any criminal proceedings. While the latter are intended to identify and potentially prosecute alleged traffickers, the former have a very different purpose (i.e., identification and assistance of victims). More specifically the Court stated the following:

> The applicants argued that the Austrian authorities had accepted that they were victims of the crime of human trafficking by treating them as such (see paras 88–91 above). However, the Court does not consider that the elements of the offence of human trafficking had been fulfilled merely because the Austrian authorities treated the applicants as (potential) victims of human trafficking (see paras 110–111 above). Such special treatment did not presuppose official confirmation that the offence had been established, and was *independent of the authorities' duty to investigate*. Indeed, *(potential) victims need support even before the offence of human trafficking is formally established, otherwise this would run counter to the whole purpose of victim protection in trafficking cases.* The question of whether the elements

53 No standard for the conclusive determination is indicated in the text of the Convention.

54 Inspiration can also be drawn from procedural standards and guaranteed developed by the ECtHR under other provisions of the ECHR. See Eva Brems, 'Procedural Protection: an Examination of Procedural Safeguards Read into Substantive Convention Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR* (Cambridge University Press 2013) 137.

55 Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States Positive Obligations in European Law*, 394.

56 For a detailed analysis of the case see Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30 *Netherlands Quarterly of Human Rights* 163.

57 *Rantsev v. Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 284.

58 *J. and Others v. Austria* App no 58216/12 (ECtHR, 17 January 2017), paras 109–111.

of the crime had been fulfilled would have to have been answered in subsequent criminal proceedings [emphasis added].[59]

10.37 An important issue that needs to be highlighted concerns the coordination between the procedure for identifying victims and the procedure for determining any international protection needs such as refugee status or forms of subsidiary protection. Victims might be detected in the context of the latter procedure, which implies that there needs to be mechanisms for their referral to the victims of trafficking identification procedure.[60] Circumstances where applicants for international protection are denied access to or cannot benefit from the aid provided in the context of trafficking identification procedure, need to be avoided.[61]

2. The preliminary stage of the victim identification procedure

(a) 'reasonable grounds to believe'

10.38 Article 10(2) of the Convention refers to 'reasonable grounds to believe' as the standard of proof for the preliminary stage of the victim identification procedure. No standard for the conclusive determination is indicated in the text of the Convention.[62] The clarifications offered by the Explanatory Report are confusing and not helpful: '[t]he Convention does not require absolute certainty – by definition impossible before the identification process has been completed – for not removing the person concerned from the Party's territory'.[63] Notably, 'absolute certainty' is impossible even after the completion of the identification process. Neither is it possible in the context of criminal proceedings against alleged criminals, where the required standard of proof is beyond a reasonable doubt.

(b) 'shall not be removed from its territory'

10.39 Article 10(2) requires that at the moment when the competent authorities have 'reasonable grounds to believe' that a person is a victim, removal proceedings need to be suspended. The Explanatory Report clarifies that the objective of Article 10(2) is to 'avoid the immediate removal from the country'.[64] Since the application of Article 13 of the Convention is triggered at the same time (i.e., 'upon reasonable grounds to believe that the person concerned is a victim'), the non-removal has to be accompanied with the granting of recovery and reflection period and authorisation of the person to stay on the state territory.

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59 *J. and Others v. Austri*a, para 115. See also Vladislava Stoyanova, *J. and Others v. Austria and the Strengthening of States' Obligation to Identify Victims of Human Trafficking* (Strasbourg Observers Blog 2017).

60 There has been a divergent state practice as to how these referrals happen. See European Migration Network (EMN), *Synthesis Report – Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures*, March 2014; GRETA has also drawn attention to the need of coordinating the two procedures. See GRETA, *Report on Italy under Rule 7 of the Rules of Procedure*, GRETA(2016)29, paras 24–46.

61 Vladislava Stoyanova, 'Victims of Human Trafficking in the Asylum Procedure. A Legal Analysis of the Guarantees for "Vulnerable Persons" under the Second Generation of EU Asylum', 58.

62 For an argument that the standard should be the same even at the conclusive stage, see Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law*, 99.

63 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 132.

64 Ibid., para 131.

3. Presumption of being a child

10.40 Article 10(3) requires that if 'there are reasonable grounds to believe' the victim is a child, the victim must then be presumed to be a child. This presumption shall operate while the age of the person is being verified.[65] During this time period, when the age of the child is uncertain, but the person is presumed to be a child, he or she 'shall be accorded special protection measures'. The text of Article 10(3) does not give a clue as to the nature of these measures; the Explanatory Report refers to the United Nations Convention on the Rights of the Child. The nature of these measures will also depend on national legislation and standards.

10.41 The personal scope of Article 10(3) is limited to victims and does not extend to individuals who might be children, but who are not conclusively identified to be victims of human trafficking. This leads to an unfortunate absence of harmony between Article 10(3) and the preceding paragraphs of Article 10. Perhaps, any negative consequences are mitigated by the modified definition of a child victim of human trafficking.[66] According to this definition, the 'means' element of the definition are excluded and trafficking of children is constituted when a child is recruited, transported, transferred, harboured or receipt for the purpose of exploitation. This exclusion makes the determination that human trafficking has been constituted easier.

4. Unaccompanied children

10.42 Article 10(4) of the Convention provides for measures of particular significance for unaccompanied minors (representation, establishment of identify and location of the family). Similar to Article 10(3), the personal scope of Article 10(4) is limited to children who are identified as victims, which excludes children who might still be in a procedure for being identified before a conclusive decision as to their status as victims is taken.

E. CONCLUSION

10.43 Despite the above-mentioned weakness of Article 10 of the Convention, this provision is of major importance since it demands the incorporation of a specific identification procedure for victims of human trafficking at national level that incorporates two stages (a preliminary state where there are 'reasonable grounds to believe that a person has been victim of trafficking in human beings' and a conclusive stage). Equally importantly, it also requires a presumption that a victim is a child and thus eligible for specific protection measures even prior to a conclusive age assessment. Unaccompanied minors are also ensured specific protection and assistance measures.

65 For the difficulties related to age assessment, see Gregor Noll, 'Junk Science? Four Arguments against Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' (2016) 28 (2) *International Journal of Refugee Law* 234. GRETA has also made recommendations as to the age assessment procedure conducted at the national level. See GRETA, *Report on Spain*, II, GRETA(2018)7, para 186.

66 See CoE Convention against Trafficking, Art 4(c).

10.44 Once the State Parties build victim identification procedures at national level, these can come under scrutiny in light of the ECHR standards as developed by the ECtHR. Accordingly, there is a potential for future progressive developments for clarifying and raising the victim identification and assistance standards through the fruitful interaction between the CoE Trafficking Convention and the ECHR.

ARTICLE 11

PROTECTION OF PRIVATE LIFE

Julia Planitzer*

1 Each Party shall protect the private life and identity of victims. Personal data regarding them shall be stored and used in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).

2 Each Party shall adopt measures to ensure, in particular, that the identity, or details allowing the identification, of a child victim of trafficking are not made publicly known, through the media or by any other means, except, in exceptional circumstances, in order to facilitate the tracing of family members or otherwise secure the well-being and protection of the child.

3 Each Party shall consider adopting, in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms as interpreted by the European Court of Human Rights, measures aimed at encouraging the media to protect the private life and identity of victims through self-regulation or through regulatory or co-regulatory measures.

A. INTRODUCTION

The main reason for including a provision on the protection of private life in the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] was to avoid unlawful disclosure of personal data of trafficked persons; supporting social re-integration and **11.01**

* The author wants to thank Andreas Gruber for his valuable comments on an earlier draft.

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

protection of trafficked persons from traffickers.[2] Article 11 of the Convention consists of two thematic strands based on the basic principle that private life and identity of victims have to be protected: protection of personal data of trafficked persons and protection of the private life, in particular, the identity of trafficked children, by the media. By making the protection of private life and identity of trafficked persons mandatory for the State Parties, the Convention further developed the relevant international legal framework on trafficking in human beings.

11.02 Data protection rules should not limit the tools, which are available to encounter trafficking in human beings, but ensure their compliance with human rights and foster the necessary trust between victims and authorities as well as other actors involved in this field.[3] Personal data is relevant for evidence; at the same time, one has to take into account concerns of possible harmful repercussions of processing such data.[4] These could include, for instance, restriction of the freedom of movement or further stigmatisation of migrants and other marginalised populations, including sex workers.[5]

B. DRAFTING HISTORY

11.03 Article 11(1) refers to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[6] This reference was included already in an early draft, which stated that States 'shall promote responsible exercise of journalism and behaviour of media when dealing with cases of victims'.[7] At a later point, it was decided to include the key principles of data protection themselves in the provision instead of referring to the CoE Personal Data Protection Convention. This should clarify that the principles of the CoE Personal Data Protection Convention are applicable, regardless of the ratification of the CoE Personal Data Protection Convention.[8]

11.04 Hence, the then Article 12(1), which is based on Article 5 of the CoE Personal Data Protection Convention, was more elaborate in the early drafts of the Convention compared to the final wording and explained that:

> [e]ach Party shall protect the private life and identity of victims. Personal data of the victims shall be stored for specified and legitimate purposes and not used in a way incompatible with those purposes.

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2 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 50 and CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH(2003)RAP2, 26 January 2004, para 67.

3 European Data Protection Supervisor, *EDPS comments on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016'*, 16 July 2012, 2.

4 Felicity Gerry, Julia Muraszkiewicz, and Niovi Vavoula, 'The role of technology in the fight against human trafficking: Reflections on privacy and data protection concerns' (2016) 32 *Computer Law & Security Review*, 209.

5 Baerbel Heide Uhl, '"Assumptions built into code" – datafication, human trafficking, and human rights – a troubled relationship?', in Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2017) 414.

6 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, 28 January 1981, entered into force 1 October 1985 (thereinafter CoE Personal Data Protection Convention).

7 CAHTEH, *Revised Preliminary Draft – European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 8.

8 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 67.

> These data shall be adequate, relevant and not excessive in relation to the purposes for which they are stored. These data shall be preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.[9]

11.05 During the 5th Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting, it was decided to revert to the initial draft and refer to the CoE Personal Data Protection Convention instead of listing the principles.[10] At first glance, one might get the impression that a lot of information was lost by this decision of the drafters. On the other hand, by referring to the underlying, comprehensive legal instrument, the updates to the CoE Personal Data Protection Convention are also applicable to the CoE Convention against Trafficking.[11]

11.06 The United Nations Children's Fund (UNICEF) successfully proposed including Article 11(2) in order to provide for special protection of children. The State Parties have to ensure that the identity or details allowing the identification of a child victim are not made public.[12]

11.07 In relation to Article 11(3), the language used concerning the behaviour of media in relation to cases of trafficking in the final provision is more cautious and flexible than the wording in an early draft, which noted: States 'shall promote' responsible media behaviour.[13] Whereas in the final provision, Article 11(3) reads: States 'shall consider adopting (…) measures aimed at encouraging the media'.[14] The initial wording was criticised as being potentially in conflict with the media's freedom of expression,[15] which led to the inclusion of the reference that the adoption of measures has to be 'in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms as interpreted by the European Court of Human Rights'.[16]

C. ARTICLE IN CONTEXT

1. Relationship between Article 11 and Articles 28 and 30 of the CoE Convention against Trafficking

11.08 The aim of Article 11 is to protect the private life of trafficked persons which includes the obligation for the State Parties to protect the personal data of trafficked persons. This should avoid further stigmatisation and contribute to the protection from retaliation from the traffickers. Articles 28 and 30 of the Convention provide for further measures of protection

9 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, 42.
10 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, 18.
11 By the Protocol amending the CoE Personal Data Protection Convention, CETS No. 223, 10 October 2018 (did not enter into force yet), the CoE Personal Data Convention underwent a thorough modernisation.
12 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Amendments to preamble and to Articles 1 to 24 proposed by national delegations and observers*, CAHTEH(2004)14, 11 June 2004, 27.
13 CAHTEH(2003)9, 8.
14 CoE Convention against Trafficking, Art 11(3).
15 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, 18.
16 CoE Convention against Trafficking, Art 11(3).

during and after the investigation and prosecution (Art 28) and during court proceedings (Art 30). Articles 28 and 30 can be assessed as *lex specialis* to Article 11. Article 28 requires the adoption of measures that 'may be necessary to provide effective and appropriate protection from potential retaliation or intimidation'[17] and lists examples without explicitly mentioning the protection of private life and identity. Article 30, however, refers specifically also to the protection of victims' private life and 'where appropriate, identity'[18] in the course of judicial proceedings. The reference to protecting the identity of trafficked persons 'in appropriate cases' is necessary in order to comply with Article 6 of the European Convention on Human Rights (ECHR) (right to a fair trial).

2. Relationship between Article 11 and Article 5 of the CoE Convention against Trafficking

11.09 Article 5(2) of the CoE Convention against Trafficking requires the State Parties to establish and strengthen prevention policies and programmes by means such as research. These policies and programmes should promote a human rights-based approach (Art 5(3)). Although data collection on various aspects of trafficking in human beings is not specifically mentioned in the text of the Convention, it is seen as important for informing, adjusting and assessing anti-trafficking policies.[19] The Group of Experts on Trafficking in Human Beings (GRETA) regularly states that:

> [t]he human rights-based approach to anti-trafficking policies advocated by the Convention requires adequate monitoring and evaluation. An essential element is the regular availability of comprehensive statistical information on both trends in trafficking in human beings and the performance of the main actors in the fight against trafficking.[20]

Hence, from Article 5 of the Convention, it can be deduced that the State Parties have to compile reliable statistical information to inform their policies and programmes. While Article 5 of the Convention requires the State Parties to base policies and programmes on statistical data, Article 11 is concerned about how such data are gathered. Statistical information can be drawn from personal data, which have to be protected adequately as set out in Article 11.

3. Relations with provisions in other standards

11.10 At the level of the United Nations (UN), Article 6(2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[21] refers to the protection of privacy and identity of victims, 'in appropriate cases and to the extent possible under its domestic law'. The Palermo Protocol does not refer to the need for protection of personal data.

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17 Ibid., Art 28(1).

18 Ibid., Art 30(a).

19 GRETA, *4th General Report on GRETA's Activities* (2015) 34.

20 See for instance GRETA, *Report on Ireland*, I GRETA(2013)15, para 89. See also GRETA, *Report on North Macedonia*, I GRETA(2014)12, para 85.

21 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

Hence, the CoE Convention against Trafficking clearly developed this international standard further by making the protection of private life and identity mandatory. Furthermore, the wording of Article 6(2) of the Palermo Protocol indicates that such protection is limited to the context of court proceedings since the provision suggests to make 'legal proceedings relating to such trafficking confidential'.[22]

11.11 The legally non-binding UN Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking[23] stresses that 'there should be no public disclosure of the identity of trafficking victims' and underlines this in relation to children.[24] Furthermore, guideline 3 refers also to the role of media, and that professional, ethical standards should apply but does not further discuss the need to protect the identity of victims.

11.12 The CoE's Recommendation Rec(2003)13 of the Committee of Ministers on the provision of information through the media in relation to criminal proceedings[25] refers on a more general basis in its principle 8 that the right to protection of privacy in accordance with Article 8 ECHR should be respected. With regard to victims and minors, particular protection should be given. Furthermore, any possible harmful effect of the disclosure of identity should be taken into account.[26] Therefore, the CoE Convention against Trafficking established a higher standard on protecting victims' identity in proceedings since Article 11 also includes suggestions on how to implement measures to protect the privacy of victims.

11.13 At the level of the European Union (EU), Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[27] refers in Recital 33 to the principle of protection of personal data and that the Directive has to be implemented in accordance with this principle. Article 21 (Protection of victims of trafficking in human beings in criminal investigation and proceedings) of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime[28] mirrors, to a certain extent, Article 11 and Article 30 of the CoE Convention against Trafficking. It requires the protection of privacy during criminal proceedings, and the EU Victims' Rights Directive also includes a higher standard in relation to children and requires to implement measures that

22 Additionally, the Legislative Guide to the Palermo Protocol also discusses the protection of identity and privacy in the context of court proceedings only, see UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations 2004) 283–4.

23 UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.

24 Ibid., Guideline 6.6 and 8.9.

25 Committee of Ministers, Recommendation Rec(2003)13 of the Committee of Ministers to Member States on the provision of information through the media in relation to criminal proceedings, 10 July 2003.

26 Recomendation Rec(2003)13, principle 8.

27 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

28 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315/57) (thereinafter EU Victims' Rights Directive).

'prevent public dissemination of any information that could lead to the identification of a child victim'.[29] In relation to media, the EU Victims' Rights Directive outlines that the EU Member States should encourage media to protect the privacy, personal integrity and personal data by taking self-regulatory measures.[30] Compared to the EU Victims' Rights Directive, the CoE Convention against Trafficking offers a broader range of measures and suggests, in addition to self-regulatory measures, co-regulatory or regulatory measures.[31]

D. ISSUES OF INTERPRETATION

1. Protection of personal data of trafficked persons

(a) Processing the personal data of trafficked persons

11.14 Due to the clandestine nature of this crime, 'reliable and holistic information on the magnitude of the problem is limited'.[32] Efforts to improve the data concerning trafficking in human beings is largely concentrated on data of trafficked persons.[33] A common system in many countries is that several stakeholders, including non-governmental organisations (NGOs), collect data and share it with a central data collector. Data collectors may require data in an identifiable form in order to avoid, for instance, double counting of cases in a database. Personal data might be shared between NGOs and a governmental data collector. Sharing or storing data would fall under processing of personal data of trafficked persons. Any violation of data protection of personal data can have far-reaching consequences. Possible risks can comprise of re-trafficking or stigmatisation, preventing (re-)integration or access to the labour market.[34] Therefore, the protection of personal data as foreseen in Article 11 plays an essential role.

11.15 Article 11(1) states that personal data of victims have to be stored and used in conformity with conditions of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[35] In 2018, the Convention underwent a modernisation process, which led to enhanced consistency of the CoE framework on data protection with the EU data

29 EU Victims' Rights Directive, Art 21(1).
30 Ibid., Art 21(2).
31 CoE Convention against Trafficking, Art 11(3).
32 Gerry et al, 212. For a critical assessment on the lack of data concerning trafficking in human beings, see Claudia Aradau, 'Human Trafficking between data and knowledge', presentation at the conference 'Data protection and right to privacy for marginalized groups: a new challenge in anti-trafficking policies' (Berlin, 25–27 September 2013) and Uhl, 410.
33 Uhl, 410.
34 Gerry et al, 213.
35 This text is based on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data as amended by Protocol CETS. 223 (Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data) which was adopted on 10 October 2018. The updated Convention (thereinafter Modernised Convention 108) will enter into force after the ratification of five Council of Europe Member States.

protection reform package.[36] [37] The Modernised Convention 108 defines personal data as 'any information relating to an identified or identifiable individual'[38] and is applicable to data processing in the private and public sector, hence applies also to data protection in the area of police and criminal justice.[39]

11.16 In relation to trafficking in human beings, one may distinguish between two general categories of victim data that constitutes personal data. First, there is general identification data, which usually includes the name and birthdate of the victim. Second, there is personal data that relates to further details of the trafficking case itself, such as the type of exploitation. Furthermore, two general purposes for personal data collection can be distinguished: (1) personal data collected in the framework of investigation and prosecution of criminal offences and the execution of criminal penalties; and (2) data collected in order to be able to have comprehensive statistical information on trends in trafficking in human beings. The necessary safeguards to protect these personal data may vary according to the category and depend on the context in which the collection of data takes place.[40]

11.17 Applicable to all data processing operations are the basic principles described in Article 5 of the Modernised Convention 108, which holds that data processing shall be processed in a way 'proportionate in relation to the legitimate purpose pursued' to provide a fair balance between the interests concerned for data collection and the rights and freedoms at stake.[41] These principles include lawfulness of processing, transparency, purpose limitation, data minimisation, data accuracy and data security.[42]

11.18 For the processing of personal data related to offences, criminal proceedings and convictions, as opposed to data collected within investigations and prosecutions of criminal offences, specific rules apply. Such processing relating to offences or criminal proceedings is only allowed where appropriate safeguards are implemented in order to protect from interferences with interests, rights and fundamental freedoms of the data subject, for instance, discrimination as a result of the data processing.[43] Hence, personal data concerning trafficking in human beings, for instance, the information that a person is a victim of trafficking, falls under this special protection of 'sensitive data'. Sensitive data requires special safeguards, which are to be applied alone or cumulatively, such as: explicit consent of the data subject (the trafficked person in the context of Article 11 of the Convention); a law covering the intended purpose

36 The EU data protection reform package consists of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119/1) (thereinafter General Data Protection Regulation) and Directive 2016/680/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119/89).

37 Council of Europe, *Explanatory Report to the Protocol amending the CoE Personal Data Protection Convention*, para 3.

38 Modernised Convention 108, Art 2(a).

39 European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law* (2018) 273.

40 Gerry et al, 213 and Modernised Convention 108, Art 11.

41 Modernised Convention 108, Art 5(1).

42 Ibid., Art 5(4).

43 Ibid., Art 6.

and means of the processing or indicating the exceptional cases where processing such data would be permitted; a professional secrecy obligation; measures following a risk analysis or technical security measures such as data encryption.[44]

11.19 For data collected in criminal investigations, there are exceptions from data protection rules to allow for flexibility and more effective results.[45] Still, nevertheless, these measures have to be provided for by law, proportionate and necessary in a democratic society. Hence no less intrusive means must be available.[46] The respective safeguards can be of technical nature and an organisational nature, including adjusting the safeguards to different categories of data.[47] The CoE Recommendation regulating the use of personal data in the police sector[48] requires to make a clear distinction in how the police processes personal data that relates to different categories of persons, for instance, suspects, victims and witnesses.[49] Generally, police should apply at all stages of data processing the relevant principles: the principles of necessity, proportionality and purpose-bound data processing.[50]

11.20 In relation to the lawfulness of data processing, it must be ensured that the processing operation is based on a legitimate basis. As mentioned above, the Modernised Convention 108 implies the consent of the data subject as one option among others to legitimatise the processing of sensitive data.[51] The consent has to be freely given, specific, informed and unambiguous. Consent can consist either of a statement or a clear affirmative action. Silence, inactivity or pre-validated forms or boxes cannot constitute consent. The trafficked person has to be informed about the implications of his or her decision; hence, it has to be explained what the consent entails.[52] This also means that the authority processing the data has to be able to provide a detailed definition of the purpose, including time frame and definition of the legitimate interest.[53]

11.21 Data protection in anti-trafficking action (datACT), an initiative of NGOs on data protection in anti-trafficking responses,[54] recommends non-governmental data collectors to make sure that (presumed) trafficked persons give their informed written consent before collecting their personal data. At the same time, the organisation should assign a staff member as a contact person in case the trafficked person wants to withdraw their consent, to access or to rectify his

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44 Council of Europe, *Explanatory Report to the Protocol amending the CoE Personal Data Protection Convention*, para 56.

45 Gerry et al, 213 and Modernised Convention 108, Art 11.

46 Modernised Convention 108, Art 11 and Council of Europe, *Explanatory Report to the Protocol amending the CoE Personal Data Protection Convention*, para 91.

47 Council of Europe Consultative Committee of the CoE Personal Data Protection Convention, *Practical Guide on the Use of Personal Data in the Police Sector*, 15 February 2018, T-PD(2018)01, 4.

48 Council of Europe, Recommendation no. R(87)15 of the Committee of Ministers to Member States regulating the use of personal data in the police sector, 17 September 1987, in the following 'CoE Police Recommendation'.

49 Council of Europe Consultative Committee of the CoE Personal Data Protection Convention, *Practical Guide on the Use of Personal Data in the Police Sector*, 3. This is based on CoE Police Recommendation, principle 3.2.

50 Council of Europe Consultative Committee of the CoE Personal Data Protection Convention, *Practical Guide on the Use of Personal Data in the Police Sector*, 3.

51 Council of Europe, *Explanatory Report to the Protocol amending the CoE Personal Data Protection Convention*, para 56.

52 Ibid., para 42.

53 Data protection in anti-trafficking action (datACT), *Data Protection Challenges in Anti-Trafficking Policies – A Practical Guide* (2015) 74.

54 Data protection in anti-trafficking action (datACT) <https://www.kok-gegen-menschenhandel.de/en/kok-projects/data-protection-datact> (accessed 18 August 2020).

or her data.[55] Regarding the consent to be freely given, it has to be ensured that the consent 'represents the free expression of an intentional choice' of the victim. Thus, the victim must, in fact, have a free choice to consent without being subject to any undue influence or pressure such as intimidation or coercive measures.[56] Otherwise, consent cannot be used as a legitimate basis for data processing.

11.22 According to the principle of data minimisation, personal data should be processed in a way that is 'adequate, relevant and not excessive in relation to the purposes for which they are processed'.[57] 'Not excessive' means that data processing 'should be limited to what is necessary for the purpose for which it is processed'.[58] The 'not excessive' requirement does not refer only to the quantity of data collected but also to the quality of the data: 'Personal data which is adequate and relevant but would entail a disproportionate interference in the fundamental rights and freedoms at stake should be considered as excessive and not be processed.'[59] Already at the stage of investigating trafficking in human beings, the application of the principle of data minimisation should entail an analysis of which personal data is, in fact, essential for the investigation.[60]

11.23 Moreover, it is essential to provide victims with information regarding the existence of their right to data protection, the categories of personal data processed, the legal basis and purposes as well as the recipients of these data.[61] In the context of criminal investigations, this transparency can be restricted, however, only if provided for by law and if it respects the essence of the fundamental right to privacy and data protection and constitutes a necessary and proportionate measure.[62] Considering the stigma a person that is declared as a victim of human trafficking may face,[63] emphasis should further be given on the accuracy of the data, which includes keeping the data up to date and routinely checking its accuracy.

11.24 GRETA reports show that various data collection models with different safeguards are applied. Several reports refer to the application of national data protection legislation.[64] In Cyprus, files on trafficking in human beings held by the Asylum Service are confidential and no details are stored in any electronic database, except basic data.[65] In Poland, personal data is stored by the National Consulting and Intervention Centre, which is funded by the Ministry of Interior, based on the victims' consent concerning the use of their data. Further technical

55 Data protection in anti-trafficking action (datACT), *Data protection standards for NGO service providers*, 2, <https://www.kok-gegen-menschenhandel.de/fileadmin/user_upload/medien/Projekte/datact_standards_en_2018.pdf> (accessed 18 August 2020).
56 Council of Europe, *Explanatory Report to the Protocol amending the CoE Personal Data Protection Convention*, para 42.
57 Modernised Convention 108, Art 5(4)(c).
58 Council of Europe, *Explanatory Report to the Protocol amending the CoE Personal Data Protection Convention*, para 52.
59 Ibid.
60 Europol Joint Supervisory Body, *Victims of Trafficking in human beings, a data protection perspective* (2016) 13.
61 Modernised Convention 108, Art 8.
62 Ibid., Art 11.
63 Gerry et al, 214.
64 See for instance GRETA, *Report on Belgium*, II GRETA(2017)26, paras 132–133; GRETA, *Report on Croatia*, II GRETA(2015)33, para 118; GRETA, *Report on Moldova*, II GRETA(2016)9, para 126.
65 GRETA, *Report on Cyprus*, II GRETA(2015)20, para 98.

safeguards are that the data are saved on an internal computer system without network access and secured by a password.[66]

11.25 When police are collecting personal data during, for instance, an investigation of a case of trafficking in human beings and these data are at a later stage used for a different purpose, the principle of purpose limitation entails that the rules of subsequent use of data have to be applied.[67] For instance, data on trafficked persons are collected in the course of prosecuting trafficking in human beings. After completing the prosecution, the data are stored in a database to deduct statistical data on trafficking or, as mentioned in GRETA's report on Albania, to monitor the situation of trafficked persons and their reintegration.[68] Subsequent use of personal data has to be undertaken for a legitimate aim, should be necessary and proportionate to the legitimate aim pursued. Personal data related to victims, however, require additional care and the principles of necessity and proportionality need specific attention.[69] Storing personal data to monitor the reintegration of trafficked persons – with interest in preventing trafficking in human beings – interferes with the right to privacy of the trafficked persons and therefore might infringe the principle of proportionality.

(b) Compiling reliable statistical data on trafficking in human beings

11.26 As regularly held by GRETA, Member States should set up a comprehensive and coherent information systems on trafficking in human beings by compiling reliable statistical data,[70] since data are needed to prepare, monitor and evaluate anti-trafficking policies. Consequently, personal data on trafficked persons may be collected in order to be able to provide statistical data at a later stage. At a certain stage of data processing, personal data turns into statistical data. Since the personal data relates to an offence or criminal proceedings, these data are sensitive data.

11.27 The CoE Recommendation concerning the protection of personal data collected and processed for statistical purposes[71] gives further guidance on how personal data has to be processed for statistical purposes. Generally, as soon as data are no longer necessary in an identifiable form, it should be made anonymous.[72] Moreover, sensitive data collected for statistical purposes should be collected in such a way that the data subject is not identifiable.[73] In the case that the processing of sensitive data for specified, legitimate statistical purposes requires the identification of the data subject (the trafficked person in this context), then a law has to provide for (further) appropriate safeguards. For example, the identification data are separated from the

66 GRETA, *Report on Poland*, II GRETA(2017)29, para 133.
67 Council of Europe Consultative Committee of the CoE Personal Data Protection Convention, *Practical Guide on the Use of Personal Data in the Police Sector*, 15 February 2018, T-PD(2018)01, 4.
68 GRETA, *Report on Albania*, II GRETA(2016)6, paras 128–129.
69 Council of Europe Consultative Committee of the CoE Personal Data Protection Convention, *Practical Guide on the Use of Personal Data in the Police Sector*, 15 February 2018, T-PD(2018)01, 4.
70 See, for instance, GRETA, *Report on Armenia*, I GRETA(2012)8, para 75.
71 Committee of Ministers, Recommendation No. Rec(97)18 of the Committee of Ministers to Member States concerning the Protection of Personal Data collected and processed for Statistical Purposes, 30 September 1997.
72 See for instance also the recommendation of the Maltese Office of the Data Protection Commissioner to anonymise data on trafficking for research and statistics as soon as possible, GRETA, *Report on Malta*, II GRETA(2017)3, para 104.
73 Council of Europe, *Explanatory Report to the Protocol amending the CoE Personal Data Protection Convention*, para 61.

rest of the data 'as from the stage of collection'.[74] Use of a pseudonym or of any digital identifier or digital identity can be regarded as another appropriate safeguard for data security. However, it does not make personal data anonymous, and thus, the rules on data protection continue to apply. Hence, when data are indirectly related to individuals by using a digital identifier, for instance, in order to avoid double-counting of cases in a database, these data have to be still considered also as personal data.[75]

11.28 Applying these standards to the context of data collection on trafficking in human beings would imply that data need to be depersonalised as early as possible. Hence, data should be depersonalised by the primary data collector, for instance, the NGO, and after that shared with, for example, the national rapporteur or any other organisation or authority that is tasked by the State with monitoring and evaluating the situation on trafficking in the country. Gerry, Muraszkiewicz and Vavoula state that when depersonalisation and anonymisation are not possible, then data controllers, whether governmental or non-governmental, should avoid processing excessive information and the storage of data in large-scale databanks. The risk of unauthorised access and abuse is significantly higher in the case of large-scale databanks.[76] Furthermore, in the light of the principle of data minimisation, it is necessary to limit the data to those that are, in fact, essential for the purpose of having reliable statistical data. As pointed out by GRETA, disaggregated data concerning 'sex, age, type of exploitation, country of origin and/or destination'[77] are necessary. Hence processing of personal data for gathering statistical data should be limited to those categories.

11.29 Several State Parties, disaggregated data are provided by several actors, including NGOs, and collected by a central data collector. For example, the Observatory of Trafficking in Human Beings in Portugal runs a database.[78] Further examples of this method can be found for instance in the Former Yugoslav Republic of Macedonia[79] and Sweden.[80] Another group of State Parties that do not have a body centralising the statistical data collected by several actors consists of, for instance, Austria,[81] Italy,[82] or Latvia.[83] In the Netherlands, personal data of (presumed) trafficked persons provided by various actors are first collected by an NGO and then, in a second step, anonymised and submitted to the national rapporteur.[84]

11.30 GRETA stresses that it is necessary to include 'victims of [trafficking in human beings] identified by law enforcement agencies, NGOs and other relevant bodies regardless of whether criminal proceedings have been instituted and whether the persons have given testimony

74 Committee of Ministers, Recommendation No. Rec(97)18, paras 3.3 and 4.8.
75 Council of Europe, *Explanatory Report to the Protocol amending the CoE Personal Data Protection Convention*, para 18. See also on this matter European Data Protection Supervisor, *EDPS comments on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016'* (10 July 2012) 3.
76 Gerry et al, 213.
77 See for instance GRETA, *Report on Austria*, II GRETA(2015)19, para 45.
78 GRETA, *Report on Portugal*, II GRETA(2017)4, para 129.
79 GRETA, *Report on North Macedonia*, I GRETA(2014)12, para 86.
80 GRETA, *Report on Sweden*, II GRETA(2018)8, para 51.
81 GRETA, *Report on Austria*, II GRETA(2015)19, para 126.
82 GRETA, *Report on Italy*, I GRETA(2014)18, paras 81–84.
83 GRETA, *Report on Latvia*, I GRETA(2012)15, paras 67–74.
84 GRETA, *Report on the Netherlands*, II GRETA(2018)19, paras 48, 50 and 157.

against the alleged perpetrators' in order to make an assessment of the situation and the relevant measures against trafficking.[85] Consequently, GRETA points out regularly that information on 'presumed' trafficked persons[86] should also be included in the data collection system of a State Party.[87] However, in the Netherlands, for instance, organisations refrained from sharing (personal) data on presumed trafficked children with the central data collector if no consent of the parents is given in order not to infringe data protection rules.[88]

2. Media encouragement to protect the private life and identity

11.31 Article 11(3) offers three different forms of measures to encourage media to protect the private life and identity of victims: States Parties 'shall consider', hence are not obliged, to implement either self-regulatory, regulatory or co-regulatory measures. Self-regulation is regulation developed and implemented by the media sector itself, and regulatory measures are standards laid down by the public authorities independently. Co-regulatory measures refer to measures developed in partnership between the private sector and public authorities.[89]

11.32 These measures have to be in accordance with Article 10 ECHR (Freedom of expression) since they interfere with and limit freedom of expression as journalists should be encouraged not to publish, for instance, pictures or names of trafficked persons when reporting the court proceedings. In *Krone Verlag GmbH & Co KG and Krone Multimedia GmbH & Co KG v. Austria*[90] the European Court of Human Rights (ECtHR) assessed a newspaper owner's obligation to pay compensation for the publication of a picture of a child victim of ill-treatment and sexual abuse in the newspaper as not violating the freedom of expression. In order for an interference by a public authority with a human right to be 'necessary in a democratic society',[91] it must correspond to a 'pressing social need', proportionate to the legitimate aim pursued and the reasons given by the national authorities to justify it are relevant and sufficient.[92] The matter of protecting the identity in media reporting lies within the conflicting interests of Article 10 ECHR (Freedom of expression) and Article 8 ECHR (Right to respect for private and family life). On the one hand, there is the right of media to disseminate information and of the public to receive information. On the other hand, there is a State's positive obligation to protect the privacy of a victim.[93]

11.33 States enjoy a certain margin of appreciation in balancing these interests. In its case-law, the ECtHR refers to certain factors that have to be taken into account when assessing a measure

85 GRETA, *Report on Spain*, II GRETA(2018)7, para 63.
86 See on this also the Commentary on Article 10.
87 See for instance GRETA, *Report on Belarus*, I GRETA(2017)16, para 71.
88 GRETA, *Report on the Netherlands*, II GRETA(2018)19, para 48.
89 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 145.
90 *Krone Verlag GmbH & Co KG and Krone Multimedia GmbH & Co KG v. Austria* App no 33497/07 (ECtHR, 14 April 2012).
91 ECHR, Art 10(2).
92 See *The Sunday Times v. the United Kingdom (No. 1)* App no 6538/74 (ECtHR, 26 April 1979) para 62 cited after *Krone Verlag GmbH & Co KG and Krone Multimedia GmbH & Co KG v. Austria*, para 47.
93 *Krone Verlag GmbH & Co KG and Krone Multimedia GmbH & Co KG v. Austria*, paras 48–51.

limiting the freedom of expression. First, although a court proceeding is public, media has a duty to show due care in communicating information received in the course of these public proceedings.[94] A further factor is whether the victim concerned is a 'public figure' and whether the pictures contributed to a debate of general interest.[95] In *Krone Verlag GmbH & Co KG and Krone Multimedia GmbH & Co KG v. Austria*, the ECtHR also took into account that the public knowledge of the identity was not material for understanding the particulars of the case.[96]

3. Protection of the identity of children

11.34 The standard to protect the identity of children under Article 11(2) is higher in comparison to Article 11(3). The State Parties have to ensure that the identity is not made publicly known by media. In comparison, in order to protect the identity of trafficked women and men, States have to encourage the media to protect the private life and identity.[97] The standard of obligation to protect the identity of trafficked children has been also applied in the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse,[98] which obliges the State Parties in Article 31 (General measures of protection) to protect the privacy, identity and image of children, 'to prevent the public dissemination of any information that could lead to their identification'.[99] However, this provision does not explicitly mention the role of the media. GRETA concluded that in its work no particular concerns about the protection of the private life and identity of child victims of trafficking arose.[100] The State Parties can decide which measure they implement in order to ensure the protection of the identity of children, which can include, for instance, criminal penalties for revealing the identity of victims in public.[101]

11.35 However, the CoE Convention against Trafficking allows for exceptions, including making the identity of a child victim publicly known when this is necessary for family tracing. This relates to Article 10(4)(c) where the Convention requests the State Parties to locate the child victim's family, 'when this is in the best interests of the child'. The first step for family reunification is tracing. There is tension between the obligation to protect the identity and sharing information for tracing. In order to share information in line with the best interests of the child, the 'maximum information necessary for tracing should be shared at the minimum risk to the child and the family'.[102] In cases where tracing of family members was successful, a risk assessment has to be conducted.[103] This complex relation between protecting the identity,

94 *Eerikäinen and Others v. Finland* App no 3514/02 (ECtHR, 13 March 2009) para 63.
95 *Krone Verlag GmbH & Co KG and Krone Multimedia GmbH & Co KG v. Austria*, paras 55–57.
96 Ibid., para 57.
97 CoE Convention against Trafficking, Art 12(3).
98 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 25 October 2007, entered into force 1 July 2010.
99 CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Art 31(e).
100 GRETA, *Thematic Chapter of the 6th General Report on GRETA's activities – Trafficking in Children* (2018) 27.
101 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 143.
102 UNICEF, *Guidelines on the protection of child victims of trafficking* (UNICEF 2006) Guideline 8.1.
103 Ibid., Guideline 8.2.

sharing information and later assessing whether family reunification is in the child's best interests and thereby making sure that also the child's view is taken into account shows the importance of appointing a legal guardian, organisation or authority to represent the child, 'as soon as an unaccompanied child is identified as a victim'.[104]

104 CoE Convention against Trafficking, Art 10(4).

ARTICLE 12

ASSISTANCE TO VICTIMS

Julia Planitzer

1 Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

- **a standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;**
- **b access to emergency medical treatment;**
- **c translation and interpretation services, when appropriate;**
- **d counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;**
- **e assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;**
- **f access to education for children.**

2 Each Party shall take due account of the victim's safety and protection needs.

3 In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.

4 Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.

5 Each Party shall take measures, where appropriate and under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.

6 Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

7 For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.

A. INTRODUCTION

12.01 The provision on assistance to victims is one of the key provisions of the CoE Convention on Action against Trafficking.[1] This Convention creates a milestone concerning standards for victim protection since, in comparison to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[2] it places a clear obligation on State Parties to provide measures of assistance. It furthermore contains a detailed list of what State Parties are required to ensure to trafficked persons. Article 12(1) includes a list of minimum measures which should support the victim's 'physical, psychological and social recovery'. Assistance under Article 12 has to be ensured on a consensual and informed basis. Furthermore, accessing assistance is not allowed to be made conditional on the trafficked person's willingness to act as a witness.

12.02 Providing assistance in a timely and effective manner is essential to ensure recovery and reintegration of trafficked persons. Gaps in assistance can lead to situations of vulnerability and

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

to further trafficking and abuse.[3] More than a decade after the entry into force of the CoE Convention against Trafficking, GRETA observes continuing and serious deficits, in particular concerning 'the availability of assistance measures adapted to the needs of victims'.[4] Gaps include, for instance, lack of specialised accommodation for different groups of trafficked persons or inadequate funding of assistance measures.[5]

B. DRAFTING HISTORY

1. General overview of the drafting history

12.03 A legal framework on assistance to trafficked persons was seen as one of the added values of CoE Convention against Trafficking.[6] Hence, the discussions around the wording of the relevant article were lengthy. Documents of the Council of Europe adopted prior to the CoE Convention on Action against Trafficking contain already the purpose of assistance and the necessity of having access to assistance. For instance, Recommendation No. R (2000) 11 of the Committee of Ministers on Action against trafficking in human beings for the purpose of sexual exploitation encourages the development of reception centres for psychological, medical, social and administrative support for the purpose of reintegration into society.[7] Further purposes mentioned are avoiding secondary victimisation[8] and, as discussed during the drafting of the CoE Convention against Trafficking, assistance is indispensable so that victims regain 'a minimum of stability before they could usefully testify in criminal proceedings'.[9]

12.04 An early draft of the then Article 10 on assistance for victims of trafficking contained a list with obligatory measures for State Parties in order to provide for the physical, psychological and social recovery of victims.[10] At that early stage of drafting, there was no differentiation between 'victims' and 'victims lawfully resident within its territory'. However, discussions in the 1st Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting showed that the participants wanted to have assistance and protection of victims taking place in two stages: one immediately when 'the victim sought assistance for the first time (…) and the other, later, once the victim had received initial emergency assistance'.[11] Another basic principle discussed during this first meeting was that 'victims had the right to be protected whether or not they cooperated with the prosecuting authorities',[12] which was at a later point

3 GRETA, *8th General Report on GRETA's Activities*, May 2019, para 87.
4 Ibid., paras 222–223.
5 Ibid., para 121.
6 Committee of Ministers, 112th Session – Minutes, CM(2003)PV1, 4 July 2003, para 49.
7 Committee of Ministers, Recommendation No. R (2000)11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation, 19 May 2000, para 26.
8 Committee of Ministers, Recommendation No. R (2002)5 of the Committee of Ministers to Member States on the protection of women against violence, 30 April 2002, Appendix, para 3(b).
9 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting report*, CAHTEH(2004)RAP5, 30 August 2004, para 89.
10 CAHTEH, *Revised Preliminary Draft – European Convention on Action against trafficking in human beings*, CAHTEH(2003)9, 27 November 2003, 7.
11 CAHTEH, *1st meeting (15–17 September 2003) – Meeting report*, CAHTEH(2003)RAP1, 29 September 2003, para 55.
12 Ibid., para 51.

included in Article 12(6) that obliges State Parties 'to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness'.[13]

12.05 The outcome of the 2nd CAHTEH meeting showed two options for the wording of the then Article 10. The first option contained a list of obligatory measures and read as follows:

> 1. Each Party shall adopt such legislative or other measures as may be necessary to provide for the physical, psychological and social recovery of victims and, in particular, the provision of:
>
> (a) Appropriate and secure housing;
> (b) Medical, psychological and material assistance;
> (c) Counselling and information, in particular as regards their legal rights, in a language that the victims can understand;
> (d) Assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
> (e) Financial support;
> (f) Educational, vocational guidance and vocational training opportunities;
> (g) Employment opportunities, including the possibility of obtaining a working permit.
>
> 2. Each Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims, in particular the special needs of children, including appropriate housing, education and care.[14]

12.06 The second option separated the measures in mandatory measures (housing, medical, psychological and material assistance; counselling and legal assistance) and optional measures (financial support, educational and vocational training measures, employment opportunities).[15]

12.07 The 5th CAHTEH meeting was crucial for the drafting of Article 12 of the CoE Convention against Trafficking – 31 delegations were in favour of the first option containing a list with obligatory measures. However, the European Commission tabled a new proposal distinguishing between mandatory and optional measures, which was based on the measures listed in Council Directive 2004/81/EC on the residence permit issued to third-country nationals[16] and supported by most delegations as basis of discussions.[17] Similar to the drafting process of Article 14 of the CoE Convention against Trafficking concerning the reasons for issuing a residence permit, Dir 2004/81/EC influenced the drafting process of Article 12. Clearly influenced by the structure of Dir 2004/81/EC is the distinction concerning medical treatment. Whereas the first option spoke about medical assistance without any further differentiation, the European Commission suggested providing 'emergency medical treatment' to all trafficked persons and 'necessary medical assistance to holders of a residence permit who did not have sufficient resources and had special needs'.[18] Based on Article 13(4) of the European

13 CoE Convention against Trafficking, Art 12(6).
14 CAHTEH, *Revised draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Following the 4th meeting of the CAHTEH (11–14 May 2004)*, CAHTEH(2004)12, 17 May 2004, 9.
15 Ibid.
16 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261/19) (thereinafter Dir 2004/81/EC).
17 CAHTEH, *5th meeting – Meeting report*, CAHTEH(2004)RAP5, paras 89 and 95. See Dir 2004/81/EC, Arts 7 and 9.
18 CAHTEH, *5th meeting – Meeting report*, CAHTEH(2004)RAP5, paras 100 and 105.

Social Charter,[19] it was decided to amend the wording and refer to 'victims lawfully resident within its territory' instead of 'holders of a residence permit'.[20]

12.08 Concerning employment, option one held that State Parties should support the access to employment opportunities, including obtaining a working permit. This provision, covering all trafficked persons, was limited by the proposal of the European Commission. The Commission proposed to adopt the rule 'that victims holding a residence permit should be authorised to have access to the labour market, vocational training and education'. Again, it was decided to amend the wording to victims 'lawfully resident within the territory of the Party concerned'.[21]

12.09 Also based on Council Dir 2004/81/EC[22] was the inclusion of the provision of translation and interpretation services, 'when appropriate'.[23]

12.10 The differentiation and restriction concerning access to medical services and employment, vocational training and education for those who are lawfully resident within the State Party's territory were criticised by NGOs in the following drafting process since this would exclude those trafficked persons whose presence has not to be regularised by the authorities.[24] This argument was also taken up by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men, which suggested the following wording on employment: 'Each Party shall allow victims access to the labour market, vocational training and education'.[25] However, although criticised, the final wording of Article 12 of the CoE Convention against Trafficking followed the European Commission's proposal and refers to 'victims lawfully resident within its territory'.[26]

12.11 During the drafting phase, the question came up, which State Party would be responsible for providing assistance to trafficked persons. The conclusion was that it would be the State 'in which the victim found him- or herself'.[27] Switzerland proposed, unsuccessfully, to limit the obligation to cases in which the offence was committed in the territory of the State Party, or when the victim is one of its nationals or had its residence on its territory at the time of the offence.[28]

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19 European Social Charter (Revised), ETS No. 163, 3 May 1996, entered into force 1 July 1999.
20 CAHTEH, *5th meeting – Meeting report*, CAHTEH(2004)RAP5, para 105.
21 Ibid., para 107.
22 Dir 2004/81/EC, Art 7(3).
23 CAHTEH, *5th meeting – Meeting report*, CAHTEH(2004)RAP5, para 100.
24 CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Contribution by Non-Governmental Organisations, Additional Comments by Amnesty International and Anti-Slavery International*, CAHTEH(2004)17 Addendum IV, 30 August 2004, 9.
25 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 6.
26 See CoE Convention against Trafficking, Art 12(3) and (4).
27 CAHTEH, *2nd meeting (8–10 December 2003) – Meeting report*, CAHTEH(2003)RAP2, 26 January 2004, para 56.
28 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Amendments to Preamble and to Articles 1 to 24 proposed by National Delegations and Observers*, CAHTEH(2004)14, 11 June 2004, 20.

2. Child-specific measures in Article 12 of the CoE Convention against Trafficking

12.12 Education for children has been placed, as opposed to education and vocational training for adults, in the first paragraph of Article 12, meaning that all children must have access to education, irrespective of benefiting from a recovery and reflection period or of being formally identified as victim. It was the Netherlands that showed that the limitation of education to only those victims 'lawfully resident', as discussed during the 5th CAHTEH meeting, would infringe the children's right to have access to compulsory primary education that is available free to all based on the International Covenant on Economic, Social and Cultural Rights.[29] The Council of Europe's Parliamentary Assembly supported this argument and included in its opinion on the draft a proposal that also the access to education for children is in the list of core measures in Article 12(1) of the CoE Convention against Trafficking.[30] The amendment was accepted in the last CAHTEH meeting.[31]

C. ARTICLE IN CONTEXT

12.13 The Palermo Protocol encompasses assistance to trafficked persons but does not establish an obligation of State Parties to implement these measures. It states that State Parties 'shall consider implementing measures'.[32] Principle 8 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking, states that trafficked persons should have access to adequate physical and psychological care.[33] The UN Declaration of Basic Principles for Victims of Crime and Abuse of Power points out that 'victims should get the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means'.[34] The CoE Convention against Trafficking clearly enhances these standards by imposing an obligation to provide trafficked persons with assistance measures. The EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims,[35] drafted after the CoE Convention against Trafficking takes up, to a certain extent, the standard established by the CoE Convention and obliges EU MS to provide assistance 'before, during and for an appropriate period of time after the conclusion of criminal proceedings'.[36]

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29 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers*, CAHTEH(2004)24, 19 November 2004, 20. This is based on Art 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights (993 UNTS 3, 16 December 1966, entered into force 3 January 1976); see also Art 28(1)(a) of the UN Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, entered into force 2 September 1990.

30 Parliamentary Assembly, *Opinion No. 253 (2005) on the Draft Council of Europe Convention on Action against Trafficking in Human Beings*, 26 January 2005, para 14(v)(c).

31 CAHTEH, *8th meeting (22–25 February 2005) – Meeting report*, CAHTEH(2005)RAP8, 16 March 2005, para 32.

32 Palermo Protocol, Art 6(3).

33 UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Principle 8.

34 UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/40/34, 29 November 1985), Principle 14.

35 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

36 Dir 2011/36/EU, Art 11(1).

D. ISSUES OF INTERPRETATION

1. Framework for providing assistance

12.14 In general, 'the Party in whose territory the victim is located must ensure that the assistance measures specified in sub-paragraphs a. to f. are provided to him or her'.[37] The obligation to provide assistance applies to all victims, whether of national or transnational trafficking, and it is irrelevant whether a residence permit has been issued or not.[38] However the obligation ends as soon as the trafficked person leaves the State Party in which he or she was found.[39]

12.15 Article 12(1) includes a set of measures that have to be included in the assistance provided. In the following section, each of the measures will be discussed in detail. Assistance measures are usually embedded in a 'National Referral Mechanism' (NRM). A NRM 'is a co-operative framework through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons, co-ordinating their efforts in a strategic partnership with civil society'.[40] It gives guidance on the identification process of trafficked persons and defines a system to refer them to actors that provide assistance. Despite the growing implementation of NRMs, a gap in 'implementing a human rights-based approach and truly empowering trafficked persons' can be observed. In order to fulfil that, NRMs need participatory tools for monitoring and evaluating NRMs and complaints mechanisms within NRMs.[41] In order to be able to fully implement the obligations under Article 10 of the CoE Convention against Trafficking (identification of victims) and the obligations related to assistance, State Parties are required to establish a coordination framework such as a NRM. GRETA has urged authorities to implement a formalised NRM.[42] In the context of Latvia, for instance, GRETA has shown that the absence of a formalised NRM also impacts the access of trafficked persons to assistance negatively.[43] State Parties need to provide a clear statutory basis on which presumed trafficked persons and trafficked persons can invoke protection and assistance.[44] Furthermore, authorities should evaluate the short- and long-term impact of assistance measures.[45]

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37 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, para 148). This is based on the argument that also under the ECHR the State Parties agreed that the rights and freedoms defined in the ECHR are applicable to everyone within their jurisdiction, see CAHTEH, *5th meeting – Meeting report*, CAHTEH(2004)RAP5, para 90. According to Art 1 ECHR, the only criteria decisive for the question whether or not an individual is entitled to the rights of the ECHR is being under a State's jurisdiction, see Christoph Grabenwarter, *European Convention on Human Rights – Commentary* (Beck 2014), Art. 1, paras 2–3.

38 CAHTEH, *5th meeting – Meeting report*, CAHTEH(2004)RAP5, para 93.

39 Ibid.

40 Theda Kröger, Jasna Malkoc and Baerbel Heide Uhl, *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons*. A Practical Handbook (OSCE/ODIHR 2004) 15.

41 Jyothi Kanics, 'National Referral Mechanisms', in Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl, *Routledge Handbook of Human Trafficking* (Routledge 2017) 312. See further, e.g., the judgment of the UK High Court declaring certain restrictions to seek a reconsideration of a negative decision as unlawful: *DS, R (On the Application Of) v Secretary of State for the Home Department* [2019] EWHC 3036 (Admin) (15 November 2019).

42 GRETA, *6th General Report on GRETA's Activities*, March 2017, para 124; GRETA, *Report on Latvia*, I GRETA(2012)15, para 126.

43 GRETA, *Report on Latvia*, I GRETA(2012)15, paras 124 and 137.

44 GRETA, *Report on Ireland*, I GRETA(2013)15, paras 188 and 190; GRETA, *Report on Slovak Republic*, II GRETA(2015)21, paras 97 and 108.

45 GRETA, *Report on Slovak Republic*, I GRETA(2011)9, paras 98 and 102–3.

2. Article 12(1)(a) of the CoE Convention against Trafficking: appropriate and secure accommodation

(a) Secure accommodation

12.16 Accommodation for trafficked persons and presumed trafficked persons has to be 'appropriate and secure' as 'victims need adapted and protected accommodation in which they can feel safe from the traffickers'.[46] Shelters should provide victims with help and stability. In order to guarantee security, shelters should keep their address secret and have strict rules on visits from outsiders.[47]

12.17 Practice shows that providing 'secure accommodation' can be used as a reason for detaining victims in public or private support facilities. Gallagher and Pearson have even called it a 'common practice for victims of trafficking to be effectively imprisoned (…) without being able to leave the shelter grounds beyond the occasional supervised excursion or trip to court'.[48] Deprivation of liberty is defined as detention, imprisonment and the 'placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.[49] The Recommended Principles and Guidelines on Human Rights and Human Trafficking state that it should be ensured that 'trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody'.[50] This is based on the prohibition on arbitrary detention[51] and the right to freedom of movement.[52] [53] Consequently, as stated by the Recommended Principles and Guidelines on Human Rights and Human Trafficking, routine detention of trafficked persons in public or private shelters is considered as unlawful since it violates several human rights.[54]

12.18 GRETA discussed the possible deprivation of liberty of (presumed) trafficked persons in relation to a few State Parties. It recalled the principle of proportionality in saying that the limitation of personal liberty has to be proportionate to the objectives aimed at by such limitations.[55] Concerned, for instance, by the presence of bars on the windows of shelters for victims of trafficking, GRETA urged to make sure that there is a balance between the need to place trafficked persons in safe accommodation and the need to achieve their recovery and

46 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 153.
47 Ibid., para 154.
48 Anne Gallagher and Elaine Pearson, 'The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking' (2010) 32 *Human Rights Quarterly* 77.
49 Art 4(2) of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT, 2375 UNTS 237, 18 December 2002, entered into force 22 June 2006).
50 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Guideline 2.6.
51 Art 9 of the International Covenant on Civil and Political Rights (ICCPR, 999 UNTS 171, done 16 December 1966, entered into force 3 March 1976), and Art 5 ECHR. In order not to violate Article 9 ICCPR, 'deprivation of liberty provided for by law must not be manifestly disproportional, unjust or unpredictable', see Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel 2005) 225.
52 ICCPR, Art 12.
53 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations 2010) 133–6.
54 Ibid., 139.
55 GRETA, *Report on Croatia*, I GRETA(2011)20, para 95.

rehabilitation.[56] Furthermore, according to Article 10(2) of the CoE Convention against Trafficking, presumed trafficked persons are also entitled to appropriate and secure accommodation. Hence, accommodating presumed trafficked persons in a holding centre for foreigners in which they are confined until receiving a residence permit[57] would not fulfil the obligations of the CoE Convention against Trafficking.

12.19 Concerning children, Article 37(b) of the UN Convention on the Rights of the Child states that children shall not be deprived of their liberty unlawfully or arbitrarily. Detention must always be the last resort and for the shortest appropriate period of time. Placements in safe accommodation should be implemented within the child protection system, therefore separated from migration-enforcement policies, practices and authorities and be part of a holistic care plan.[58] Every child, at all times, has a fundamental right to liberty and freedom from immigration detention.[59] Hence, children shall never be detained for reasons of their or their parents' migration status, since this constitutes a child rights violation and is not in the best interests of the child.[60]

12.20 In its evaluations, GRETA expressed serious concerns on the issue of 'disappearance' of unaccompanied children, especially from migrant reception facilities. In order to prevent children from disappearing, safe accommodation suitable specifically for children and sufficient numbers of adequately trained supervisors are necessary.[61] However, GRETA stressed that the provision of any accommodation needs to be in accordance with international standards on the rights of the child, including the child's right to personal liberty.[62] For instance, in the context of Norway, GRETA assessed shelter policies, restricting personal liberty and access to internet and phones for presumed trafficked children of 12 years or above. Leaving the shelter is only allowed with permission from the police. The county social welfare decides upon the placement and reviews the need for placement every six weeks. Children have the possibility to challenge the placement in this institution.[63] In this context, GRETA reminds States to act in the best interests of the child and refers to the international standards on the rights of the child stating that detention of children shall be used only as measure of last resort and for the

56 GRETA, *Report on Montenegro*, I GRETA(2012)9, paras 142 and 148.

57 GRETA, *Report on North Macedonia*, I GRETA(2014)12, paras 155 and 156.

58 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para 32 (f).

59 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para 5.

60 Ibid. See further UN General Assembly, *Global study on children deprived of liberty*, A/74/136, 11 July 2019, paras 121 et seq.

61 GRETA, *Thematic Chapter of the 6th General Report on GRETA's Activities*, *Trafficking in Children*, March 2017, 28.

62 Ibid., 30.

63 Children have access to a lawyer who can challenge the placement decision in court, see GRETA, *Report on Norway*, II GRETA(2017)18, para 108.

shortest possible period of time.[64] In conclusion, State Parties have to provide accommodation which creates a safe and enabling environment for children, including through sufficient numbers of adequately trained staff. Any placement in shelters must follow the child's best interests and the right to personal liberty.

(b) Appropriate accommodation

12.21 GRETA questioned the 'appropriateness of accommodating in the same shelter' women, men and children[65] and recommends to ensure conditions in shelters that are adequate and adapted to the special needs of trafficked persons,[66] including to the special needs of children.[67] Generally, the type of appropriate accommodation depends on the victim's personal circumstances.[68] It would be preferable if accommodation is separate from the immigration system and 'responds to the type of abuse that they have sustained'.[69] It is recommended that women 'should not be housed with men they do not know or random acquaintances'.[70] In several evaluations of State Parties, GRETA urged to ensure that there is also specialised accommodation for trafficked men.[71] State Parties should set up specific shelters for child victims that are specialised in receiving and assisting trafficked children.[72] Furthermore, GRETA recommended establishing specialised shelters separate from the immigration system.[73] Specifically concerning children, the Explanatory Report to the CoE Convention against Trafficking holds that 'placement of a child in a detention institution should never be regarded as appropriate accommodation'.[74] Accommodation needs to be able to respect the trafficked persons' privacy, which can be an issue, for instance, when persons have to share bedrooms with up to three other persons.[75]

3. Article 12(1)(a) of the CoE Convention against Trafficking: psychological and material assistance

12.22 Material assistance should provide subsistence to trafficked persons. It can take the form of aid in kind such as food and clothing and does not necessarily have to be in the form of money.[76] However, it is recommended to provide presumed trafficked persons or victims directly with

64 GRETA, *Report on Norway*, II GRETA(2017)18, para 117. See also GRETA, *Report on the Netherlands*, II GRETA(2018)19, para 156.
65 GRETA, *Report on North Macedonia*, I GRETA(2014)12, para 151.
66 GRETA, *Report on Montenegro*, I GRETA(2012)9, paras 142 and 148.
67 See for instance GRETA, *Report on Denmark*, I GRETA(2011)21, para 137.
68 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 154.
69 GRETA, *8th General Report on GRETA's Activities*, May 2019, para 118.
70 Ibid.
71 See for instance GRETA, *Report on Armenia*, II GRETA(2017)1, paras 108 and 112; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 103; GRETA, *Report on Bulgaria*, I GRETA(2011)19 paras 165 and 169; GRETA, *Report on Serbia*, II GRETA(2017)37, paras 126 and 128; GRETA, *Report on Spain*, II GRETA(2018)7, paras 166–168; GRETA, *Report on Sweden*, I GRETA(2014)11, para 153; GRETA, *Report on Greece*, I GRETA(2017)27, paras 157 and 164; GRETA, *Report on Switzerland*, I GRETA(2015)18, paras 139 and 142.
72 GRETA, *Thematic Chapter of the 6th General Report on GRETA's Activities*, *Trafficking in Children*, 28.
73 GRETA, *Report on Ireland*, I GRETA(2013)15, paras 188–9.
74 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 155.
75 See for instance GRETA, *Report on Croatia*, I GRETA(2011)20, para 95; GRETA, *Report on Montenegro*, I GRETA(2012)9, para 142 and 148.; GRETA, *Report on Ireland*, I GRETA(2013)15, para 175.
76 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 156.

financial support, meaning that they should have a certain amount of money at their disposal. This can have a positive effect on psychological stabilisation and rehabilitation by for instance allowing trafficked persons to regain control of daily decision-making in their life.[77]

12.23 State Parties have to provide, as a minimum, psychological assistance. Research shows that mental health problems are prevalent among trafficked persons.[78] Psychological trauma symptoms include for instance dissociation, suicidal ideation, post-traumatic stress disorder or depression.[79] A lack of psychological support for trafficked persons can lead to difficulties in coping with their daily life and to re-victimisation.[80] Prior to participating in a programme of therapy, trafficked persons require a period of stabilisation.[81] Ongoing criminal proceedings or uncertainty about the residence permit can negatively affect the success of any treatment. Social stressors such as uncertain immigration status or unstable housing can exacerbate distress and psychological symptoms.[82] A minimum of three months of support services would be needed to have a decrease in the presence and severity of symptoms that are most likely to affect the cognitive functioning which is highly relevant for criminal investigations.[83] Interventions need be tailored to the trafficked person and need to take account of abuse experienced both prior to and during exploitation and the potential for ongoing harm.[84]

4. Article 12(1)(b) of the CoE Convention against Trafficking: access to emergency medical treatment

12.24 Article 12 makes a distinction between emergency medical treatment (Art 12(1)(b)) and necessary medical assistance for victims lawfully resident within the territory (Art 12(3)). This is further stressed by the Explanatory Report, which states that 'full medical assistance is only for victims lawfully resident in the Party's territory'.[85] The wording used is partly based on Article 13 of the Revised European Social Charter (ESC). Article 13(1) of the Revised ESC requires State Parties to ensure 'that any person who is without adequate resources (…) be granted adequate assistance, and, in case of sickness, the care necessitated by his condition'.[86] Based on Article 13(1) and (4) of the Revised ESC, States have an obligation:

77 Kröger, Malkoc and Uhl, 72. See also OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment* (OSCE 2013) 116.

78 Sukran Altun, Melanie Abas, Cathy Zimmerman, Louise M. Howard, Sian Oram, 'Mental Health and Human Trafficking: responding to Survivors' Needs' (2017) 14:1 *BJPSYCH INTERNATIONAL* 21.

79 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment*, 74 et seq.

80 Conny Rijken, 'Trafficking in Persons: A Victim's Perspective', in Piotrowicz, Rijken, Heide Uhl, 247.

81 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment*, 115.

82 Rijken, 247 and Altun et al., 23.

83 Cathy Zimmerman and others, *Stolen smiles: The physical and psychological health consequences of women and adolescents trafficked in Europe* (2006) 94.

84 Altun et al., 23.

85 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 157.

86 Revised ESC, Art. 13(1).

> to provide adequate medical and social assistance to persons in need (…) on an equal footing with their own nationals to nationals of other Parties who are lawfully resident or working regularly within their territory, or otherwise lawfully present within their territories.[87]

However, unlawfully present migrants are not allowed to be deprived 'of the protection of the most basic rights enshrined in the Charter, or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity'.

12.25 Consequently, State Parties are obliged under Article 13 (1) of the Revised ESC to provide unlawfully present migrants with urgent medical assistance.[88] The requirement of 'urgency' should not be interpreted too narrowly,[89] and the provision of emergency medical care has to be assessed based on the individual's particular state of health.[90] For example, in the United Kingdom, emergency medical treatment accessible for anyone includes, for instance, treatment given within an Accident and Emergency Unit, compulsory psychiatric treatment, family planning services, treatment for sexually transmitted diseases and other infectious diseases.[91] The European Commission against Racism and Intolerance's (ECRI) goes beyond that and recommends in its General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination that along with access to emergency medical treatment, 'other forms of necessary health care' should be ensured.[92]

12.26 Looking at the right to health as enshrined in Article 12 ICESCR, ensuring access to health care for undocumented persons is understood more broadly than the interpretation in relation to 'urgent medical assistance' based on the Revised ESC. States have 'core obligations' under Article 12 ICESCR that encompass for instance ensuring access to health facilities, goods and services on a non-discriminatory basis, provision of essential drugs, ensuring reproductive, maternal and child health care, provision of immunisation against infectious diseases and providing information and education on health problems.[93] These obligations apply to everyone, including also for instance 'migrant workers and victims of international trafficking, regardless of legal status and documentation'.[94] Also in order to implement the right to health for migrant children, States should ensure access to health care for children 'equal to that of nationals, regardless of their migration status'. A comprehensive approach to children's rights

87 European Committee of Social Rights, *Conclusions 2013 – Statement of interpretation-Articles 13§1 and 13§4*, 2013_163_03/Ob/EN.

88 Ibid., referring to European Committee of Social Rights, *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 30 and 31.

89 European Committee of Social Rights, *Conclusions on Montenegro*, 2013/def/MNE/13/4/EN, 6 December 2013.

90 Ibid.

91 European Committee of Social Rights, *Conclusions on United Kingdom*, XX-2/def/GBR/13/4/EN, 6 December 2013.

92 ECRI, *General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination*, CRI(2016)16, 16 March 2016, para 21 and Explanatory Memorandum, 22.

93 Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4, 11 August 2000, paras 43–44.

94 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (International Covenant on Economic, Social and Cultural Rights, art. 2, para. 2)*, E/C.12/GC/20, 2 July 2009, para 30.

implies that access to health care for all migrant workers and their families, regardless of their migration status, should be ensured.[95]

12.27 Hence, the division made in the text of the CoE Convention against Trafficking between access to emergency medical treatment and access to necessary medical assistance depending on the residence status is not supported by the international human rights framework. As shown above, the international human rights framework requires to ensure health care to all persons, regardless of their migration status, equal to that of nationals. In order to implement the obligations stemming from Article 12 of the CoE Convention against Trafficking, GRETA urged for instance 'to guarantee effective access to public health care for all victims of trafficking, regardless of residence status'.[96]

5. Article 12(1)(c) of the CoE Convention against Trafficking: translation and interpretation services

12.28 State Parties have to offer, as a minimum, translation and interpretation services. The Explanatory Report clarifies that these services are not to be understood as being limited to the right to an interpreter in judicial proceedings.[97] The additional wording of 'when appropriate' in Article 12(1)(c) gives State Parties, however, discretionary power to which extent these services are offered. Language aid is needed to help trafficked persons with formalities and should support them in claiming their rights.[98] In the context of Denmark, GRETA stressed the importance of providing information on the rights and obligations of trafficked persons in 'languages that victims of trafficking can understand (…) which includes the use of qualified interpreters'. Furthermore, written information on rights should be accessible in 'an appropriate range of languages'.[99] Hence, providing translation and interpretation services should be interpreted broadly in order to ensure a victim's access to legal rights and obligations.

6. Article 12(1)(d) and (e) of the CoE Convention against Trafficking: counselling and assistance to enable rights and interests to be considered in criminal proceedings

12.29 According to Article 12(1)(d) of the CoE Convention against Trafficking State Parties have to provide victims with counselling and information 'in particular as regards their legal rights and the services available to them'. This obligation is not necessarily identical with the obligation to provide legal assistance or legal aid, as referred to in Article 15(2) of the CoE Convention against Trafficking. This is also applicable to Article 12(1)(e) that obliges State Parties to provide at least assistance to enable rights and interests 'to be presented and considered at appropriate stages of criminal proceedings against offenders'.[100] Hence, services provided under Article 12(1)(d) and (e) are broader than 'free legal aid' (Art 15(2)) and do not have to be necessarily provided by a lawyer.

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95 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *Joint general comment No. 4 (2017) and No. 23 (2017)*, CMW/C/GC/4-CRC/C/GC/23, paras 55 and 58.

96 *Report on Poland*, II GRETA(2017)29, para 120; *Report on Bulgaria*, II GRETA(2015)32, para 137.

97 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 158.

98 Ibid.

99 GRETA, *Report on Denmark*, I GRETA(2011)21, paras 148 and 150.

100 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, paras 161 and 162.

12.30 Counselling under Article 12(1)(d) is a set of first minimum information a presumed trafficked person or victim has to receive. At this stage, the information to be provided concerns 'matters such as availability of protection and assistance arrangement, the various options open to the victim, the risks they run, the requirements for legalising their presence' and information on possible forms of legal redress and how the criminal-law system operates.[101] Such information a person is supposed to receive during the recovery and reflection period (Art 13 of the CoE Convention against Trafficking) in order to be able to make 'an informed decision'. Provision of information under Article 12 should include information on how to have access to measures such as legal assistance, legal aid and compensation.[102] According to GRETA, under Article 12 State Parties should take measures to 'ensure that all presumed and identified victims of THB have effective access to legal aid and legal counselling as part and parcel of the assistance measures'.[103]

7. Article 12(1)(f) of the CoE Convention against Trafficking: access to education for children

12.31 Concerning children, State Parties are obliged to ensure access to education as part of the assistance measures. The right to education for all children is enshrined in several human rights treaties,[104] including in Article 2 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. It states that '[n]o person shall be denied the right to education'.[105] In General Comment No. 6, the Committee on the Rights of the Child points out that an 'unaccompanied or separated child should be registered with appropriate school authorities as soon as possible.'[106] GRETA urged the authorities of some State Parties to provide access to education and vocational training to trafficked children.[107]

8. Article 12(2) of the CoE Convention against Trafficking: taking due account of the victim's safety and protection needs

12.32 The Explanatory Report refers to the necessity to take the individual needs of trafficked persons into account. The needs can vary widely, depending on factors such as type of exploitation, country of origin, material and financial resources or information of the local knowledge.[108] Tailored measures are necessary in order to meet the individuals' protection

101 Ibid., para 160. The text of Art 12(1)(d) of the CoE Convention is based on Art 6(3)(b) of the Palermo Protocol.
102 GRETA, *Report on Denmark*, I GRETA(2011)21, para 150.
103 GRETA, *Report on Slovak Republic*, II GRETA(2015) 21, paras 107 and 108.
104 See UN CRC, Art 28. See further UN Committee on Economic, Social and Cultural Rights, *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights – Statement by the Committee on Economic, Social and Cultural Rights*, E/C.12/2017/1, 13 March 2017. In para 6, the Committee stresses that all children, including those with an undocumented status, have a right to receive education since education is an important channel for integration.
105 Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 9, 20 March 1952, entered into force 18 May 1954, Art 2.
106 UN Committee on the Rights of the Child, *General Comment No. 6 (2005) – Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, 1 September 2005, para 42.
107 GRETA, *Thematic Chapter of the 6th General Report on GRETA's Activities, Trafficking in Children*, 30.
108 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 164.

needs, without any 'one-size-fits-all' model of assistance.[109] Furthermore, needs may change over time, including short-term needs and long-term needs such as employment.[110]

9. Article 12(3) of the CoE Convention against Trafficking: provision of necessary medical or other assistance to lawfully residing victims

12.33 The medical assistance of Article 12(3) of the CoE Convention against Trafficking goes beyond the 'emergency medical treatment' of Article 12(1)(b) of the CoE Convention against Trafficking and covers, for instance, medical treatment during pregnancy or in cases of HIV/AIDS.[111] Based on Article 13 of the ESC, the state has to provide a person, 'who is without resources and who is unable to secure such sources either by his or her own efforts or from other sources', in case of sickness with 'the care necessitated by his or her condition'.[112] As held by the European Committee of Social Rights, this means that 'everyone who lacks adequate resources must be able to obtain medical care free of charge in case of sickness as necessitated by his/her condition'.[113]

12.34 For further defining the term 'other assistance' of Article 12(3) of the CoE Convention against Trafficking, Article 13 of the Revised ESC can be a useful source. According to Article 13 of the Revised ESC, States have an obligation to provide social assistance that allows a person to 'meet basic needs in an adequate manner'[114] and 'live a decent life'.[115] The level of assistance is considered as appropriate when the monthly amount of assistance benefits paid to a person living alone is not manifestly below the poverty threshold. This threshold is set at 50 per cent of the median equivalised income defined by Eurostat.[116]

10. Article 12(4) of the CoE Convention against Trafficking: access to the labour market, vocational training and education for lawfully resident victims

12.35 Article 12(4) of the CoE Convention against Trafficking obliges State Parties to adopt the conditions for having access to the labour market, vocational training and education for trafficked persons lawfully resident in the country. Although Article 12(4) does not create a right to access to the labour market itself,[117] GRETA stresses the importance of providing victims with education, vocational training and access to the labour market.[118] Under Article

109 Evelyn Probst, 'Victims' Protection within the Context of Trafficking in Human Beings and European Union Standards' (2019) 19:3 *ERA Forum* 361.

110 Jordan J. Steiner, Jamie Kynn, Amanda M. Stylianou, Judy L. Postmus, 'Providing Services to Trafficking Survivors: Understanding Practices across the Globe' (2018) 15:2 *Journal of Evidence-Informed Social Work* 153–4. See also Noel Busch-Armendariz, Maura Busch Nsonwu, Laurie Cook Heffron, 'A Kaleidoscope: The Role of the Social Work Practitioner and the Strength of Social Work Theories and Practice in Meeting the Complex Needs of People Trafficked and the Professionals That Work with Them' (2014) 57:1 *International Social Work* 10.

111 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 165.

112 Ibid.

113 European Committee of Social Rights, *Conclusions on Croatia*, XIX-2/def/HRV/13/1/EN, 02 January 2010.

114 European Committee of Social Rights, *Conclusions on Portugal*, XIV-1/def/PRT/13/1/EN, 30 March 1998.

115 European Committee of Social Rights, *Finnish Society of Social Rights v. Finland*, Complaint No. 88/2012, 9 September 2014, para 112.

116 European Committee of Social Rights, *Conclusions on Bulgaria*, 2013/def/BRG/13/1/EN, 06 December 2013.

117 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 166.

118 GRETA, *Report on Malta*, I GRETA(2012)14, para 123.

12(4) of the CoE Convention against Trafficking, State Parties have to adopt the conditions governing access for all victims lawfully resident in the territory. GRETA criticises different conditions for accessing the labour market for victims from EU MS and victims lawfully residing from non-EU MS and states that this would fail to implement Article 12(4). Luxembourg was urged by GRETA to 'grant access to the labour market and to training to victims from third countries who are lawfully resident in Luxembourg'.[119]

12.36 GRETA typically discusses the implementation of Article 12(4) under the term 'reintegration of victims of trafficking'. Since 'reintegration' can be narrowed in its understanding to the context of return and repatriation of trafficked persons, the UN Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, advocated the use of the term 'social inclusion'. 'Social inclusion' is a lengthy and complex process that aims at 'the full and permanent restoration of all rights that had been violated before and during the trafficking cycle'.[120] Access to employment, to economic independence and to vocational training are among the most important aspects of social inclusion.[121]

12.37 GRETA urges[122] or considers[123] State Parties 'to facilitate the reintegration of victims of trafficking into society by establishing long-term programmes and providing them with vocational training and assistance to find employment'.[124] This requires adequate funding for programmes.[125] GRETA recommends specific actions in order to improve access to employment for trafficked persons such as public-private partnerships to create appropriate work opportunities[126] and notes that, for instance, in Croatia jobs for trafficked persons are subsidised.[127]

11. Article 12(5) of the CoE Convention against Trafficking: cooperation with non-governmental organisations

12.38 The Recommended Principles and Guidelines on Human Rights and Human Trafficking[128] stress the importance of cooperating with NGOs concerning the provision of shelter, health care and counselling.[129] Cooperation with NGOs that provide victim support services is seen as invaluable since 'victims may be more likely to trust a non-governmental organization than

119 GRETA, *Report on Luxembourg*, I GRETA(2013)18, paras 104 and 107.
120 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/41/46, 23 April 2019, paras 6–9.
121 Ibid., paras 48 and 57.
122 See for instance GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 103; GRETA, *Report on Malta*, I GRETA(2012)14, para 128; GRETA, *Report on Romania*, II GRETA(2016)20, para 119.
123 GRETA, *Report on Montenegro*, II GRETA(2016)19, para 107; GRETA, *Report on Georgia*, II GRETA(2016)8, para 118.
124 GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 103.
125 GRETA, *Report on Slovenia*, II GRETA(2017)38, para 108; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 107.
126 GRETA, *Report on Cyprus*, II GRETA(2015)20, para 90.
127 GRETA, *Report on Croatia*, II GRETA(2015)33, para 96.
128 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.
129 Ibid., Guidelines 6.1 and 6.2.

criminal justice agencies'[130] and NGOs can provide a 'safe and neutral environment'.[131] At the 5th CAHTEH meeting, it was decided to add Article 12(5), since 'some delegations thought that the role of NGOs in victim assistance was crucial'.[132] In comparison to Article 6(3) of the Palermo Protocol, the CoE Convention stresses the importance of cooperation with NGOs by including a separate paragraph on this matter in Article 12. Under Article 12(5) State Parties have to take measures to cooperate with civil society in order to implement all their obligations under Article 12. At the same time, Article 12(5) of the CoE Convention and Article 6(3) of the Palermo Protocol use the same wording that allows State Parties certain discretion ('where appropriate'). In addition to that, Article 12(5) further requires co-operation 'under the conditions provided for by its internal law'.

12.39 State Parties that delegate aspects of assistance to NGOs remain responsible for meeting the obligations of the CoE Convention against Trafficking.[133] The obligation to implement Article 12 means that, in the case of delegating assistance to NGOs, the State Party has to ensure that the NGO receives adequate financial resources for that.[134] Furthermore, the State Party also has to guarantee the quality of services provided by NGOs,[135] for instance, by adequately financing them. For implementing assistance measures, State Parties are required to establish minimum quality standards for all service providers as well as effective supervision of their observance.[136]

12.40 The implementation of Article 12 requires formalised cooperation between NGOs and state authorities, which can be embedded in a NRM. Cooperation can be organised in different ways and includes for instance the commissioning of NGOs with certain tasks through tenders or procurements.[137] Protocols of cooperation or MoUs, which typically form part of a NRM,[138] need to be regularly assessed and monitored.[139]

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130 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/20/18, 6 June 2012, para 46.

131 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Occasional Paper No. 8: The Critical Role of Civil Society in Combating Trafficking in Human Beings* (OSCE 2018) 45.

132 CAHTEH, *5th meeting – Meeting report*, CAHTEH(2004)RAP5, para 110.

133 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 149.

134 See for instance GRETA, *Report on Portugal*, I GRETA(2012)17, para 132; GRETA, *Report on Germany*, I GRETA(2015)10, para 150; GRETA, *Report on France*, II GRETA(2017)17, para 161.

135 GRETA, *Report on France*, II GRETA(2017)17, para 161.

136 GRETA, *Report on Armenia*, I GRETA(2012)8, paras 126 and 129. See also GRETA, *Report on Sweden*, I GRETA(2014)11, paras 148 and 154; GRETA, *Report on United Kingdom*, I GRETA(2012)6, paras 256 and 278; GRETA, *Report on Latvia*, I GRETA(2012)15, paras 133 and 137.

137 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Occasional Paper No. 8: The Critical Role of Civil Society in Combating Trafficking in Human Beings*, 45 and Marieke van Doorninck, 'Changing the System from Within – The Role of NGOs in the Flawed Anti-trafficking Framework', in Piotrowicz, Rijken, Heide Uhl, 426.

138 See on Memoranda of Understanding in the context of anti-trafficking measures, for instance, Julia Planitzer, *Guiding Principles on Memoranda of Understanding between Key Stakeholders and Law Enforcement Agencies on Counter-Trafficking* (UN.GIFT/IOM 2009) and Council of the Baltic Sea States, *Model Memorandum of Understanding*, http://un-act.org/publication/view/model-memorandum-of-understanding/ accessed 9 May 2019.

139 See for instance GRETA, *Report on Malta*, I GRETA(2012)14, para 129; GRETA, *Report on Cyprus*, I GRETA (2011)8, para 149.

12. Article 12(6) of the CoE Convention against Trafficking: unconditionality of assistance

12.41 Article 12(6) of the CoE Convention against Trafficking obliges State Parties to adopt legislative or other measures that ensure 'that assistance to a victim is not made conditional on his or her willingness to act as a witness'. In principle, States have an obligation to take protective measures for trafficked persons as part of their human rights obligation to protect.[140] Principle 8 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking states that trafficked persons should be protected from further harm and exploitation and receive physical and psychological care.[141] The precise content of the obligation to protect from further harm depends on the circumstances of each case. Protection from further harm requires for instance bringing the person to a safe place, ensuring access to medical support and conducting a risk assessment to determine whether the person is at a particular risk of intimidation or retaliation.[142] Resolutions of the General Assembly refer to an obligation to provide protection for the victims[143] and to 'exercise due diligence (…) to protect and assist victims' since 'not doing so violates and impairs or nullifies the enjoyment of the human rights and fundamental freedoms of the victims'.[144]

12.42 In *Rantsev v Cyprus and Russia*, the ECtHR explains that the positive obligation under Article 4 ECHR includes also the obligation of States, in certain circumstances, to take operational measures to protect victims or potential victims of trafficking. The state authorities have to act when being 'aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited (…)'.[145] This obligation to protect can include for instance securing the immediate physical safety of the trafficked person by arranging a place in shelter.[146] In any case, States are responsible to put in place 'a legislative and administrative framework providing real and effective protection of the rights of victims of human trafficking'.[147]

12.43 Since there is an obligation of States to take protective measures for trafficked persons it can be concluded that therefore any condition on the provision of assistance 'denies the legal nature of

140 Victims of trafficking have a status as victims of crime and victims of human rights violations leading to a legal entitlement to receive assistance based on Principles 14–17 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147 (2006), para 10. See OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, 130–131 and 142. See further Julia Planitzer, *Trafficking in Human Beings and Human Rights – The Role of the Council of Europe Convention on Action against Trafficking in Human Beings* (Neuer Wissenschaftlicher Verlag 2014) 80–82.

141 Principle 8 of the *Recommended Principles and Guidelines on Human Rights and Human Trafficking.*

142 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, 145.

143 UNGA, Improving the coordination of efforts against trafficking in persons, A/RES/61/180, 8 March 2007, preamble.

144 UNGA, Improving the coordination of efforts against trafficking in persons, A/RES/70/179, 16 February 2016, preamble.

145 *Rantsev v Cyprus and Russia*, App no 25965/04 (ECtHR, 7 January 2010) para 286. See also *C.N. v the United Kingdom*, App no 4239/08 (ECtHR, 13 November 2012) para 67.

146 Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24 *International Journal of Refugee Law* 197.

147 *Chowdury and Others v Greece*, App no 21884/15 (ECtHR, 30 March 2017) para 87.

both the entitlement and the obligation'.[148] By providing assistance to trafficked persons that is unconditional from the willingness to act as a witness, a state is fulfilling its obligation to protect. Hence, the application of a human rights-based approach requires assistance to trafficked persons that is unconditional from cooperation with competent authorities. The Recommended Principles and Guidelines on Human Rights and Human Trafficking also formulate the principle of unconditionality in Guideline 6.1 concerning the provision of shelter and hold that the provision 'should not be made contingent on the willingness of the victims to give evidence in criminal proceedings'.[149] In addition, UN human rights treaty bodies state that it is important to provide assistance on the sole basis of need.[150]

12.44 The Explanatory Report states that assistance is not conditional upon the 'victim's agreement to cooperate with competent authorities in investigations and criminal proceedings'.[151] However, at the same time, this principle needs to be balanced with the specific obligation to give evidence as a witness if requested to do so. Therefore, victims cannot rely on Art 12(6) of the CoE Convention against Trafficking when refusing to act as a witness 'when they are legally required to do so'.[152] It might be helpful to have a closer look again at the drafting history of Article 12(6) of the CoE Convention against Trafficking to understand why the text is formulated in this way. Article 12(6) of the CoE Convention against Trafficking was initially suggested by UNICEF. The provision should ensure enhanced protection for children and make sure that assistance to children is not, 'under any circumstances, made conditional on the child's willingness to act as a witness'.[153] Already at this stage, delegations were concerned that this provision can be contradictory to legislation in many countries, which make it compulsory for persons to give evidence if asked to do so. It was therefore included in the Explanatory Report that Article 12(6) 'is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular, when investigating and prosecuting the offences concerned'.[154] Only at the very last CAHTEH meeting, it was decided to make this provision applicable to all trafficked persons.[155]

12.45 Article 12(1) and (2) is applicable to trafficked persons at all stages of the identification process, based on Article 10(2) of the CoE Convention against Trafficking. Furthermore, also Article 13(2) of the CoE Convention against Trafficking refers to assistance. Hence, when there are reasonable grounds to believe that a person has been a victim of trafficking in human beings, this person has to receive assistance encompassing Article 12(1) and (2) of the CoE Convention against Trafficking. Although Article 12(6) refers to the term 'victims' only, one

148 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, 142.

149 Guideline 6.1 of the *Recommended Principles and Guidelines on Human Rights and Human Trafficking.*

150 See for instance UN Human Rights Committee, *Concluding observations of the Human Rights Committee – Poland*, CCPR/C/POL/CO/6 (2010), para 14; UN Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women – Cyprus*, CEDAW/C/CYP/CO/8 (2018), para 29 (f). See for further examples Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 300.

151 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 168.

152 Ibid., para 170.

153 CAHTEH, *Draft European Convention on Action against Trafficking in Human Beings: Contribution by the delegation of Austria, Netherlands and by the observer of UNICEF*, CAHTEH (2004)1, 26 January 2004, 13.

154 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 170. See also CAHTEH, *5th meeting – Meeting report*, CAHTEH(2004)RAP5, para 114.

155 CAHTEH, *8th meeting – Meeting report*, CAHTEH(2005)RAP8, para 36.

can also deduct from the drafting history that Article 12(6) intends to encompass all trafficked persons, at all stages of the identification process. After the suggestion from UNICEF to include this provision focussing on child victims, some delegations feared that this could be misinterpreted and imply that 'adults' were obliged to testify if they wished to receive assistance.[156] Hence, by including this provision (Art 12(6)) the drafters wanted to ensure that also 'adults' are included, which would be broader than 'victim' and can be understood as encompassing all trafficked persons at all stages of the identification process and during the recovery and reflection period. Nevertheless, as stated by Stoyanova concerning Article 10,[157] it would have been much more lucid if the terminology of Article 12(6) would not be limited to 'victims' as defined by the CoE Convention against Trafficking.

13. Article 12(7) of the CoE Convention against Trafficking: provision of services on a consensual and informed basis

12.46 Amnesty International and Anti-Slavery International proposed to add the text of Article 12(7). They suggested that the text should 'expressly state that protection, services and assistance should be provided on a fully informed and consensual basis, and on the basis of periodic individualized needs assessments carried out by suitably qualified experts'.[158] Supported by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men,[159] this provision was partly added at the last CAHTEH meeting.[160]

12.47 The wording of 'consensual and informed basis' had already been used by the Brussels Declaration on Preventing and Combating Trafficking in Human Beings[161] in 2002. The Recommended Principles and Guidelines on Human Rights and Human Trafficking, also touches on the issue of non-coercion in the provision of support and states that trafficked persons 'should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS'.[162] However, the CoE Convention against Trafficking turned this into an obligation for State Parties. The Explanatory Report takes up the contentious issue of mandatory HIV/AIDS testing[163] and stresses

156 CAHTEH, *5th meeting – Meeting report*, CAHTEH(2004)RAP5, para 112.

157 See the Commentary on Art 10 of the CoE Convention against Trafficking.

158 CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Contribution by non-governmental organisations, Additional Comments by Amnesty International and Anti-Slavery International*, CAHTEH(2004)17 Addendum IV, 30 August 2004, 9. This was also supported by a later statement of 127 NGOs, CAHTEH (2004)17 Addendum X, 27 September 2004.

159 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 7.

160 CAHTEH, *8th meeting – Meeting report*, CAHTEH(2005)RAP8, 14–15.

161 Council of the European Union, Council Conclusions of 8 May 2003 (2003/C 137/01), point 13 (Immediate victim assistance). The Brussels Declaration is an outcome of the 'European Conference on Preventing and Combating Trafficking in Human Beings – Global Challenge for the 21st Century' (18–20 September 2002) with more than 1000 representatives of EU MS, further States including China and Canada, NGOs, inter-governmental and international organisations.

162 Guideline 6.2 of the *Recommended Principles and Guidelines on Human Rights and Human Trafficking*.

163 Gallagher, 313.

that 'victims must be able to agree to the detection of illness such as HIV/AIDS'.[164] The formulation of Article 12(7) in the CoE Convention against Trafficking influenced other instruments against trafficking in human beings, such as Dir 2011/36/EU.[165]

14. Article 12(7) of the CoE Convention against Trafficking: taking due account of the rights of children

12.48 Taking due account of the special needs of children requires acting according to the best interest of the child based on Article 3(1) of the UN CRC. Best-interests assessments and determinations should be carried out by actors 'independent of the migration authorities in a multidisciplinary way' under meaningful participation of for instance legal guardians or legal representatives.[166] According to Article 10(4) of the CoE Convention against Trafficking, unaccompanied trafficked children should be represented by a legal guardian, organisation or authority. Legal guardians should be in a position to develop trust with the child and to accompany the child through all legal and other procedures. This would be undermined for instance when social workers are nominated as guardian for dozens of children at the same time.[167] It is of utmost importance that the best-interests assessment does not have a traumatic impact on the child, by for instance repeated interviews.[168]

E. CONCLUSION

12.49 The UN Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro underlines the general human rights obligation of States to ensure a right to remedy for victims of human rights violations.[169] Social inclusion of trafficked persons forms an integral part of this obligation. One form of ensuring access to the right to remedy is restitution, which includes assistance and support.[170] The application of a human rights-based approach requires assistance that is non-conditional upon victims' cooperation with the criminal justice system.[171] Article 12(6) of the CoE Convention against Trafficking implements this by obliging State Parties to provide assistance that is not made conditional on the willingness to act as a witness.

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164 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 171.

165 Dir 2011/36/EU, Art 11(5).

166 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *Joint general comment No. 3 (2017) and No. 22 (2017)*, CMW/C/GC/3-CRC/C/GC/22, para 32 (c).

167 See on this OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Occasional Paper No. 9: Child Trafficking and Child Protection: Ensuring that Child Protection Mechanisms Protect the Rights and Meet the Needs of Child Victims of Human Trafficking* (OSCE 2018) 40.

168 European Union Agency for Fundamental Rights, *Children deprived of parental care found in an EU Member State other than their own – A guide to enhance child protection focusing on victims of trafficking* (EU 2019) 62.

169 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/41/46, 23 April 2019, para 11.

170 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/69/269, 6 August 2014, Annex para 9 (g).

171 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/41/46, 23 April 2019, para 61.

12.50 Article 12(1) of the CoE Convention against Trafficking includes minimum measures, whereas further measures listed in Article 12(3) and (4) are only available for victims that are lawfully resident within the respective territory. This differentiation seems to make an implementation of measures of social inclusion based on human rights obligations challenging. When State Parties make a residence permit conditional on the willingness to cooperate with the authorities based on Article 14(1)(b) of the CoE Convention against Trafficking, State Parties nevertheless remain under an obligation to ensure unconditional access to assistance measures under Article 12. However, this could have an impact on the unconditional access to assistance measures in Article 12(3) and (4) as these measures require a lawful residence. Consequently, a human rights-based approach requires that also long-term measures such as access to the labour market are not conditional on any cooperation in order to achieve social inclusion.

12.51 While the differentiation based on the residence status may not only create a tension with the unconditional access to assistance measures, but also with the obligation to ensure non-discriminatory access to economic, social and cultural rights. Rights included in the International Covenant on Economic, Social and Cultural Rights apply to everyone, including 'victims of international trafficking, regardless of legal status and documentation'.[172] Hence, the division made in the text of the CoE Convention against Trafficking between for example access to emergency medical treatment and access to necessary medical assistance depending on the residence status is not in line with the international human rights framework. GRETA urges for example 'to guarantee effective access to public health care for all victims of trafficking, regardless of residence status',[173] based on a human rights approach to the implementation of Article 12 of the CoE Convention.

172 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2 July 2009, para 30.

173 GRETA, *Report on Poland*, II GRETA(2017)29, para 120. See also GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 137.

ARTICLE 13

RECOVERY AND REFLECTION PERIOD

Helmut Sax

1 Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.

2 During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2.

3 The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly.

A. INTRODUCTION

The 'recovery and reflection period' certainly ranks among the most original, powerful, yet contested concepts in anti-trafficking policies. Its inclusion in the Council of Europe (CoE) **13.01**

Convention on Action against Trafficking in Human Beings[1] – as Article 13 – was marked by major controversy between governments, the CoE, the European Union (EU) and civil society; yet, it is nevertheless considered as one of the main achievements of the treaty.[2] The concept itself has been praised as 'an effective best practice and humanitarian measure at protecting the human rights of trafficked persons'.[3]

13.02 The concept is based on the idea that trafficked persons, who are in the process of recovering and escaping the influence of traffickers, need not only a safe space but also a certain amount of time to reflect on their options, before taking decisions, which will impact their life and safety, and eventually, of others as well. For this purpose, Article 13 aims to create a protected environment for the victim's initial recovery and decision-making, by requiring legislation to ensure trafficked persons a minimum of 30 days in the respective country where they are present, during which they shall have access to assistance and protection from forced return to their country of origin.

13.03 Conceptually, this should lead to a 'win-win' situation for both the victim and the prosecution side – it grants the trafficked person access to services and information and supports the individual stabilisation process, and, thus, also creates better prospects for investigators and prosecutors for a strong, credible victim statement, in case the person decides to testify in court against the trafficker.

13.04 However, empirical research and practice have shown that there are several pitfalls inherent in such situations, with potentially conflicting interests between the parties involved.[4] Above all, the concept combines two important elements, the trafficked person's individual recovery from the trafficking experience, and the reflection on possible next steps. This decision-making process, however, is influenced by several factors, many of them beyond the individual's control. The person has to weigh the risks of breaking relations with the traffickers and cooperating with state authorities against possible gains from such cooperation. One such expectation of the victim might be to gain access to a temporary residence permit by cooperating with police investigators – considering that legislation in many countries makes such permit conditional on co-operation (see also Art 14 of the Convention in this regard). But it depends strongly on the individual case to what extent the victim can actually provide relevant information to the investigation, and whether such permit is eventually granted. Furthermore, defence lawyers may question the credibility of witnesses about eventual 'deals' for cooperation. Studies show that testifying in court is not, in any case, an empowering experience for victims, 'to the contrary, that it can be a process that is both disempowering and unpredictable'.[5] The pressure to cooperate with authorities may lead to the instrumentalisation

1 Council of Europe, Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 From a comparative perspective, Gallagher noted that '[t]hose lobbying at the Trafficking Protocol negotiations would never have even bothered to seriously push for a mandatory recovery and reflection period …', see, Anne Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 *European Journal of Migration and Law*, 187.

3 UNODC, *Toolkit to Combat Trafficking in Persons* (United Nations 2008) 326.

4 See Anette Brunovskis and May-Len Skilbrei, 'Two Birds with One Stone? Implications of Conditional Assistance in Victim Protection and Prosecution of Traffickers' (2016) 6 *Anti-Trafficking Review*, 13.

5 Ibid., 29.

of victims for prosecution purposes, contrary to the purpose of the reflection period. And from an investigator's point of view, information about a case and the statement of the victim should be gained as quickly as possible to secure relevant evidence, which, however, might effectively be delayed because of granting this period.

13.05 The concept of the recovery and reflection period is intended to reinstate and strengthen the person's autonomy and self-determination about future life perspectives. To achieve this goal, it requires a strong legal framework and practical implementation, which offers clear perspectives and understanding of what to expect from both sides, victims and investigators. Its way of incorporation into the Convention itself as well as its current state of domestic implementation, however, is still marked by compromise and misconception, which is why this important victim protection concept has by far not yet reached its potential.

B. DRAFTING HISTORY

13.06 Neither the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[6] nor the UN Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking[7] provides for a recovery and reflection period for victims of trafficking. At the national level, the instrument can be traced back to developments in Western Europe; for instance, a *circulaire* issued by the Ministry of the Interior in Belgium on 7 July 1994 granted victims of trafficking '*un délai de reflexion*'[8] of 45 days to decide about cooperation with authorities.[9]

13.07 On the regional level, the European Communities Council Framework Decision of 19 July 2002 on combating trafficking in human beings did not deal substantially with victim protection. Nevertheless, shortly thereafter, the Brussels Conference and Declaration of September 2002 called for much more comprehensive standards for the protection of victims of trafficking, including as witnesses.[10] For the decision-making process about eventual cooperation with authorities, the Brussels Declaration states that a:

> detailed explanation to a victim of exactly what would be required by the criminal justice system is a central part of a long enough reflection period before such a short-term residence permit is issued and

6 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

7 UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002. Nevertheless, the Commentary on the Recommended Principles highlights the importance of the concept, stating that 'the spirit of the Principles and Guidelines – in particular their emphasis on victim protection and informed, consensual involvement in legal proceedings – fully support this new tool', see OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations 2010) 205.

8 In early documents and literature, the instrument was sometimes called 'reflection delay' (see also CAHTEH, *Revised Preliminary Draft – European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 8, or 'period of grace' (Gallagher, A Critical Review, 179).

9 Georgina Vaz Cabral, *Les formes contemporaines d'esclavage dans six pays de l'Union Européene, Institut des hautes études de la sécurité intérieure* (Paris 2001) 72.

10 Gallagher, A Critical Review, 166.

should include the fact that account will be taken of the victim's co-operation when that person applies for a residence permit on other grounds, once the special short-term permit has expired.[11]

13.08 This indicates a framing of the discussion within a migration context, linking the recovery and reflection period with questions of regular stay and access to residence permits. It was also against this background that the recovery and reflection period, for the first time, became regulated regionally through the European Communities Council Directive (Dir) 2004/81/EC of 29 April 2004 on residence permits issued to certain third-country nationals cooperating with authorities.[12] Article 6 ('reflection period') of that Council Dir 2004/81/EC requires the Member States to grant to victims of trafficking 'a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities'. The provision does not specify a certain duration of that period, which is left to the Member States to decide. Article 6(3) of the Dir 2004/81/EC explicitly states that the 'reflection period shall not create any entitlement to residence under this Directive'. Still, it bars authorities to enforce any expulsion order during this period and mandates the Member States to ensure victims access to certain levels of assistance (Art 7(3) of the Dir 2004/81/EC).

13.09 As indicated already by the Directive's title, there are several limitations in the European Communities' approach at that time. Above all, it is intended to regulate the right to stay only, and for third-country nationals only, further limited to those who cooperate with authorities. The reflection period is conceived just as a pre-stage to an eventual residence permit, and 'treatment granted before the issue of the residence permit' is limited to minimum levels ('standards of living capable of ensuring their subsistence and access to emergency medical treatment', Art 7(1) of the Dir 2004/81/EC).[13] Additionally, there is no minimum time period, and it primarily targets adult victims, since Member States may decide by themselves whether to apply this directive also to children.[14]

13.10 This short excursus to EU legislation, which was drafted partly in parallel to the Convention, helps explain many of the difficulties and controversies which also appeared during the drafting process of Article 13 of the Convention.

13.11 The recovery and reflection period led to prolonged debates during all but two of the eight meetings of the CoE drafting Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) from 2003 to 2005. The discussion started with concerns about how to best protect the interests of victims in the context of repatriation, 'in view of the trauma caused by trafficking', thus, considering that 'repatriation should not take place immediately'.[15] Controversy arose, however, already in the 1st CAHTEH meeting about the relationship of

11 European Union, *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, 29 November 2002, 14981/02 Annex, para 14(5).

12 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (thereinafter Dir 2004/81/EC) (OJ L 261/19).

13 See Gallagher, A Critical Review, 168.

14 Directive 2004/81/EC, Art 3(3).

15 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 53.

such reflection period with irregular stay, assessment of safety risks of the victim, granting of residence permit and eventual conditionality of cooperation with prosecuting authorities.[16]

13.12 After the 2nd CAHTEH meeting, the observer of the United States raised the issue of how to reconcile the procedural right of prosecuting authorities to compel victims to testify in court, which is foreseen in many codes of criminal procedure, with the intended non-conditionality of the reflection period in relation to cooperation. The observer proposed to add text declaring that the reflection 'is without prejudice to' investigation and prosecution.[17]

13.13 At the 3rd meeting, the CAHTEH agreed on the fundamental principle of non-conditionality of the 'recovery and reflection period'[18] since 'this period was to enable victims to recover and assess the possibilities open to them, granting them the period should not be subject to co-operation with the investigating or prosecuting authorities'.[19] The meeting report also explains that in relation to the decision-making, 'informed' means:

> the victim should be able to view the matter calmly and should be informed of the possibility of taking legal action against the traffickers and the available protective measures and assistance, all of which required that the victim was no longer under the traffickers' influence.[20]

Drafters further clarified that for this purpose, victims should not worry about eventual deportation, which means that while states were 'free to select the method employed, the parties were nonetheless obliged to create a legal framework ensuring that victims could remain in national territory for the reflection period'.[21] For instance, a method could be a 'written document such as a residence permit', or take 'the form of suspending deportation'.[22]

13.14 There was disagreement among the drafters, however, about whether to specify a certain duration of the reflection period and, if so, about which length. An initial draft of the provision stated 'a reflection delay of at least one month'.[23] Some delegations preferred a more generic reference to 'an appropriate or reasonable period', others demanded more clarity for victims by setting an explicit time period for all States Parties – '[r]eflection periods of one month, 45 days, two months and three months were mentioned'.[24] Moreover, other delegations referred to the Dir 2004/81/EC on residence permits, which did not set any minimum period. Since no consensus could be reached at the meeting, drafters decided to delete the entire reference to a specific length of the period in the draft text.

13.15 This development sparked concern in the anti-trafficking community. In April 2004, the EU Group of Experts on Trafficking in Human Beings – a consultative body to advise the

16 Ibid.
17 CAHTEH, *Contribution by the observer of the United States of America*, CAHTEH(2004)1, Addendum I, 29 January 2004, 3.
18 See on the formal agreement on this term, CAHTEH *3rd Meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, para 10.
19 Ibid., para 10.
20 Ibid.
21 CAHTEH, *3rd Meeting – Meeting Report*, CAHTEH(2004)RAP3, para 13.
22 Ibid.
23 CAHTEH, CAHTEH(2003)9, 8.
24 CAHTEH *3rd Meeting – Meeting Report*, CAHTEH(2004)RAP3, para 11.

Commission created in 2003 – adopted an Opinion on the reflection period and residence permit for victims.[25] The Opinion directly referred to the on-going negotiations about the CoE Convention, and the experts strongly advocated for inserting an explicit period 'for not less than three months'. Furthermore, this document provided an expert's view on how such period should be conceived. First, the recovery and reflection period should be understood as part of a comprehensive set of victim protection measures. During this period, trafficked persons should be able to recover, based on an immediate risk assessment (not just in relation to eventual return), through access to 'secure housing, psychological counselling, medical and social services and legal consultation'. With such support, victims are in a better position to take an informed decision on 'whether to assist in criminal proceedings and/or pursue legal proceedings for compensation claims'.[26] This should be followed by a temporary residence permit of at least six months (renewable), 'irrespective of the capacity and/or willingness of the trafficked person to act as a witness'.[27] Thus, both stages – initial reflection and first temporary stay – should be accessible without the need for cooperation with the authorities, which should prevent undue pressure and instrumentalisation of the victims for the purposes of the prosecution.[28] However, as events unfolded, neither in the context of the European Communities nor the CoE did such a concept prevail. On a separate issue, it should be noted that the Experts Group stressed the need to ensure access to a recovery and reflection period also specifically for children, even beyond three months, and to grant them unconditional access to a residence permit based on their best interests, in order to prevent an incentive for traffickers to specifically target children.[29]

13.16 In September 2004, following a CAHTEH hearing with civil society organisations, a coalition of 127 non-governmental organisations issued a joint statement on the CoE drafting process, which called for the treaty to 'expressly require states to ensure a sufficient reflection and recovery period of a minimum of three months', and enable victims access to 'a full range of assistance, protection and services'.[30] Despite these efforts, controversies persisted. The drafters could agree, though, on an understanding that the reflection period begins 'immediately and not on completion of the identification process'[31] and it was possible to state in the Convention's Draft Explanatory Report that the recovery and reflection period 'applied not only to victims unlawfully present in the receiving Party's territory but also to victims in a legal situation but with a short-term residence permit'.[32] However, no breakthrough could be achieved on the issue of explicit mention and length of the recovery period, especially, since the European Commission and several EU Member States (EU MS) did not want to go beyond the standards set by the Dir 2004/81/EC. In late 2004, the Committee on Equal Opportunities for Women and Men of the CoE Parliamentary Assembly adopted comments on the draft

25 EU Group of Experts on Trafficking in Human Beings, *Opinion on reflection period and residence permit for victims of trafficking in human beings* (18 May 2004) (thereinafter Experts Group Opinion 2004).
26 Experts Group Opinion 2004, paras 2–3.
27 Ibid., para 4.
28 Ibid., para 1.
29 Ibid., paras 3 and 6.
30 CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings – Joint Statement of 127 Non-Governmental Organisations*, CAHTEH(2004)17 Addendum X, 27 September 2004, 5.
31 Since the Article about the period 'was concerned with persons for whom there were reasonable grounds to believe to be victims and not with identified victims', CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 140.
32 CAHTEH, *7th Meeting (7-10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 97.

treaty, followed by an Opinion of the Parliamentary Assembly itself in January 2005,[33] recommending an explicit three-month recovery and reflection period, as well as an additional provision mandating authorities to issue a separate residence permit during this period. During the final CAHTEH meeting in February 2005, no agreement on both issues could be reached. Only in relation to the latter, a request to 'authorise the persons concerned to stay' in the country was inserted into Article 13 of the CoE Convention against Trafficking.[34] Consequently, it was left to a political decision by the CoE Committee of Ministers, which, finally, paved the way to include a minimum one-month recovery and reflection period in the treaty text.[35]

C. ARTICLE IN CONTEXT

13.17 The recovery and reflection period is intended as a victim empowerment instrument, at the intersection of victim protection and prosecution of traffickers. Consequently, the functioning of this concept in practice is strongly dependent on the quality and effective implementation of the respective strategies and policies in those areas.

1. Relationship between Article 13 and Articles 10 and 12

13.18 Described as a 'particularly effective way to promote self-identification of victims of trafficking'[36] the reflection period comes at an early place in the identification process, as prescribed in Article 10 (identification of victims) of the Convention. At this stage, particular emphasis should be made to Article 10(2), which highlights state cooperation with 'relevant support organisations'. Victim shelters, street work and other outreach activities bring social workers and other professionals working with non-state intervention centres in close contact with victims and may, thus, set the ground for the victim to take an informed, meaningful decision-making process regarding whether to further cooperate with the authorities. Furthermore, Article 10(2) follows the same intention to provide a safe environment for the victim by providing that such person 'shall not be removed from its territory' (until completion of the identification process), as soon as there are 'reasonable grounds to believe that a person has been a victim of trafficking – the same test as required under Article 13.[37] Additionally, under Article 10(2), the trafficked person shall have access to assistance measures under Article 12(1) and (2) – which is echoed in Article 13(2) as well. Of utmost importance in this regard ranks Article 12(1) lit. d which requires access of the trafficked person to 'counselling and

33 Parliamentary Assembly, *Draft Council of Europe Convention on Action against Trafficking in Human Beings*, Opinion 253(2005), 26 January 2005, para 14(vi)(a) and (b).

34 CAHTEH, *8th Meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, para 45 and Appendix III, 52.

35 See Committee of Ministers, *923rd Meeting of the Ministers' Deputies*, CM/Del/Dec(2005)921/4.2, 6 April 2005, as referred to in CM/Notes/923/2.4/4.2/10.4-Add and Committee of Ministers, *925th Meeting of the Ministers' Deputies*, CM/Del/Dec(2005)925/4.5.

36 Theda Kröger, Jasna Malkoc and Baerbel Heide Uhl, *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons*. A Practical Handbook (OSCE/ODIHR 2004) 64.

37 See on this also Commentary on Art 10 of the CoE Convention against Trafficking, referring to the more robust request in Art 13(1) to 'authorise the persons concerned to stay'.

information, in particular as regards their legal rights and the services available to them, in a language they can understand' – a pre-condition for any informed decision to be taken under Article 13.

13.19 This is further expanded upon by Article 15, which addresses the victim's right to access to information about legal redress and compensation. Furthermore, in line with the specific concern of the Convention for the protection of the rights of children in identification and assistance, such legal counselling has to be provided in a way which also is sensitive to the needs and interests of trafficked children. On a more general level, Article 12(7) requires the State Parties to ensure the provision of services to trafficked persons on a 'consensual and informed basis' only, based on a comprehensive risk assessment, including specific protection needs of children.[38]

2. Relationship between Articles 13 and 14

13.20 Another strong connection exists between Article 13 and Article 14 (Residence permits). One of the purposes of the reflection period is the stabilisation and recovery of the victim, and regularisation of residence status is of primary importance for this. In order for the other purpose to work – self-determined decision-making of the victim – cooperation with police must not be a requirement. However, looking at Articles 13 and 14 together, this reveals an imperfect implementation of the concept of the recovery and reflection period. Under Article 14, the State Parties may decide to issue a residence permit to victims only in the case of cooperation with the investigation, but not due to the victim's personal situation – leaving those trafficked persons who decided during the recovery and reflection period against cooperation in a vulnerable situation. Moreover, Article 14 does not prescribe a minimum time for the residence permit. Thus, even in cases of cooperation, predictability of future perspectives remains limited for victims, because of possible decisions taken by others, such as eventual closing of the case by a prosecutor.[39]

3. Relationship between Article 13 and Chapter V of the CoE Convention against Trafficking

13.21 The potential role of the victim as a witness in court also has direct implications on the provision of the recovery and reflection period. In order to make an informed decision, the victim should be made aware of what is expected of him/her during further proceedings, and what set of protection measures could be offered.[40] Therefore, almost all provisions of the Convention's Chapter V (Investigation, prosecution and procedural law) are relevant for effectively granting the recovery and reflection period. For instance, Article 27(3) requires the State Parties to allow qualified non-governmental victim support organisations access to their clients to support them during criminal proceedings. Article 28 (Protection of victims, witnesses and collaborators with the judicial authorities), furthermore, mandates authorities to

38 See similar calls for risk assessment in the Convention's Art 12(2) and Art 16, prior to the decision about the eventual return of victims.

39 Brunovskis and Skilbrei, 22.

40 Ibid., 24–25, and, Gallagher, A Critical Review, 177, about potentially increased personal risks due to victim cooperation.

provide 'effective and appropriate protection from potential retaliation or intimidation' to victims, witnesses and other 'collaborators' with the judicial authorities, as well as for the same type of support organisations mentioned in Article 27(3). In addition, it must be made clear to victims considering cooperation with authorities, to what extent their rights to privacy and integrity will be protected during court proceedings.[41] Finally, in order to implement these standards and adopt a victim-centred approach, specialised capacities among professionals need to be built, including through training,[42] which needs to explain the complexities and potentially conflicting interests when providing a recovery and reflection period.

13.22 The recovery and reflection period needs to be also understood as an instrument to support the Convention's objective of not criminalising victims of trafficking because of their situation of vulnerability and dependency,[43] as expressed most specifically in the 'non-punishment principle' of Article 26. Lack of legal clarity and training for professionals about the application of this principle hampers the effective implementation of the recovery and reflection period, which also relies on trust-building with victims.

4. Relationship between Article 13 of the CoE Convention against Trafficking and EU legislation

13.23 As described in the drafting process, the earlier adoption of the Dir 2004/81/EC, with its provision on a 'reflection period', proved to be a major challenge for reaching an agreement on such a concept within the CoE Convention negotiations. The European Communities variant is framed in a context of 'residence permit in return for co-operation in investigation'[44] and does not specify an explicit minimum period for recovery and reflection. Seven years later, the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[45] still does not contain a provision on the recovery and reflection period; instead, it refers to the Dir 2004/81/EC, on several occasions.[46] This includes the requirement for EU MS to ensure that legal information is made available to victims which also addresses the 'reflection and recovery period pursuant to Directive 2004/81/EC' (Art 11(6)).

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41 CoE Convention against Trafficking, Art 30.

42 Ibid., Art 29(3).

43 See also, Gallagher, A Critical Review, 177.

44 However, there are further limitations. Even if a trafficked person decides to cooperate upon reflection and has severed all ties with the trafficker, Art 8 of the Dir 2004/81/EC does not immediately grant a right to a residence permit, but only requires EU MS to 'consider' granting such status. See, on the other hand, the conceptualisation of the recovery and reflection period in the opinions issued by the EU Group of Experts on Trafficking in Human Beings, in particular Experts Group Opinion 2004 and EU Group of Experts on Trafficking in Human Beings, *Report of the Experts Group on Trafficking in Human Beings*, Brussels, 22 December 2004, 170 et seq. (Explanatory Paper 10 'Reflection period and residence status').

45 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (thereinafter Dir 2011/36/EU) (OJ L 101/1).

46 See, for instance, Recital 7 of the Preamble of the Dir 2011/36/EU, which requires to take Dir 2004/81/EC 'into consideration' and Recital 17, stating that the Dir 2011/36/EU 'does not deal with the conditions of the residence of the victims of trafficking', but instead, refers to Dir 2004/81/EC. On the difficult relationship between the two EU instruments, and negative implications for victim protection, see OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, *Prevent. Combat. Protect – Human Trafficking. Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (2011) 43 and 46–7.

13.24 Concerning the relationship between EU instruments and the CoE Convention against Trafficking in general, considerations may arise concerning the so-called 'disconnection clause' in Article 40(3) of the Convention.[47] In short, it seeks to ensure the application of EU legislation 'in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case'.[48] The significantly narrower scope of application and protection offered by the EU concept of the reflection period should be taken into account when assessing the application of that clause.

D. ISSUES OF INTERPRETATION

13.25 Not only was the Convention drafting process marked by controversies about the new, original concept of the recovery and reflection period. Also, an assessment of the domestic implementation of Article 13 by the CoE Group of Experts on Action against Trafficking in Human Beings (GRETA) in 2014 uncovered that out of 35 country reports examined, 30 of them contained 'urges' by GRETA to review national standards and practice. In 86 per cent of the reports, GRETA indicated non-compliance with Article 13 of the Convention by State Parties.[49] A variety of aspects of the concept have led to a divergence in interpretation and application in practice, as the findings from the GRETA's country monitoring confirm.[50]

1. Article 13(1) of the CoE Convention against Trafficking: 'a recovery and reflection period of at least 30 days'

(a) Legal nature of the recovery and reflection period

13.26 From the wording of Article 13(1) follows that the recovery and reflection period is understood as a distinct instrument, separate from residence permits (Art 14). The provision contains certain parameters for domestic implementation: it speaks of a certain period of time (30 days); it should be provided for by the 'internal law' of states;[51] it serves particular purposes and triggers certain effects, such as non-enforcement of eventual expulsion orders.[52] At the same time, Article 13(1) 'should not be confused with the issue of the residence permit under Article 14 paragraph 1'.[53] The distinction between a 'period' and a 'permit' is important to make. GRETA[54] highlighted that granting the period must not be made conditional on cooperation with authorities, whereas the regulation of the residence permit may allow to do so.[55] At the

47 See on this also Commentary on Art. 40 of the CoE Convention against Trafficking.

48 See for further documentation, Council of Europe, *Explanatory Report to the Council of Europe Convention on action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 375.

49 GRETA, *4th General Report on GRETA's Activities*, March 2015, 32–3 and 46–7.

50 Ibid., 46–7. For a substantial analysis of the implementation of reflection periods in selected countries, see Anette Brunovskis, *Balancing protection and prosecution in anti-trafficking policies – A comparative analysis of reflection periods and related temporary residence permits for victims of trafficking in the Nordic countries, Belgium and Italy* (Fafo/Nordic Council of Ministers 2012).

51 CoE, *Explanatory Report*, para 173.

52 This includes the creation of 'a legal framework allowing the victim to remain on their territory for the duration of the period', CoE, *Explanatory Report*, para 178.

53 CoE, *Explanatory Report*, para 175. See also Dir 2004/81/EC, Art 6(3) which explicitly states that the 'reflection period shall not create any entitlement to residence' under that Directive.

54 GRETA, *4th General Report*, 47.

55 CoE, *Explanatory Report*, para 175. See also, Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 322.

same time, Parties are free – within their margin of 'authorising stay' without obligation to cooperation – to construe the recovery and reflection period itself also as an entitlement for a residence permit for that same period,[56] which is eventually followed by a residence permit under Article 14.

13.27 Although the origins of the concept can be traced to the protection of victims of trafficking who have no legal entitlement to be in the country concerned, the relevance of such protective period of time should not be limited to this narrow context. The recovery and reflection provision is also important for trafficked persons, who might have entered a country legally (e.g., under a students' visa regime, or with short-time residence permits), but which validity may expire due to changed circumstances such as loss of employment or insufficient subsistence resources.[57] Furthermore, 'period of time' can be applied to contexts other than protection from a return to the victim's home country, for instance: in relation to time limits defining or regulating access to social services, claims for compensation and other means of redress – thus, preventing such time limits' expiry for at least 30 days.

13.28 Article 13 does not specify any procedural requirements for the 'provision' of this period, whether or how it should be formally 'issued' or documented, or by whom. From the wording, it is construed as an obligation of result, and the effective procedural implementation is left to the State Parties' 'internal law'.[58]

(b) Length of the recovery and reflection period

13.29 As described in the drafting history, the questions of whether to specify a certain period of time and, if so, of which length, created major controversy during the drafting process. Contrary to the recommendations by the CoE's Parliamentary Assembly, the EU Experts Group on Trafficking in Human Beings and civil society organisations, who all advocated for 90 days, it ended with a compromise of '30 days'.

13.30 Still, Article 13(1) speaks of 'at least' 30 days, creating a minimum period of time only, not excluding longer periods, as contained in several domestic laws. An analysis of relevant legislation by GRETA shows a great diversity of approaches taken by the State Parties. While many countries have opted for the 30 days limit, others have set the length at 45 days,[59] 60 days,[60] 90 days[61] or even six months in some Nordic countries.[62] Furthermore, several

56 See for instance, GRETA, *Report on Norway*, I GRETA(2013)5, para 182.
57 CoE, *Explanatory Report*, para 172; see also, GRETA, *4th General Report*, 46.
58 See also the following section on provision in 'internal law'.
59 GRETA, *Report on Belgium*, I GRETA(2013)14, para 155.
60 GRETA, *Report on Croatia*, II GRETA(2015)33, para 119; GRETA, *Report on Estonia*, I GRETA(2018)6, para 152; GRETA, *Report on Ireland*, II GRETA(2017)28, para 159.
61 GRETA, *Report on Albania*, II GRETA(2016)6, para 131; GRETA, *Report on Greece*, I GRETA(2017)27, para 167; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 109; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 121; GRETA, *Report on Netherlands*, II GRETA(2018)19, para 160; GRETA, *Report on Poland*, GRETA(2017)29, para 135; GRETA, *Report on Romania*, II GRETA(2016)20, para 131; GRETA, *Report on Spain*, II GRETA(2018)7, para 191. In the case of GRETA, *Report on Germany*, II GRETA(2019)7, para 178, victims are granted a period of at least three months before required to leave the country.
62 GRETA, *Report on Norway*, II GRETA(2017)18, para 122; GRETA, *Report on Finland*, II GRETA(2019)6, para 148. In the case of Iceland, in the context of a recovery and reflection period, a temporary residence permit of even up to nine

countries offer the possibility to extend the period depending on the situation,[63] including in cases of a trafficked child.[64] Generally, GRETA has welcomed the fact that the recovery and reflection period is foreseen longer than the minimum length laid down under Article 13 of the Convention.[65] In relation to a possible maximum length of the recovery and reflection period, one should take into account, however, potentially negative implications of prolonged periods of reflection, for the sensitive balancing of interests between victim protection and offender prosecution. For example, empirical research in Norway (which has a recovery period of up to six months) has shown some negative impact on both investigations (e.g., difficulties in securing evidence) and the status of victims at court (e.g., defence lawyers challenging the credibility of victims as witnesses).[66] So far, GRETA has not engaged in a debate about an eventual maximum period.

(c) Providing the recovery and reflection period 'in its internal law'

13.31 Article 13 of the CoE Convention against Trafficking limits itself to defining the main parameters of the concept of the recovery and reflection period, while the further details are left to the State Parties to regulate.[67] As described above, legal provisions may be necessary for matters regulating entry into and stay in a country, access to a wide variety of services and child protection, for instance. Article 13(3) contains additional aspects about a possible revocation of the period, requiring further implementing steps. The question, however, remains, of what legal quality such 'internal law' is expected to be, or in more concrete terms: is there a need to specifically establish legislation on the recovery and reflection period, or may it be sufficient to apply already existing legislation in a way which has the same effect as Article 13?

13.32 Over the years, GRETA has developed a strict interpretation of what means provision in 'internal law'. It has repeatedly urged the State Parties to specifically define the recovery and reflection period and its purposes in its legislation.[68] For instance, GRETA rejected as insufficient the issuance of instructions by a Ministry of the Interior, to grant temporary residence based on humanitarian grounds to trafficked persons;[69] a 'Handbook on the Aliens Law' for police, which was considered by police to have the effect of an internal decree;[70] or the

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months was reported to GRETA by the authorities. Still, GRETA criticised the lack of a clear statement of purpose as a recovery and reflection period in the legislation, see GRETA, *Report on Iceland*, II GRETA(2019)02, paras 124–7.

63 GRETA, *Report on Armenia*, II GRETA(2017)1, para 126; GRETA, *Report on the Slovak Republic*, II GRETA(2015)21, para 122.

64 GRETA, *Report on Portugal*, II GRETA(2017)4, para 132.

65 GRETA, *Report on Croatia*, II GRETA(2015)33, para 121; GRETA, *Report on Finland*, I GRETA(2015)9, para 172; GRETA, *Report on Greece*, I GRETA(2017)27, para 171; GRETA, *Report on Iceland*, I GRETA(2014)17, para 146; GRETA, *Report on Ireland*, I GRETA(2013)15, para 196; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 109; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 122; GRETA, *Report on the Netherlands*, GRETA(2014)10, para 177; GRETA, *Report on Portugal*, I GRETA(2012)17, para 137.

66 Brunovskis and Skilbrei, 26.

67 In a similar approach, Art. 6 (last sentence) of the Dir 2004/81/EC leaves the determination of duration and starting point of the reflection period to national law.

68 See for instance GRETA, *Report on Italy*, II GRETA(2018)28, para 195.

69 GRETA, *Report on Serbia*, II GRETA(2017)37, paras 144 and 147.

70 GRETA, *Report on Austria*, II GRETA(2015)19, paras 130 and 131. A comparative study on the transposition of several directives, including on residence permits for trafficked persons, also concluded that the said 'Handbook' did not constitute sufficient transposition of Art 6 (reflection period) of Dir 2004/81/EC. See Academic Network for Legal Studies on Migration and Asylum in Europe, *Directive 2004/81 Victims of Trafficking Synthesis Report* (2007) 31–2.

qualification of legally regulated 'special support programmes' for trafficked persons[71] as acceptable ways to specifically implement the recovery and reflection period. GRETA urged Parties to review if the purposes of recovery and independent decision-making were clearly stated in law[72] or regulations.[73] Furthermore, GRETA objected to certain terminology used in domestic laws, for instance, framing a reflection period as a delayed 'order to leave the territory'.[74]

13.33 Such strict interpretation about a clear, transparent legal framework needs to be complemented by comprehensive efforts for capacity building and training among relevant professionals (see Art 29) about the legal provisions governing the reflection period, as well as by measures to ensure the victim's rights to relevant, and publicly available legal information and advice (Arts 12(1) lit. d and 15). Moreover, the lack of a clear legal implementation framework for the recovery and reflection period may be seen as a major factor contributing to the general lack of statistical data about this concept, also highlighted by GRETA.[75]

2. Article 13(1) of the CoE Convention against Trafficking: 'when there are reasonable grounds'

13.34 The application of the recovery and reflection period is usually triggered during the early stages of the identification process when 'reasonable grounds' can be found 'to believe that the person concerned is a victim' (Art 13(1)). This is the same test as provided for under Article 10(2) of the Convention, which follows the same intention, i.e. protection from early removal of the victim to the country of origin, while the identification process is still on-going.[76] In such situations, no 'absolute certainty' about the victims' status is required, only sufficient reason.[77] In this context, the generally broad understanding of 'victim', as defined in Article 4 lit. e, should be recalled: 'any natural person who is subject to trafficking in human beings'.[78]

13.35 Practice varies significantly in respect to the application of this test, sometimes even within countries, such as in case of decentralised competences.[79] GRETA has urged for a review of the implementation of Article 13 in situations where a reflection and recovery period is only granted 'to a person who has been recognised as a victim of trafficking in human beings'.[80] On the other side of the spectrum, in the Netherlands, the 'slightest indication of possibly being a victim of [trafficking in human beings]' leads to persons being offered the recovery and reflection period.[81] Within the meaning of 'reasonable grounds', GRETA accepted other

71 GRETA, *Report on Italy*, II GRETA(2018)28, para 192.
72 GRETA, *Report on Bulgaria*, II GRETA(2015)32, paras 157–8; GRETA, *Report on Estonia*, I GRETA(2018)6, paras 154–5.
73 GRETA, *Report on Belarus*, I GRETA(2016)14, paras 146–7.
74 GRETA, *Report on Germany*, II GRETA(2019)7, para 185.
75 GRETA, *4th General Report*, 46.
76 See on this also Commentary on Art 10 of the CoE Convention against Trafficking.
77 See CoE, *Explanatory Report*, para 132, in relation to Art 10.
78 See on this Commentary on Art 4 of the CoE Convention against Trafficking.
79 See, for instance, GRETA, *Report on Germany*, II GRETA(2019)7, paras 180–182; GRETA, *Report on Spain*, I GRETA(2013)16, para 203.
80 GRETA, *Report on Latvia*, II GRETA(2017)2, para 136 and 139.
81 GRETA, *Report on the Netherlands*, II GRETA(2018)19, para 160.

formulations as well, such as 'sufficient grounds',[82] 'concrete grounds',[83] or 'good reasons',[84] but generally insisted on clear instructions for the application of the period.[85]

13.36 On the other side, there is no 'obligation' for victims themselves to immediately report their situation to police or other authorities. In the case of migrant workers exploited on agricultural farms producing strawberries in Greece, such an argument by the prosecuting authorities was dismissed by the European Court of Human Rights, stating:

> in rejecting the request of this group of applicants on the grounds, inter alia, that their complaint to the police was belated, the public prosecutor disregarded the regulatory framework governing human trafficking. Article 13 of the Council of Europe's Anti-Trafficking Convention provides for a 'recovery and reflection period' of at least thirty days for the person concerned to be able to recover and escape from the influence of the traffickers and knowingly take a decision about cooperating with the authorities.[86]

3. Article 13(1) of the CoE Convention against Trafficking: 'to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with competent authorities'

13.37 Article 13 explicitly mentions two main purposes for providing victims with the recovery and reflection period: (1) 'to recover and escape the influence of traffickers' and (2) 'to take an informed decision on co-operating with the competent authorities'. Both purposes follow two underlying reasons and motivations, linked by one victim empowerment consideration: the recovery shall help the victim to regain control of his/her life by breaking through the cycle of dependency with the trafficker, while the reflection is linked to an expectation that – following an informed decision by the trafficked person to cooperate with authorities – this 'is likely to make the victim a better witness'.[87] It is worth noting that these two reasons are grammatically linked by 'and/or', indicating that each of them is sufficient to initiate the provision of this period.[88] Such an understanding would support approaches by victim support experts, who voiced concern about a dominant criminal justice approach to victim protection, including the recovery and reflection period, and which may lead to just another form of instrumentalisation of victims in the interests of prosecution and criminal justice.[89] Therefore, physical and mental recovery of the trafficked persons and access to services helpful to stabilise one's personal life situation should be seen as a sufficient argument to trigger the effects of the recovery period, irrespective of further victim cooperation decision-making. GRETA has repeatedly insisted

82 GRETA, *Report on Albania*, II GRETA(2016)6, para 131.
83 GRETA, *Report on Germany*, II GRETA(2019)7, paras 178 and 184.
84 GRETA, *Report on Romania*, I GRETA(2012)2, para 150.
85 GRETA, *4th General Report*, 47. See for instance GRETA, *Report on Germany*, II GRETA(2019)7, para 184.
86 *Chowdury and others v Greece*, App no 21884/15 (ECtHR, 30 March 2017) para 121.
87 CoE, *Explanatory Report*, para 174.
88 Thus, differing from Art 6 of Dir 2004/81/EC, which speaks of a 'reflection period' only in its title, and whose purpose is phrased as 'allowing [victims] to recover and escape the influence of the perpetrators of the offences *so that* they can take an informed decision as to whether to cooperate …' (emphasis added).
89 Brunovskis and Skilbrei, 28. See also Experts Group Opinion 2004, para 1.

that domestic regulation needs to comprehensively reflect the concept and purposes of the recovery and reflection period in line with Article 13.[90]

13.38 The recovery element implies an obligation to provide for victim's access to, for instance, psychosocial support services. The reflection element poses an obligation to the State Parties to ensure access to relevant information, including legal advice. Such services need to be provided in a way which is adapted to the needs of the victims (in terms of language requirements and interpretation, or in relation to trafficked children).

13.39 GRETA has stressed that the State Parties should ensure victims of trafficking to be 'systematically informed of the possibility of benefiting from a recovery and reflection period and its implications'.[91] In a large number of countries, the need for capacity building and training for all specialists involved in the identification process was urged by GRETA; 'officers performing identification should be issued with clear instructions stressing the need to offer the recovery and reflection period as defined in the Convention, i.e. not making it conditional on the victim's co-operation and offering it to victims before formal statements are made to investigators'.[92] In addition, GRETA expressed concern about the regulation of the recovery and reflection period in some countries, which required an application with investigating bodies, i.e., cooperation with authorities contrary to its original intention.[93]

13.40 Still, Article 13(1) contains an important exception to the concept of self-determined cooperation of the victim with authorities ('without prejudice to the activities' by the prosecution), in relation to obligations of witnesses to testify in court, as typically foreseen in domestic codes of criminal procedure. In such cases, someone 'who is legally required to do so therefore cannot use Article 13, paragraph 1, as a basis for refusing to testify'.[94]

13.41 Furthermore, Article 13(1) also mentions the victim's escape of the influence of traffickers. In the context of Article 13(1), the reference to victims' efforts to break the cycle of dependency in relation to the trafficker should only be understood to underline further the need for the trafficked person to recover and regain control. It, thus, serves a different purpose than Article 13(3), which addresses potential illegitimate use of the recovery and reflection period.[95] Failure to break ties with the traffickers has been used by some governments to revoke the period, which has been criticised by GRETA.[96]

90 See for instance, GRETA, *Report on Latvia*, II GRETA(2017)2, paras 136–139; GRETA, *Report on Germany*, I GRETA(2015)10, paras 152 and 154.
91 GRETA, *4th General Report*, 47.
92 See for instance, GRETA, *Report on Austria*, II GRETA(2015)19, para 131.
93 GRETA, Report on Germany, II GRETA(2019)7, para 180; GRETA, *Report on Sweden*, II GRETA(2018)8, para 145; GRETA, *Report on Spain*, II GRETA(2018)7, para 194.
94 CoE, *Explanatory Report*, para 176.
95 Ibid., para 173.
96 GRETA, *Report on France*, I GRETA(2012)16, para 162.

4. Article 13(1) of the CoE Convention against Trafficking: 'shall not be possible to enforce any expulsion order'

13.42 In terms of the immediate effects of the provision of the recovery and reflection period, Article 13(1) bars the forced removal of victims of trafficking from the country they are presently in. Instead, as explained above, authorities should take measures to 'authorise' the victim's stay in the country. Questions may arise about the relationship between such measures and action taken in relation to an asylum procedure. In several countries, the recovery and reflection period is 'incompatible with an asylum application'.[97] Hence, if a presumed victim of trafficking is detected during the asylum procedure and eventually granted a reflection period, the person may lose some entitlements linked to the asylum application – contrary to Article 40(4), which guarantees rights of persons under international humanitarian and refugee law.[98]

13.43 Furthermore, State Parties are obliged to ensure access to a recovery and reflection period specifically also for children protecting them from forced return. Also, after that period, no child may be returned to another country before a dedicated child's best interest determination and risk assessment has been undertaken as according to Article 16(7) of the CoE Convention against Trafficking. Moreover, it follows from Article 13(1) ('to take an informed decision') that children must have access to relevant information about the recovery and reflection period in a way that they can understand. In addition, this implies that all relevant stakeholders working with children, including legal guardians assigned to unaccompanied children,[99] require proper training on the concept of the recovery and reflection period for children.[100] GRETA has voiced concern about the general lack of data specifically on children granted a recovery and reflection period,[101] as well as about lack of access for children.[102]

13.44 Additionally, in contrast to the reflection period regulated under the Dir 2004/81/EC on residence permits (Art 6), Article 13 of the CoE Convention against Trafficking does not limit the recovery and reflection period to third-country nationals only. On the contrary, as repeatedly stated by GRETA, there may be situations also for EU nationals after a stay of three months, when their residence status turns irregular and which makes them vulnerable to (re) trafficking and exploitation. Consequently, GRETA recommended that national laws should provide for the application of the recovery and reflection period also to EU nationals.[103] Typically, this is accompanied by a statement of GRETA, which 'stresses once again the importance of the recovery and reflection period for the recovery of victims and their effective

97 See for instance GRETA, *Report on Norway*, II GRETA(2017)18, para 123.

98 See also, Guideline 2 para 7 of the OHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking*: 'Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.'

99 CoE Convention against Trafficking, Art 10(4).

100 UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe* (UNICEF 2006) 104.

101 GRETA, *6th General Report on GRETA's Activities*, para 154: 'in most countries, there is no data on the number of child victims of trafficking who have benefitted from a recovery and reflection period'.

102 See, for instance, GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 222.

103 GRETA, *Report on Greece*, I GRETA(2017)27, paras 169 and 171; GRETA, *Report on Ireland*, II GRETA(2017)28, para 160; GRETA, *Report on Poland*, II GRETA(2017)29, para 140; GRETA, *Report on Portugal*, II GRETA(2017)4, para 135; GRETA, *Report on the Slovak Republic*, II GRETA(2015) 21, para 125; GRETA, *Report on Slovenia*, II GRETA(2017)38, para 125.

access to the ensuing rights; as such, it should be granted to any presumed or identified victim of trafficking in human beings, including children'.[104] In fact, and in light of its overall victim empowerment purpose, this instrument should be accessible irrespective of the nationality of victims, or whether applied in a country of destination or of origin of victims or in an internal trafficking context.[105]

5. Article 13(2) of the CoE Convention against Trafficking: access to assistance during the recovery and reflection period

13.45 Another effect of the recovery and reflection period lies in the trafficked person's access to a set of assistance measures, as provided for in Article 12(1) and (2) of the Convention. Again, intended to 'assist victims in their physical, psychological and social recovery', this includes safe accommodation, psychological and material assistance, emergency medical treatment, interpretation and translation service, counselling and information about their rights and representation in proceedings as well as access to education for children. However, further necessary medical assistance and access to the labour market are not covered. Nevertheless, GRETA has referred to general human rights obligations, such as Article 13 (The right to social and medical assistance) of the Revised European Social Charter,[106] which requires respective State Parties to:

> ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition.[107]

13.46 In practice, however, general persistent challenges in relation to provision of assistance intersect with obligations under Article 13 of the CoE Convention against Trafficking, such as access to service unconditional from co-operation with investigations, lack of services specific to trafficking for the purpose of various forms of exploitation, including the gender dimension,[108] and insufficient integrated child protection approaches.[109]

6. Article 13(3) of the CoE Convention against Trafficking: 'not bound to observe this period'

13.47 Since the provision of the recovery and reflection period may have direct implications on the regulation of entry and stay, concerns have been raised by government delegations during the

104 See, for instance, GRETA, *Report on Belgium*, II GRETA(2017)26, para 139.

105 See also, OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, *Prevent. Combat. Protect – Human Trafficking. Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (2011) 43: 'The provision of a reflection and recovery period is equally important for victims of internal trafficking as for EU citizen and third country national victims.'

106 Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163.

107 GRETA, *8th General Report*, para 152. See on this also Commentary on Art 1 of the CoE Convention against Trafficking.

108 See also Art 17 of the CoE Convention and the potentially empowering role of direct engagement with trafficked persons, as expressed by GRETA: '(…) it is critical, therefore, that the gender dimension of prevention and protection measures, recognize these risks and include survivors of trafficking in the design and implementation of social inclusion and reintegration measures', GRETA, *8th General Report*, para 112.

109 Ibid., paras 101–145.

drafting process about limitations to control entry and stay.[110] Eventually, a separate paragraph 3 was inserted into Article 13, which covers two situations, under which the State Parties may not grant a recovery and reflection period, namely, on the grounds of public order or improperly claimed victim status. These criteria were added 'to guarantee that victims' status will not be illegitimately used'.[111]

13.48 GRETA has developed a narrow interpretation on the grounds for early termination of the period.[112] Assessing state practices, GRETA has highlighted that a significant number of State Parties[113] have added grounds, such as the victim having 'voluntarily, actively or upon his/her own initiative renewed contacts with the suspected traffickers' to the list for early termination. However, broader discretion is given to EU MS under the Dir 2004/81/EC on residence permits, which allows states to 'at any time terminate the reflection period if the competent authorities have established that the person concerned has actively, voluntarily and on his/her own initiative renewed contact with the perpetrators of the offences' (Art 6(4) of the Dir 2004/81/EC). GRETA, nevertheless, 'stresses that the reasons listed in Article 13(3) of the Convention as justifying the non-observance of the recovery and reflection period do not include the re-establishment of contact with the trafficker, but only grounds of public order or claiming victim status improperly'.[114] Consequently, GRETA urged the State Parties to 'ensure that no termination of the recovery and reflection period is carried out on the grounds that victims or presumed victims have "actively, voluntarily and on their own initiative renewed contact with the perpetrators" without due regard to the person's individual situation, which involves an examination of his/her case'.[115]

110 See, for instance, the United Kingdom's 'fundamental objections to the inclusion of a provision which calls for mandatory reflection periods, as it would provide opportunities for abuse by those seeking to circumvent immigration control or removal', see CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE*, CAHTEH(2004)13, 9 June 2004, 32.

111 CoE, *Explanatory Report*, para 173.

112 GRETA, *4th General Report on GRETA's Activities*, 47.

113 GRETA, *Report on Albania*, II GRETA(2016)6, para 132; GRETA, *Report on Belgium*, I GRETA(2013)14, para 157; GRETA, *Report on Croatia*, II GRETA(2015)33, para 123; GRETA, *Report on Finland*, I GRETA(2015)9, para 167; GRETA, *Report on Ireland*, II GRETA(2017)2, para 159; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 111; GRETA, *Report on Malta*, II GRETA(2017)3, para 107; GRETA, *Report on North Macedonia*, I GRETA(2014)12, para 159; GRETA, *Report on Romania*, I GRETA(2012)2, para 150.

114 GRETA, *Report on North Macedonia*, I GRETA(2014)12, para 162.

115 See, for instance, GRETA, *Report on Malta*, II GRETA(2017)3, para 110; GRETA, *Report on North Macedonia*, I GRETA(2014)12, para 163.

ARTICLE 14

RESIDENCE PERMIT

Julia Planitzer

1 Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:
- **a the competent authority considers that their stay is necessary owing to their personal situation;**
- **b the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.**

2 The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.

3 The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.

4 If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.

5 Having regard to the obligations of Parties to which Article 40 of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

A. INTRODUCTION

14.01 The discussions on residence permits for trafficked persons were among the controversial areas during the drafting of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings.[1] The discussions started with a draft stating that, '[e]ach Party shall provide in its internal law for residence permits (…) to victims who have suffered serious abuse or harm, or if they or their family members are in danger of further harm, or who are assisting the investigation or prosecution of traffickers'.[2] The provision became weaker in the course of the negotiations. Only at the very end of the drafting phase was the wording amended again in order to make the issue of residence permits compulsory. The Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men commented shortly before the last Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting that the current wording would rather reflect 'the member states' desire to protect themselves from illegal migration rather than of accepting that trafficking in human beings is a crime and that its victims must be protected'.[3] The development of this provision is one of the examples in which, as held by the Chair of the CAHTEH Mr. Jean-Sébastien Jamart, 'the "human rights" perspective has been excluded (…) in order to comply with the Community compromise negotiated by experts in combating illegal immigration'.[4] Hence, the final text is a compromise.

14.02 The provision regulating residence plays an essential role, since ensuring residence for trafficked persons is a precondition to have access to rights such as access to remedies. Enabling residence means that States can fulfil its obligations to protect the rights of trafficked persons. The negotiations of the wording on residence were characterised on the one hand by the concern that unconditional residence could form an 'incentive for trafficking and irregular migration'[5] and the aim of reaching higher standards in terms of protection of rights of trafficked persons on the other hand. Finally, the negotiations achieved a standard on residence that places an obligation on State Parties to issue a residence permit and thereby further developed other existing standards such as the United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[6]

B. DRAFTING HISTORY

14.03 Already several years before the negotiations of the CoE Convention against Trafficking started, the Council of Europe discussed the issuing of residence permits for trafficked persons

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).
2 CAHTEH, *Revised Preliminary Draft-European Convention on Action against trafficking in human beings*, CAHTEH(2003)9, 27 November 2003, 8.
3 Parliamentary Assembly, *Draft Council of Europe Convention on Action against Trafficking in Human Beings*, Opinion 253(2005), 26 January 2005, para 8.
4 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, 30.
5 EU Group of Experts on Trafficking in Human Beings, *Report of the Experts Group on Trafficking in Human Beings 2004* (Brussels 2004) 235.
6 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

due to the predominant understanding of trafficking in human beings as a cross-border issue. In 2000 it was recommended 'to grant temporary residence permits to enable the victims to testify against the offenders', since '[t]hese testimonies are essential in order to charge the traffickers, as they often constitute the only tangible proof against them'.[7] This recommendation focusses on trafficking for the purpose of sexual exploitation and follows the approach to grant residence when the trafficked person co-operates with relevant authorities and acts as witness. However, it also encourages destination countries, 'if necessary, to consider providing victims with the more protective status of temporary resident on humanitarian grounds'.[8] Also a following recommendation takes into account that trafficked persons should receive residence on humanitarian grounds.[9] Already in 1997, the European Union (EU) obliged Member States to ensure that 'victims are available (…) to give evidence in any criminal action, which may entail provisional residence status in appropriate cases'.[10] In 2004, the Organization for Security and Co-operation in Europe (OSCE) issued an 'Action Plan to Combat Trafficking in Human Beings' which recommends to provide residence permits taking into account such factors as potential dangers to victims' safety.[11] Hence, the Action Plan solely targets issuing a residence permit due to the personal situation. All these developments influenced early drafts of the CoE Convention against Trafficking and the different approaches were referred to in the drafting process as 'utilitarian approach' and 'humanitarian approach'. The 'humanitarian approach' foresaw the issuing of a residence permit due to the personal situation, whereas the 'utilitarian approach' would require the co-operation in investigation or prosecution in order to receive a residence permit.[12]

1. The obligation to issue a residence permit

14.04 Early drafts of the provision on the residence permit formulated an obligation for States to issue a residence permit.[13] During the 3rd CAHTEH meeting, however, those delegations, which preferred a non-obligatory granting of a permit, succeeded. This would give States more discretion.[14] Since this meeting, the wording was non-compulsory and States 'shall provide (…) for the possibility to deliver a renewable residence permit to victims'.[15]

7 Council of Europe, *Action against trafficking in human beings for the purpose of sexual exploitation: Recommendation No. R (2000) 11 and explanatory memorandum* (Council of Europe 2004) 37. See further Committee of Ministers, Recommendation No. R (2000) 11 of the Committee of Ministers to Member States on Action against Trafficking in Human Beings for the purpose of sexual exploitation, 19 May 2000, paras 34–35.

8 Ibid. 38.

9 Parliamentary Assembly, Recommendation No. 1545 (2002) Campaign against trafficking in women, 21 January 2002, para 10(ix)(g).

10 Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children, 97/154/JHA (OJ L 63/2), Title II F (i).

11 OSCE, Decision No. 557: OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 24 July 2004, 15.

12 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, para 20.

13 CAHTEH, *Revised Preliminary Draft – European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 8.

14 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, paras 18–20.

15 CAHTEH, *Revised Draft Europe Convention on Action against Trafficking in Human Beings: Following the 3rd meeting of the CAHTEH (3–5 February 2004)*, CAHTEH(2004)8, 12 February 2004, 12.

14.05 Non-governmental Organisations (NGOs) lobbied in order to strengthen the wording again by making States obliged to ensure the provision of renewable residence permits of at least six months in length.[16] At the 6th meeting, some delegations mentioned their preference for a compulsory issue of residence permits.[17] The Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men supported this and proposed to make States obliged to issue a residence permit.[18] Finally, the CAHTEH agreed and adopted the suggested amendment.[19]

2. Reasons for issuing a residence permit

14.06 State Parties can choose between granting a residence permit in exchange for co-operation with the law-enforcement authorities or granting one due to the personal situation, or issuing a residence permit based on both grounds.[20] An early draft of the Convention included an obligation to issue a residence permit on several grounds. A permit shall be issued 'to victims who have suffered serious abuse or harm, or if they or their family members are in danger of further harm, or who are assisting the investigation or prosecution of traffickers'.[21] Discussions in the 3rd CAHTEH meeting led to summarising the various grounds under the headings of a 'utilitarian approach' ('for the purpose of investigation or criminal procedure') and a 'humanitarian approach' ('necessary owing to their personal situation'). Some delegations were of the view that for instance the ground of 'serious abuse or harm' would be insufficiently precise in order to be a workable criterion. The discussions concluded that 'the victim's personal situation must be such that it would be unreasonable to require him or her to leave national territory'.[22] Later comments by Italy and Sweden show how different the opinions of the States were: Italy proposed issuing a residence permit to victims in any case, hence without mentioning any grounds. Differently, Sweden suggested allowing residence permits only for the purpose of investigation or criminal procedure.[23]

14.07 In the course of the following meetings, the approach to have two groups of grounds, from which States can choose, was further discussed. Amnesty International and Anti-Slavery International urged to issue residence permits to trafficked persons 'if their stay is necessary

16 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Contribution by non-governmental organisations, Additional Comments by Amnesty International and Anti-Slavery International*, CAHTEH(2004)17, Addendum IV, 30 August 2004, 11; CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Joint Statement of 127 non-governmental organisations*, CAHTEH(2004)17, Addendum X, 27 September 2004, 5.

17 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 41.

18 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 4 November 2004, 7–8.

19 CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, 16.

20 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 182.

21 CAHTEH(2003)9, 8.

22 CAHTEH, *3rd meeting – Meeting Report*, CAHTEH(2004)RAP3, 9.

23 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Amendments to preamble and to articles 1 to 24 proposed by national delegations and observers*, CAHTEH(2004)14, 11 June 2004, 31.

owing to their personal situation and/or for the purpose of investigation or legal or administrative proceedings, including criminal proceedings'.[24] The final wording of Article 14 (1) ('in one or other of the two following situations or in both') is based on a proposal of the European Commission.[25]

3. The length of the residence permit

14.08 An early draft of the Convention foresaw a period of at least six months for the residence permit.[26] Nevertheless, discussions in the 3rd CAHTEH meeting led to a text that leaves the decision on the length of the residence permit to the State Parties, but includes the obligation to implement renewable residence permits.[27] After the 4th meeting, Italy,[28] the Committee on Equal Opportunities for Women and Men of the CoE Parliamentary Assembly[29] as well as NGOs[30] lobbied in order to get the minimum duration of six months back into the draft, unsuccessfully, however. The declaration of the Chair of the CAHTEH, Mr Jean-Sébastien Jamart, at the beginning of the 8th and last CAHTEH meeting showed that a majority of delegations were in favour of having a minimum duration of six months, but exclusively in the case of co-operation with the authorities. In cases where the residence permit would be granted based on the personal situation, a majority of States opted for some discretion on the length. The aim, however, was to avoid the establishment of 'two categories of victims'.[31] Hence, letting State Parties to decide on the length of the residence permit but make it at least 'renewable' forms a compromise between these two approaches.

14.09 Any reference to granting a permanent residence permit was dropped in the discussions. Although there was consensus at the 1st CAHTEH meeting that the Convention should 'deal with the possibility of issuing residence permits (temporary and/or *permanent*)[32] and despite the lobbying of NGOs and the Committee on Equal Opportunities for Women and Men of the CoE Parliamentary Assembly,[33] the CAHTEH followed the suggestion of the European Commission to delete a reference to permanent residence permits.[34] Similarly, any reference to the possibility of a family reunification was dropped, despite for instance the OSCE's efforts to explicitly include it.[35] Again, the European Commission suggested deleting the reference since

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24 CAHTEH(2004)17, Addendum IV, 11.
25 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Contribution by the delegation of the Commission of the European Communities*, CAHTEH(2004)17, Addendum II, 30 August 2004, 5.
26 CAHTEH(2003)9, 8.
27 CAHTEH, *3rd meeting – Meeting Report*, CAHTEH(2004)RAP3, para 20.
28 CAHTEH(2004)14, 31.
29 CAHTEH(2004)23, 7–8.
30 CAHTEH(2004)17, Addendum IV, 11.
31 CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, 30.
32 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, 15 (emphasis added).
33 CAHTEH(2004)17, Addendum IV, 11 and CAHTEH(2004)23, 7–8.
34 CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, 16.
35 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004, 43.

family reunification 'involved certain prerequisites to do with resources and housing'. The Committee followed this suggestion and deleted the reference.[36]

4. The residence permit for child victims

14.10 Early drafts of the text did not mention children, but it was the United Nations Children's Fund (UNICEF) that suggested to explicitly extend the right to a residence permit also to child victims and renew the residence permit for children until a durable solution has been identified.[37] Italy introduced the basic principle of acting in the best interest of the child as enshrined in the UN Convention on the Rights of the Child (CRC)[38] and France suggested to add the phrase 'when this is legally necessary'[39] in order to take into account that certain States may not require a distinct residence permit for children.[40] Based on a proposal of the European Commission,[41] provisions on children have been brought together under one paragraph. Establishing a specific paragraph on children further clarified that issuing a residence permit to children is not conditional upon their co-operation or their personal situation; the child's best interests take precedence over the two requirements.[42] The reference to a 'durable solution' however had been dropped.

C. ARTICLE IN CONTEXT

1. Relationship between Article 14 and Article 12 of the CoE Convention against Trafficking

14.11 Residence is a key requirement in order to be able to have initial access to further rights, in particular assistance measures. Whereas the measures listed in Article 12(1) and (2) are accessible also during the recovery and reflection period (Art 13) and hence for presumed trafficked persons, Article 12(3) and (4) are accessible for victims lawfully resident within the territory. Consequently, to have access to necessary medical or other assistance and access to the labour market, to vocational training and education, trafficked persons need a lawful residence. In cases where State Parties decide to issue residence permits exclusively on the ground of co-operation, this creates a tension with Article 12(6) that requires 'to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness'.[43]

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36 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, 11.

37 CAHTEH, *Draft European Convention on Action against Trafficking in Human Beings: Contribution by the delegations of Austria, Netherlands and by the observer of UNICEF*, CAHTEH(2004)1, 26 January 2004, 14.

38 Art 3 of the Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, entered into force 2 September 1990.

39 CAHTEH(2004)14, 31.

40 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 186. Furthermore, the wording 'when legally necessary' clarifies also that State Parties do not need to establish a specific residence permit for trafficked children in cases where there are already other existing grounds for residence applicable.

41 CAHTEH(2004)17, Addendum II, 5.

42 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 186.

43 CoE Convention against Trafficking, Art 12(6). See on this matter also Yoon Jin Shin, *A Transnational Human Rights Approach to Human Trafficking: Empowering the Powerless* (Brill 2018) 62–6.

14.12 Article 12(6) of the CoE Convention against Trafficking speaks of the 'willingness to act as a witness' which is narrower than the term 'co-operation with the competent authorities in investigation or criminal proceedings' in Article 14(1)(b). Nevertheless, the Explanatory Report on Article 12(6) refers to the broader 'co-operation with the competent authorities in investigation or criminal proceedings'.[44] Therefore, Article 12(6) covers not only the willingness to act as witness but also the agreement to co-operate with the authorities. Hence, even if a State Party requires in relation to residence a rather low threshold for co-operation, for instance providing information without acting as witness, implementation of the provision of unconditionality in Article 12(6) can be challenging. Making a residence permit conditional on the willingness to co-operate with the authorities or to act as a witness means that the access to assistance measures is made conditional on this willingness as well. Therefore, this would not fulfil the obligation of Article 12(6) to provide access to assistance measures unconditionally.[45]

2. Relationship between Article 14 and Article 15 of the CoE Convention against Trafficking

14.13 Similar to the context above, there is also a tension between Article 15 of the CoE Convention against Trafficking providing the right of victims to compensation from the perpetrators and Article 14. Although the Explanatory Report concerning Article 15 stresses that for victims, 'it would be very difficult (…) to obtain compensation if they were unable to remain in the country where the proceedings take place',[46] Article 14, in particular Article 14(1)(b), does not explicitly extend the duration of the permit to compensation proceedings. There was an unsuccessful attempt during the drafting process to extend the permit to those proceedings that enable victims to obtain compensation.[47] Victims might have to submit their claims to civil courts in those cases where criminal courts are not empowered to determine civil liability towards the victim.[48] Claims to the civil court are not covered by the wording of Article 14(1)(b) referring to co-operation in criminal proceedings. The report of the Group of Experts on Action against Trafficking in Human Beings (GRETA) on the United Kingdom shows that residence can be granted without the victim having to co-operate with criminal proceedings in case it is necessary for claiming compensation. However, according to NGOs this form of residence is very rarely granted.[49]

14.14 Practice shows that victims face challenges in pursuing their compensation claims after return to their home country.[50] The UN Special Rapporteur on trafficking in persons, especially women and children pointed out that regular residence permits are an important prerequisite for claiming compensation, 'as it would be very difficult for trafficked persons to seek remedies

44 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 168.
45 See on the unconditionality of assistance also the Commentary on Art 12 of the CoE Convention against Trafficking.
46 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 192.
47 CAHTEH(2004)23, 7–8.
48 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 197.
49 GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 224.
50 Liliana Sorrentino, *Justice at Last – European Action for Compensation for Victims of Crime, Legal Assessment: Compensation Practices* (La Strada International 2018) 49. See on the challenge to claim for compensation when the exploited person has left the country of destination in the context of corporate liability for labour exploitation, Julia Planitzer and Nora Katona, 'Criminal Liability of Corporations for Trafficking in Human Beings for Labour Exploitation' (2017) 8 *Global Policy*, 508.

if they are at risk of expulsion or have already been expelled'.[51] The Basic principles on the right to an effective remedy for victims of trafficking in persons frame the right to effective remedy as a human rights-based approach and define a precondition to have a right to remain lawfully in the country in which the remedy is being sought for the duration of proceedings.[52] Hence, the application of a human rights-based approach in conjunction with the obligations of State Parties under Article 15(3) and (4) of the CoE Convention against Trafficking would require an extension of the duration of the permit to all compensation proceedings.

3. Relationship between Article 14(5) and Article 40(4) of the CoE Convention against Trafficking

14.15 Article 14(5) is a reference to Article 40(4) and forms a particular application of the principle defined in Article 40(4), which states that the CoE Convention against Trafficking does not affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law.[53] Article 14(5) refers to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees[54] and states that the right to seek and enjoy asylum of a trafficked person shall not be impacted by granting of a residence permit.

4. Relations with provisions in other standards

14.16 In comparison to the Palermo Protocol, Article 14 establishes a clear obligation for State Parties to issue residence permits. The respective provision of the Palermo Protocol uses weaker language and State Parties 'shall consider adopting legislative (…) measures that permit victims of trafficking in persons to remain (…) in appropriate cases'.[55] The Palermo Protocol leaves a wide margin of discretion to the State Parties, since it does not for instance refer explicitly to co-operation but to 'appropriate cases' instead. For the implementation, 'humanitarian and compassionate factors' should also be taken into account.[56] The Model Law against Trafficking in Persons of UNODC suggests different options for implementation: one option in which co-operation is irrespective and one option tied to co-operation for the duration of any relevant legal proceedings.[57]

14.17 In parallel to the drafting of the CoE Convention against Trafficking, the EU Council Dir 2004/81/EC on the residence permit issued to victims of trafficking in human beings from

51 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/66/283, 9 August 2011, para 21.
52 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/69/269, 6 August 2014, Annex, paras 5 and 7(g).
53 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, paras 190, 377.
54 Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951, entered into force 22 April 1954 and Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967, entered into force 4 October 1967.
55 Palermo Protocol, Art 7.
56 Ibid, Art 7(2).
57 UNODC, *Model Law against Trafficking in Persons* (UNODC 2009) 60–61.

third countries[58] was drafted and adopted. The negotiations concerning Directive 2004/81/EC influenced the drafting process of the Convention.[59] Article 14 of the CoE Convention against Trafficking goes further than Article 8 of Dir 2004/81/EC (Issue and renewal of the residence permit), since the provision in the Directive does not formulate an obligation to issue a residence permit and EU MS 'shall consider' it when three requirements are met: (1) necessity for investigations or the judicial proceedings; (2) clear intention to co-operate; and (3) stopping all relations with the suspected traffickers. For the Directive, the minimum duration of the residence permit is six months and, similarly to the CoE Convention against Trafficking, has to be renewable.[60] However, the conditions of non-renewal are differently regulated in the CoE Convention against Trafficking and Dir 2004/81/EC. In the CoE Convention against Trafficking, the conditions are defined by the State Parties' national law. The Directive 2004/81/EC gives less room for discretion to EU MS and defines that the permit 'shall not be renewed' when the three requirements mentioned above are not fulfilled any more or when a competent authority decides to stop the relevant proceedings.[61] In comparison to the Convention, Dir 2004/81/EC does not foresee the issuing of a residence permit due to the personal situation. Also concerning children, the CoE Convention against Trafficking goes further than Article 8 of Dir 2004/81/EC since the Directive leaves it to the EU MS to decide whether it should be applicable to minors or not.[62]

D. ISSUES OF INTERPRETATION

1. Reasons for issuing a residence permit

14.18 The wording of Article 14(1) on which grounds States have to provide a residence permit leads to three options: (1) residence in case of co-operation; (2) residence due to the personal situation; and (3) issuing residence permits on both grounds (1) and (2).[63] Consequently, State Parties could disregard both options (2) and (3) and issue permits on exclusively the ground on co-operation and fulfil the Convention that way.

(a) The right to unconditional residence

14.19 The option to issue a residence permit when the victim's 'stay is necessary owing to their personal situation' as opposed to the approach to issue a permit in return for co-operation is also discussed under the heading of 'unconditional residence'. As discussed above,[64] issuing a permit exclusively in return for co-operation impedes the implementation of Article 12 which

58 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who co-operate with the competent authorities (OJ L 261/19) (thereinafter Dir 2004/81/EC).

59 See for instance CAHTEH, *3rd meeting – Meeting Report*, CAHTEH(2004)RAP3, para 8 and CAHTEH(2004)1, 8.

60 Dir 2004/81/EC, Art 8(3).

61 Ibid, Art 13.

62 Ibid, Art 3(3).

63 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 182.

64 See section C.1. above.

requires unconditional access to assistance measures. Therefore, several actors call for unconditional residence: UN human rights mechanisms recommend offering unconditional residence.[65] Furthermore, the EU Group of Experts on Trafficking in Human Beings as well as NGOs lobbied for strengthening access to unconditional residence during the drafting process of the Convention.[66] However, in order to fulfil the CoE Convention against Trafficking, State Parties are not obliged to offer unconditional residence.

14.20 Nevertheless, based on human rights obligations of States, an obligation to unconditional residence can be deducted. This obligation can be derived from the State obligation to protect, to conduct effective investigation and prosecution as well as the obligation to provide reparation.[67] Hence, the application of a human rights-based approach requires the issuing of permits also in situations in which trafficked persons are not willing or able to co-operate with authorities.

14.21 Article 14(2) describes a form of unconditional residence for child victims. The residence permit shall be issued in accordance with the best interests of the child. If residence is in the best interest of the child, then this would 'take precedence over'[68] the requirements of personal situation or co-operation with authorities. This means that there are different standards applied concerning different groups of victims.

14.22 The explanation of what falls under 'personal situation' is rather broad. The Explanatory Report refers to 'a range of situations, depending on whether it is the victim's safety, state of health, family situation or some other factor which has to be taken into account'.[69] *PK(Ghana) v Secretary of State for the Home Department* describes a guidance on how the term *necessary* (owing to their personal situation) should be interpreted. Necessary means 'required to achieve a desired purpose, effect or result', hence has to be seen through 'the prism of the objectives of

65 See for instance in relation to the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee): Concluding Observations: Albania, UN Doc. CEDAW/C/ALB/CO/4, 2016, para 25; Concluding Observations: Belgium, UN Doc. CEDAW/C/BEL/CO/7, 2014, para 25; Concluding Observations: Germany, UN Doc. CEDAW/C/DEU/CO/7-8, 2017, para 30; Concluding Observations: Montenegro, UN Doc. CEDAW/C/MNE/CO/2, 2017, para 25. See also Janie Chuang, 'Article 6' in Beate Rudolf, Marsha A Freeman and Christine M Chinkin (eds), *The UN Convention on the Elimination of all Forms of Discrimination against Women: A Commentary* (Oxford University Press 2012) 190.

66 EU Group of Experts on Trafficking in Human Beings, *Report of the Experts Group on Trafficking in Human Beings 2004* (22 December 2004) Annex 2, 228 and CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Statement and press release from Amnesty International and Anti-Slavery International*, CAHTEH(2004)17, Addendum XI, 27 September 2004, 4.

67 See Julia Planitzer, *Trafficking in Human Beings and Human Rights – The Role of the Council of Europe Convention on Action against Trafficking in Human Beings* (NWV 2014) 106–8. The obligation to protect includes the obligation to ensure access to rights such as services, reparation and being protected from re-trafficking. In the case of conditional residence, the victim would need to co-operate first in order to have access to rights that have to be protected by the State in any case. Without ensuring residence, the State is not in a position to fulfil its obligations to protect the victims' rights. The State's obligation to effective investigation and prosecution can be a basis for an obligation to provide unconditional residence since this can raise chances of co-operation and therefore increase the effectiveness of investigation and prosecution. The 'Basic principles on the right to an effective remedy for victims of trafficking in persons' categorise temporary or permanent residence as a form of restitution, see UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/69/269 (2014) in Annex, 9 (d).

68 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 186.

69 Ibid, para 184.

the Convention'.[70] The relevant objective in this context would be 'the protection and assistance of victims of trafficking'.[71] Consequently, a State would not have 'an open-ended discretion', but rather has to decide whether the stay of a person is necessary for the purposes of protection and assistance of that person.[72]

14.23 GRETA reports refer to factors including the age of the person,[73] inadequate medical care available in the country of origin,[74] family ties, work or studies.[75] Furthermore, presence in the country can be justified by the personal situation such as a need for medical recovery.[76] The Ukrainian law foresees also a residence permit 'in case the responsible authorities have reasonable grounds to believe that the victim's life, physical or mental health or freedom and integrity would be threatened upon the victim's return to the country of origin'.[77]

14.24 Several State Parties follow the approach to issue a residence permit in both situations. In Luxembourg, for instance, personal circumstances are explicitly mentioned in the law as possible grounds for granting a residence permit.[78] As shown in the GRETA reports, numerous States in principle grant a residence in case of Article 14(1)(b), but the legislation in place also foresees an exception based on humanitarian reasons. For example, Germany could grant a permit beyond the requirement of co-operation with authorities in case of urgent humanitarian or personal grounds or substantial public interest or family reunification.[79] Hungary formulates specific exceptions: a permit on humanitarian grounds can be granted for third-country nationals who have been subjected to particularly exploitative working conditions or to foreign nationals who are under 18 years of age and who were employed illegally in Hungary.[80]

14.25 Human rights obligations require States to offer unconditional residence, which goes beyond the standard as defined in Article 14. Due to the wording of Article 14, GRETA regularly reminds Parties that there would be the possibility to choose or to adopt both grounds for residence simultaneously. At the same time though, GRETA stresses that 'granting a

70 *PK (Ghana) v Secretary of State for the Home Department* [2018] EWCA Civ 98, para 44.
71 Ibid, para 50.
72 Ibid, para 51.
73 GRETA, *Report on Ireland*, I GRETA(2013)15, paras 200, 204.
74 GRETA, *Report on Switzerland*, I GRETA(2015)18, paras 154–155. See further *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 313 (IAC), where the Upper Tribunal (Immigration and Asylum Chamber) of the United Kingdom referred to Art 14 of the CoE Convention against Trafficking, in particular to the state of health in relation to the personal situation and decided that 'to return the appellant to Tanzania in her present state of health would, having regard to her personal situation, be unreasonable (…)', para 67 of [2013] UKUT 313 (IAC).
75 GRETA, *Report on Finland*, I GRETA(2015)9, para 180.
76 GRETA, *Report on Poland*, II GRETA(2017)29, paras 142–143.
77 GRETA, *Report on Ukraine*, I GRETA(2014)20, paras 168–169.
78 GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 117. Further States are for instance: GRETA, *Report on Finland*, I GRETA(2015)9, para 180; GRETA, *Report on Italy*, I GRETA(2014)18, paras 157–158; GRETA, *Report on Poland*, II GRETA(2017)29, paras 142–143; GRETA, *Report on Spain*, II GRETA(2018)7, paras 197–198; GRETA, *Report on the United Kingdom*, II GRETA(2016)21, paras 223–224.
79 GRETA, *Report on Germany*, I GRETA(2015)10, para 163.
80 GRETA, *Report on Hungary*, I GRETA(2015)11, para 164. Further examples are for instance GRETA, *Report on Estonia*, I GRETA(2018)6, para 158; GRETA, *Report on Greece*, I GRETA(2017)27, paras 173, 175; GRETA, *Report on Iceland*, I GRETA(2014)17, paras 148–150; GRETA, Report on *Sweden*, II GRETA(2018)8, para 150; GRETA, *Report on Switzerland*, I GRETA(2015)18, paras 154–155.

residence permit on account of the personal situation (…) tallies with the human-rights based approach to combating THB'.[81] The reminder is often followed by an invitation to 'grant temporary residence permits to victims of THB on the basis of their personal situation, in addition to the residence permit on the basis of the victim's co-operation (…)'.[82]

(b) Residence for the purpose of co-operation with competent authorities in investigation or criminal proceedings

14.26 Article 14 (1)(b) formulates an obligation of State Parties to issue a residence permit when 'the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities'. The term 'co-operation' is not further defined, hence it is left to the States' discretion how much involvement is needed in order to assess the stay as 'necessary'.[83]

14.27 Consequently, State Parties apply this requirement differently. GRETA's assessments help to define in which range 'co-operation' is understood as fulfilling the CoE Convention against Trafficking. Several States apply a rather low threshold: Belgium considers the requirement of co-operation as satisfied when the victim provided relevant factual information without necessarily making an official statement or filing a complaint.[84] In Spain it is sufficient if the information is potentially useful for the investigation or prosecution.[85] At the other end of the spectrum of different applications, GRETA clearly interprets that tying further additional elements to the requirement of co-operation is going beyond the meaning of the CoE Convention against Trafficking. For example, in Slovenia, a victim has to co-operate as a witness in criminal proceedings and in addition to that, the testimony has to be considered important by the relevant authority.[86]

14.28 A further example for tying additional elements to the requirement of co-operation is the requirement of a declaration from the relevant authorities that the presence of the victim is necessary for the investigation or prosecution.[87] In Germany, the victim has to declare his or her willingness to testify as a witness in the criminal proceedings, but in addition, the public prosecutor or the criminal court have to consider the presence of the victim 'to be appropriate in connection with criminal proceedings (…) because it would be more difficult to investigate the facts of the case without his or her information'.[88] Hence, issuing a residence permit also

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81 GRETA, *Report on Armenia*, II GRETA(2017)1, para 131. See for instance also GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 161; GRETA, *Report on Estonia*, I GRETA(2018)6, para 158; GRETA, *Report on Ireland*, II GRETA(2017)28, para 172.

82 GRETA, *Report on Ireland*, II GRETA(2017)28, para 172. See further for instance GRETA, *Report on Estonia*, I GRETA(2018)6, para 160; GRETA, *Report on Germany*, I GRETA(2015)10, para 171.

83 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 135. Also the Explanatory Report rather confusingly mentions that the co-operation model has been introduced because 'victims are deterred from contacting the national authorities by fear of being immediately sent back to their country of origin', which would be rather an argument for unconditional residence, see Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 185.

84 GRETA, *Report on Belgium*, II GRETA(2017)26, para 143.

85 GRETA, *Report on Spain*, II GRETA(2018)7, para 198.

86 GRETA, *Report on Slovenia*, I GRETA(2013)20, para 132. GRETA, *Report on Slovenia*, II GRETA(2017)38, para 128.

87 GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 129.

88 GRETA, *Report on Germany*, I GRETA(2015)10, para 160.

depends on the value of the testimony as additional element.[89] A declaration of relevant authorities in addition to the willingness to co-operate clearly forms an additional element that can be assessed as going beyond the meaning of co-operation in Article 14(1)(b).

14.29 To be in line with the CoE Convention against Trafficking, the national legislation regulating the residence permit should refer to 'co-operation'. Reference to the requirements of lodging a complaint or testifying is, according to GRETA, narrower than the meaning of the term 'co-operation'.[90]

14.30 Legislation that regulates the issuing of a residence permit for trafficked persons has to be well-tailored to the particular situation of trafficked persons, otherwise inconsistencies with other existing immigration regulations emerge. Trafficked persons can lack identification documents, hence the requirement of valid identification documents can form a challenge for them.[91] Furthermore, high costs of applications for residence permits to be borne by trafficked persons or NGOs assisting them are a practical barrier.[92] Another example is the requirement of being exempted from administrative responsibility for irregular residence in order to obtain a residence permit.[93] Challenges like that can hamper the fulfilment of the obligation to issue a permit based on the personal situation or in case of co-operation with the competent authorities.

2. The length of the residence permit

14.31 Article 14 does not define the duration of the residence permit, hence application of the State Parties differ as the reports issued by GRETA show. For example, in Switzerland the residence permit is issued for the likely duration of the criminal proceedings.[94] In France, a residence permit valid for 10 years requires conviction of the perpetrators.[95] Differently, permanent residence in Belgium can be granted irrespective of whether the judicial proceedings resulted in a conviction or not, but the trafficked person's statement had to be significant in the judicial proceedings.[96] Permanent residence is granted in the Netherlands for instance, when the person co-operated and the proceedings lasted for over three years.[97]

14.32 Reasons listed for withdrawal of a residence permit are for instance that the trafficked person renews contact with the perpetrator, she or he ceases to co-operate, the co-operation is deemed fraudulent, the withdrawal is necessary due to public policy or the national security or when the competent authorities decide to discontinue the proceedings.[98] State Parties that are not bound

89 Ibid., para 165.
90 GRETA, *Report on France*, II GRETA(2017)17, para 188.
91 GRETA, *Report on Norway*, I GRETA(2013)5, para 204; GRETA, *Report on Spain*, II GRETA(2018)7, para 201.
92 GRETA, *Report on France*, I GRETA(2012)16, para 171.
93 GRETA, *Report on Spain*, I GRETA(2013)16, para 207.
94 GRETA, *Report on Switzerland*, I GRETA(2015)18, para 154.
95 GRETA, *Report on France*, II GRETA(2017)17, para 187.
96 GRETA, *Report on Belgium*, II GRETA(2017)26, para 142.
97 GRETA, *Report on the Netherlands*, II GRETA(2018)19, para 166.
98 See, e.g., GRETA, *Report on Latvia*, II GRETA(2017)2, para 141; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 121. See further Art 14 of Dir 2004/81/EC.

by Dir 2004/81/EC also apply these reasons.[99] Further reason for revoking can also be dependence on welfare benefits, but trafficked persons are exempted in case this is caused by a trafficking-related trauma.[100]

3. The residence permit and the 'right to seek and enjoy asylum'

14.33 Granting a residence permit 'shall be without prejudice to the right to seek and enjoy asylum'.[101] Hence, the right to seek and enjoy asylum cannot be precluded by the fact of being a victim of trafficking. State Parties therefore have to ensure that victims of trafficking have 'appropriate access to fair and efficient asylum procedures'.[102] This includes that there is legal counselling available on the possibility to lodge an asylum claim and that claims of trafficked persons are examined on their merits in regular procedures due to their complexity.[103] Consequently, a reconciliation of the framework dealing with the identification of trafficked persons and granting access to assistance and the framework of international protection and its procedures is necessary and those frameworks should not be seen as isolated, separated procedures.[104] As to the application in practice, GRETA identified a lack of data on how often asylum is granted where the persecution feared is linked to trafficking in human beings.[105] Furthermore, GRETA identifies frictions between the frameworks on trafficking in human beings and on asylum, such as for instance in Norway, where the recovery and reflection period is incompatible with an asylum application.[106]

4. The residence permit for child victims

14.34 Acting in accordance with the best interests of the child means that the decision-making process concerning a child must include an evaluation of the possible impact of the decision.[107] When assessing and determining the best interests of the child, several factors have to be taken into account, for instance the child's views, family environment, care, protection and safety of

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99 See, e.g., GRETA, *Report on North Macedonia*, II GRETA(2017)39, para 131.

100 GRETA, *Report on Switzerland*, I GRETA(2015)18, para 157.

101 CoE Convention against Trafficking, Art 14(5).

102 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 377. See further UNHCR, *Guidelines on international protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07, 7 April 2006, para 45 and UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Guideline 2.7.

103 UNHCR, *Guidelines on international protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07, 7 April 2006, para 45.

104 See N Frei and C Hruschka, 'Access to Asylum for Victims of Trafficking under a Human Rights-based Approach' in M O'Sullivan and D Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Oxford: Hart Publishing 2017) 290 and 295. Frei and Hruschka suggest implementing a 'clearing procedure' similar to procedures already in place for unaccompanied minor applicants.

105 GRETA, *5th General Report on GRETA's Activities* (2016) 40.

106 GRETA, *Report on Norway*, II GRETA(2017)18, para 123. See also GRETA, *Report on Ireland*, II GRETA(2017)28, para 126. GRETA urged to monitor the relationship between asylum and trafficking in human beings to ensure that the right to seek and enjoy asylum does not impede identification as a victim of trafficking.

107 UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, 29 May 2013, 2.

the child and situation of vulnerability.[108] Hence, based on the CRC, it is defined, how State authorities should apply the principle of acting in the best interest of the child. Consequently, there should be a difference in the procedure between trafficked children and adults. However, analysis of the application based on the reports of GRETA shows that generally only concerning a few State Parties substantial information regarding the residence permit for children is available.[109]

14.35 The child's best interest should take precedence over the two requirements of co-operation with the authorities and the personal situation.[110] As clearly stressed in relation to Germany, State Parties have to ensure that 'child victims of trafficking may be granted a residence permit on the basis of their best interests and not on the basis of their willingness or ability to co-operate with judicial bodies'.[111]

108 Ibid., 7–9.

109 See for instance GRETA, *Report on Belgium*, II GRETA(2017)26, paras 146–148; GRETA, *Report on Germany*, I GRETA(2015)10, paras 168 and 170; GRETA, *Report on Sweden*, I GRETA(2014)11, para 167; GRETA, *Report on Spain*, I GRETA(2013)16, para 216. See also GRETA, *Thematic Chapter of the 6th General Report on GRETA's Activities* (2018) 32.

110 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 186.

111 GRETA, *Report on Germany*, I GRETA(2015)10, para 170.

ARTICLE 15

COMPENSATION AND LEGAL REDRESS

Barbara Linder

1 Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.

2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

3 Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.

4 Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23.

A. INTRODUCTION

Article 15 of the Council of Europe Convention on the Action against Trafficking in Human Beings[1] aims at ensuring that victims of trafficking in human beings have access to a remedy for the harm suffered. It contains four paragraphs. Article 15(1) ensures the right to legal information, 15(2) refers to the right to legal assistance and the possibility of getting legal aid, 15(3) covers the right to receive compensation from the perpetrator and 15(4) requires State Parties to guarantee compensation if the latter cannot, or not fully, be obtained from the perpetrator. **15.01**

Compensation is one form of reparation. The rules concerning remedies and reparations for victims of human rights violations are defined in the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[2] They state that remedies should be proportional to the gravity of the harm suffered and the circumstances of the case.[3] They list all forms of reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[4] **15.02**

> Compensation should be provided for any economically assessable damage […] resulting from [violations] such as: (a) physical or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage, and (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[5]

B. DRAFTING HISTORY

1. General changes

In the first drafts of the Convention, compensation and legal redress were discussed under Article 11.[6] It set out that: **15.03**

> 1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that victims are promptly informed by competent authorities on relevant court and administrative proceedings. In particular, each Party shall provide in its internal law for the right to legal assistance,

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 UNGA, *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006.

3 Ibid., paras 15 and 18.

4 Ibid., paras 8, 15–23.

5 Ibid., para 20.

6 CAHTEH, *Revised Preliminary Draft of the European Convention on Action against Trafficking in Human Beings*, CAHTEH (2003) 9, 27 November 2003, 8; CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, 42; CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, 48; CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, 48.

as enshrined in Article 6 of the Convention for the protection of Human Rights and fundamental freedoms, and for the right to compensation for victims.

2. Each Party shall adopt such legislative and other measures as may be necessary to ensure that assets resulting from the application of measures provided in Article 23 are used, as a first priority, to pay any compensation claims for victims and/or fund victims' support organisations.[7]

During the 6th Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting, the Committee decided to reorder chapter III and Article 11 became Article 15.[8] It was ultimately adopted with significant modifications compared to the initial draft.

15.04 The reference to 'law enforcement authorities' in paragraph 1 was replaced by a reference to 'competent authorities'[9] as law enforcement authorities are not always the first ones to come in contact with victims.[10] It was also added that information must be provided in a language understandable to victims, allowing them to make properly informed decisions to initiate proceedings of whatever sort.[11]

15.05 In an early recommendation adopted prior to the drafting of the Convention, the Parliamentary Assembly of the Council of Europe recommended linking the right to compensation with the authorisation to a victim of human trafficking to stay in the country concerned.[12] Ultimately, this reference was only included in the Explanatory Report, which requires states to inform victims on the possibility of obtaining a residence permit to remain in the country during proceedings about compensation.[13]

2. Legal assistance and legal aid

15.06 During the drafting process, the discussions revolved around the nature of legal assistance and the question of whether free legal aid should be granted automatically to every victim of trafficking. The first draft of the Convention required that 'each Party shall provide in its internal law for the right to legal assistance, as enshrined in Article 6 of the [ECHR] […]'.[14] Many delegations criticised this reference, noting that Article 6(3)(c) concerned only the rights of a defendant during the criminal procedure, which were not necessarily transferrable to a

7 CAHTEH(2003)9, 8.
8 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH (2004)RAP6, 11 October 2004, 48.
9 CAHTEH, *5th meeting – Meeting Report*, CAHTEH (2004) RAP5, para 120.
10 Ibid.
11 CAHTEH, *Council of Europe Draft convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 8; Parliamentary Assembly, *Opinion No. 253 (2005) on the Draft Council of Europe Convention on Action against Trafficking in Human Beings*, 26 January 2005, 4.
12 Parliamentary Assembly of the Council of Europe, Recommendation No. 1545 (2002) Campaign against trafficking in women, 21 January 2002, para 10 (ix)(d).
13 CAHTEH, *Draft explanatory report concerning provisions which have been examined in the second reading*, CAHTEH (2004) 20, 23 September 2004, para 119.
14 CAHTEH (2003) 9, 8; Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 192.

victim of trafficking.[15] The Committee justified this reference with the case law of the European Court of Human Rights (ECtHR) maintaining that, under certain circumstances, Article 6 also provided for legal assistance in civil cases (judgment in *Airey v. Ireland*, 9 October 1979). Moreover, it noted that the ECtHR had interpreted Article 6(1) of the ECHR as a basis for securing the right to have any claim relating to civil rights brought before a court or tribunal.[16] It emphasised that the ECtHR had acknowledged that the right to effective access to a court might in some circumstances necessitate free assistance by a lawyer provided on the basis of legal aid according to the internal law of the State Party.[17] However, during the 5th CAHTEH meeting, the Committee decided to move the explicit reference to Article 6 of the ECHR from the text of the Convention to the Explanatory Report.[18]

15.07 Some delegations required 'legal assistance for victims or, if they have not sufficient means to pay for legal assistance, the possibility to be given it free', others objected to this proposal.[19] The United Kingdom (UK) delegation, for example, raised the objection that 'free legal assistance' would have a 'disproportionate financial impact on destination countries'.[20] During the 5th CAHTEH meeting, the Committee adopted a text, based on a proposal of the European Commission,[21] according to which each Party 'shall provide, in its internal law, for the right to legal assistance for victims and for the conditions under which the victim may benefit from free legal aid'.[22] Amnesty International and Anti-Slavery International called for the right to access to justice and that legal aid is made available to all trafficked persons. Both organisations were concerned that if legal aid was only granted in accordance with national laws, a trafficked person's access would depend on practice in individual states.[23] The 8th CAHTEH meeting was dedicated to an in-depth discussion on the introduction of a right to 'free legal assistance'.[24] The Committee referred to the judgment in *Steel and Morris v. United Kingdom*, in which the ECtHR held that:

15 CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Norway and by the observer Mexico*, CAHTEH(2003)8 rev 2, Addendum II, 1 December 2003, 6; CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Sweden and by the observer of International Labour Office*, CAHTEH (2003) 8 rev.2 Addendum I, 1 December 2003, 5; CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Switzerland*, CAHTEH (2004) 1 Addendum II, 29 January 2004, 7; CAHTEH, *2nd meeting (8–10 December 2003) – Meeting Report*, CAHTEH(2003)RAP2, 26 January 2004, 15–16.

16 See judgment in *Golder v. United Kingdom*, App no 4451/70 (ECtHR, 21 February 1975).

17 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 63; CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, 17.

18 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, 17.

19 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004, 7.

20 Ibid, 29–30.

21 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 121.

22 Ibid., 48.

23 CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by Non-Governmental Organisations, Additional Comments by Amnesty International and Anti-Slavery Organisation*, CAHTEH(2004)17 Addendum IV, 30 August 2004, 10; Amnesty International and Anti-Slavery Organisation, *Council of Europe: Recommendations to Strengthen the December 2004 Draft European Convention on Action against Trafficking in Human Beings*, IOR61/001/2005 (January 2005), 13.

24 CAHTEH, *8th meeting (22–25 February 2005) – Final meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, para 52.

> [t]he question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself or herself effectively.[25]

However, at the end of the meeting, the Committee decided not to amend Article 15(2) and to require automatic legal aid but to allow states to make it available according to their internal legal provisions.[26]

3. Right to compensation from the perpetrator and funding of compensation

15.08 The right to compensation from the perpetrator, initially included in paragraph 1, became enshrined in paragraph 3 of Article 15, which refers explicitly to compensation by the perpetrator.[27] Since the beginning of the drafting process, it was clear that victims must be assured of the possibility of taking their claims to civil courts in cases where criminal courts do not have the power to determine civil liability of the accused.[28] The Organization for Security and Co-operation in Europe (OSCE) delegation proposed unsuccessfully additional points on procedure, requiring states to ensure that victims obtain 'a decision within a reasonable time in the course of criminal or civil proceedings, from the trafficker or from the State Party, for instance through a compensation fund for victims […]'.[29]

4. Extent of redress

15.09 In Recommendation 1545 (2002) on a campaign against trafficking in women, the Parliamentary Assembly had already recommended that 'a right to compensation, insertion and rehabilitation'[30] should be included. During the drafting process of the Convention, NGOs wanted not only compensation to be mentioned, but all internationally recognised elements of reparation, including restitution, rehabilitation, satisfaction and guarantees of non-repetition.[31] Yet, the final version of the Convention provides only for monetary compensation for the harm suffered.

15.10 There were also discussions on which kinds of harm should be compensated. In the 2nd CAHTEH meeting, it was agreed that the Explanatory Report should state that compensation would cover 'material detriment (the cost of medical treatment, for example) and non-material injury'.[32] The OSCE delegation suggested that non-material damages should also include the 'suffering due to psychological and physical distress, compensation for material losses or

25 *Steel and Morris v. UK*, App no 6841/01 (ECtHR, 15 February 2005), para 61.
26 CAHTEH, *8th meeting (22–25 February 2005) – Final meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, para 52 and Appendix III.
27 CAHTEH, *5th meeting – Meeting Report*, CAHTEH(2004)RAP5, para 123.
28 CAHTEH(2004)20, paras 120 and 123.
29 CAHTEH(2004)13, 43.
30 Parliamentary Assembly, Recommendation No. 1545 (2002) Campaign against trafficking in women, 21 January 2002, para 10(ix)(d).
31 CAHTEH(2004)17 Addendum IV, 30 August 2004, 10; Amnesty International and Anti-Slavery Organisation, *Council of Europe: Recommendations to Strengthen the December 2004 Draft European Convention on Action against Trafficking in Human Beings*, IOR61/001/2005 (January 2005), 13–14.
32 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 64.

withheld earnings'.[33] The preliminary draft of the Explanatory Report finally specified that compensation was pecuniary covering both 'material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced)'.[34] This explanation was included in the final Explanatory Report.[35]

5. Compensation guarantee

15.11 Already during the first meetings, the states agreed on the need to guarantee compensation for victims. The means of guaranteeing compensation should be left to the State Parties, a compensation fund was suggested as one option.[36] The Italian delegation noted that the measures taken by the state might also include programmes aimed at social assistance and social integration of victims.[37] This suggestion was included in the Convention.[38]

15.12 State parties should establish a legal basis for compensation, an administrative framework and operational arrangements for compensation schemes.[39] Assets of criminal origin were mentioned as a potential source for funding a compensation fund or measures for social assistance and integration of victims.[40] Some delegations requested more openness with regard to the way State Parties would ensure the funding of compensation in their national systems.[41] Mexico noted that not all national legislations would allow confiscated proceeds of crime to be used in this way.[42] The UK delegation was concerned that the wording on a right to compensation, if too vague, 'would bring any victim of trafficking within the scope of a compensation scheme – even where they had suffered no injury through violence or sexual assault as a result of the trafficking and potentially where a case of trafficking is never brought before the courts'.[43] The State Party responsible for guaranteeing compensation should be the one with jurisdiction over the offence.[44] Amnesty International and Anti-Slavery International urged, unsuccessfully though, that the guarantee of reparation be independent of the identification, arrest, charge or punishment of the perpetrator.[45]

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33 CAHTEH(2004)13, 43.
34 CAHTEH(2004)20, para 124.
35 Council of Europe, *Explanatory Report – CoE Convention against Trafficking in Human Beings*, CETS No. 197, para 197.
36 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 65; CAHTEH, *3rd meeting – Meeting Report*, CAHTEH(2004)RAP3, 42. The modalities of the guaranteed compensation were not yet defined at this stage.
37 CAHTEH(2004)13, 9.
38 CAHTEH, *8th meeting – Final meeting report*, CAHTEH(2005)RAP8, 52.
39 CAHTEH (2004)20, para 125.
40 Ibid.
41 CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Sweden and by the observer of International Labour Office*, CAHTEH (2003) 8 rev.2 Addendum I, 1 December 2003, 5, CAHTEH(2004)13, 18.
42 CAHTEH(2003)8 rev 2, Addendum II, 6.
43 CAHTEH(2004)13, 30.
44 CAHTEH, *2nd meeting – Meeting Report*, CAHTEH(2003)RAP2, para 66.
45 Amnesty International and Anti-Slavery Organisation, *Council of Europe: Recommendations to Strengthen the December 2004 Draft European Convention on Action against Trafficking in Human Beings*, IOR61/001/2005 (January 2005), 14.

C. ARTICLE IN CONTEXT

1. Procedural matters: the right to information, legal assistance and legal aid

15.13 The Palermo Protocol[46] requires State Parties to ensure victims are provided 'in appropriate cases' with 'information on relevant court and administrative proceedings'.[47] However, it does not require explicitly that victims be provided with legal assistance when traffickers are prosecuted.

15.14 The Recommended Principles and Guidelines on Human Rights and Human Trafficking refer to an 'entitlement to such information, assistance and immediate support [which] is not discretionary but is available as a right for all persons who have been identified as trafficked'. They require states to provide information in a language the victim understands as well as legal and other assistance that allows victims to access remedies.[48] The Basic Principles on the Right to an Effective Remedy for Trafficked Persons require states to provide trafficked persons with information on their rights, available remedies and procedures for obtaining remedies.[49]

15.15 Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime[50] states that victims have the right to access legal aid when they have the status of parties to criminal proceedings. Furthermore, victims should get their expenses reimbursed when participating in criminal proceedings.[51] Conditions for both shall be determined by national law. Article 12(2) of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims requires states to ensure that victims:

> have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.[52]

In relation to state compensation schemes, Directive 2004/80/EC relating to compensation of crime victims[53] refers to ensuring access to information on the possibilities to apply for

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46 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

47 Palermo Protocol, Art 6(2).

48 UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on human rights and human trafficking*, E/2002/68/Add.1, 20 May 2002, Guideline 4 (8) and Guideline 9.

49 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/69/269, 6 August 2014, Annex para 7(c).

50 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315/57) (thereinafter EU Victims' Rights Directive).

51 EU Victims' Rights Directive, Arts 13 and 14.

52 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU), para 12 (2).

53 Directive 2004/80/EC of the Council of the European Union on 29 April 2004 relating to compensation to crime victims (OJ L 261/15) (thereinafter Dir 2004/80/EC).

compensation and to receive general guidance and information on the application for compensation for victims of crimes of cross-border situations.[54]

15.16 Some of the above-mentioned instruments include child specific standards in compensation procedures that are based on Article 12 of UN Convention of the Rights of the Child (CRC),[55] for example, the Guidelines on justice in matters involving child victims and witnesses of crime or specific guidelines elaborated by UNICEF.[56] The Recommended Principles and Guidelines on Human Rights and Human Trafficking require State Parties to adopt 'measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation'.[57] Children should also be provided with appropriate legal assistance by appropriately trained persons.[58] The Basic Principles on the Right to an Effective Remedy for Trafficked Persons require states to ensure the child's effective access to information including services, entitlements, family reunification and the child's right to express his/her views freely in all matters affecting the child.[59] The CoE Convention against Trafficking does not explicitly refer to children in Article 15, but promotes an underlying 'child-rights approach' to all anti-trafficking measures.[60]

2. Substantive matters: compensation from the perpetrator, compensation guarantee by the state

15.17 The UN Convention against Transnational Organised Crime requires states to provide procedures for compensation and restitution for victims of offences.[61] Again, the Palermo Protocol obliges State Parties to ensure that their 'domestic legal system contains measures that offer victims […] the possibility of obtaining compensation for damage suffered'.[62] The CoE Convention against Trafficking has raised the standard set by the UN Convention and its Protocol substantially by introducing an obligation to ensure access to compensation *in all cases*. In contrast to the UN Convention, it requires states not only to establish procedures but also to guarantee compensation. Its regulations on compensation and redress are also more specific and more victim protection oriented than the ones in the Palermo Protocol, which, for example, does not require legal assistance or legal aid to be provided to victims.

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54 Dir 2004/80/EC, Arts 4 and 5.

55 UN Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, entered into force 2 September 1990.

56 ECOSOC Resolution 2005/20, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, Annex, 22 July 2005. See further UNICEF, *Guidelines for protection* of *the Rights of Child Victims of Trafficking in Southeastern Europe* (UNICEF 2003) section 3.9.2: 'Law enforcement authorities should undertake to ensure that child victims are provided with appropriate access to justice and fair treatment, restitution and compensation including prompt redress.' See also UNICEF, *Guidelines on the Protection of Child Victims of Trafficking* (UNICEF 2006) 33: 'Law enforcement authorities should adopt measures necessary to protect the rights and interests of child victims at all stages of judicial proceedings against alleged offenders, and during procedures for obtaining compensation.'

57 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Guideline 8 para 8.

58 Ibid., Guideline 8 paras 6 and 10.

59 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/69/269, 6 August 2014, Annex para 18.

60 See, Preamble of the CoE Convention against Trafficking.

61 United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, Art 25.

62 Palermo Protocol, Art 6 (6).

15.18 The European Convention on the Compensation of Violent Crimes[63] refers to all international crimes of violence entailing impairments of health.[64] It requires the State Party to contribute to the compensation of victims who have 'sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence' in situations where compensation is not fully available from other sources.[65] However, the state should only pay compensation where it is not available from other sources, for example, the offender or social security. If a victim is in urgent need and cannot await the outcomes of the proceedings, State Parties might subrogate in the victim's rights and reclaim the amount of money awarded.[66] Compensation should also be awarded if the perpetrator cannot be prosecuted or punished.[67] It should cover at least the 'loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance'.[68] Thereby the Convention on the Compensation of Violent Crimes sets certain minimum standards for compensation.

15.19 According to the Recommended Principles and Guidelines on Human Rights and Human Trafficking victims should 'have an enforceable right to fair and adequate remedies, including the means for as full a rehabilitation as possible'.[69] Also the Basic Principles on the Right to an Effective Remedy for Trafficked Persons require states to ensure that victims have a 'legally enforceable right to have access to remedies (…) irrespective of the victim's immigration status (…)'.[70] Remedies 'may include restitution, compensation, recovery, satisfaction, and guarantees of non-repetition'.[71] They require State Parties also to ensure adequate victim protection during judicial proceedings or to offer non-judicial ways of compensation. Both sets of Principles take a broader approach to remedies and limit them not only to compensation as suggested by the Convention.

15.20 Article 17 of the Directive 2011/36/EU on preventing and combatting trafficking specifies that member states shall 'ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent'.[72] The Directive has requirements similar to the CoE Convention against Trafficking while leaving considerable discretion to the State Parties on how to transpose them in their national justice system. The EU Directive 2009/52/EC does not explicitly mention the term 'compensation' but elaborates

63 Council of Europe, *European Convention on the Compensation of Victims of Violent Crimes*, No. 116, 24 November 1983, entered into force 1 February 1988.
64 Ibid., Preamble.
65 Ibid., Art 2(1) and (2).
66 Council of Europe, *Explanatory Report, ETS 116, Compensation of Victims of Violent Crimes*, Art 2.
67 Ibid., Art 2(1) and (2).
68 Ibid., Art 4.
69 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add. 1, 20 May 2002, Guideline 9, Principle 17.
70 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/69/269, 6 August 2014, Annex para 7(a).
71 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Joy Ngozi Ezeilo, A/HRC/17/35, 13 April 2011, para 1.
72 Dir 2011/36/EU, Art 17.

on the payments an employer is liable to pay to an 'illegally employed third-country national'.[73] Since the Directive focuses on employment relationships, the elements of compensation that workers may obtain from the employer are defined in precise detail. Yet, in contrast to the CoE Convention against Trafficking, it does not cover non-material compensation.

3. Access to compensation and residence

15.21 A frequent challenge to obtain compensation is that trafficked persons are not allowed to stay in a country until a judgment is passed or becomes definitive.[74] This is addressed by the Recommended Principles and Guidelines on Human Rights and Human Trafficking that recommend State Parties make arrangements 'to enable trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings'.[75] Also, according to the Basic Principles on the Right to an Effective Remedy for Trafficked Persons states, should provide a residence status 'to allow the victim of trafficking to exercise his or her right to remain during proceedings (…)'.[76] Trafficked persons should be allowed to remain in the country for the duration of any criminal, civil labour or administrative proceedings, and guaranteed that the provisions of any judgment specifying reparation can be enforced, including when the judgment is made in a country where the victim is not (or is no longer) located.[77]

15.22 The EU Council Directive 2004/81/EC on the residence permit issued to victims of trafficking in human beings from third-countries[78] does not explicitly refer to the pursuit of compensation claims as ground for residence. According to the Employers' Sanctions Directive, States have to define at national level the conditions under which residence permits can be extended until the back-payments are completed.[79]

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73 Directive 2009/52/EC of the European Parliament and of the Council on 18 June 2009 on minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ L 168/24) (thereinafter Employers' Sanctions Directive), Art 6(1).

74 La Strada International, Anti-Slavery International, *European Action for Compensation for Trafficked Persons (comp.act): Findings and results* (2012) 14, 25, 48, 49 and *Guidance on representing trafficked persons in compensation claims*, 8–9.

75 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Guideline 9.

76 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/69/269, 6 August 2014, Annex para 7(d).

77 UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Joy Ngozi Ezeilo, A/HRC/17/35, 13 April 2011, para 9.

78 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261/19).

79 Dir 2009/52/EC, Art 6(5). The purpose of Dir 2004/80/EC is to ensure that victims of crime can submit applications for compensation based on the state compensation scheme in their member state of residence, when the crime happened in a different member state; hence, residence in the country in which the crime has happened is not dealt with in this instrument.

D. ISSUES OF INTERPRETATION

1. Access to information on how to seek compensation via judicial and administrative proceedings

15.23 Article 15(1) requires states to ensure that victims are, from their first contact with the competent authorities, provided with information on relevant judicial and administrative proceedings, or any other procedures they can use to obtain compensation in a language they can understand. The underlying rationale is that they can only claim rights, including their right to compensation, if they know them.[80] Victims whose residence in a country has no legal basis are particularly at risk of not receiving adequate information and access to legal assistance.[81] One reason is for instance that undocumented migrants are discouraged in the first place to report a crime because information might be shared with immigration authorities.[82]

15.24 Whereas Article 15(1) requires to provide information about procedures to be used to obtain compensation,[83] Article 12 of the CoE Convention against Trafficking obliges to provide broader information including information on legal rights (in particular the right to information, the right to a lawyer, the right to remedy, and the right to privacy), the different legal options and their outcomes, the forms of legal redress or the functioning of the criminal justice system.[84]

15.25 GRETA has, on several occasions, emphasised the importance of systematically providing understandable information to victims in order to enable them to claim compensation.[85] It has equally noted that many victims do not speak the local language and that there is still a need for more information to be provided to victims, including children, on the rights and implications of being recognised as a victim.[86]

15.26 'Competent authorities' include all public authorities with whom victims may have their first contact, in particular, the police, the labour inspectorate, the prosecutor's office, customs or immigration services. It does not necessarily have to be these authorities that provide victims with adequate information; they might also refer them to other organisations such as specialised NGOs.[87]

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80 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 192.
81 GRETA, *8th General Report on GRETA's Activities*, May 2019, 7.
82 Joëlle Milquet, *Strengthening victims' rights: from compensation to reparation – Report of the Special Adviser, J. Milquet, to the President of the European Commission, Jean-Claude Juncker* (March 2019) 62.
83 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 192.
84 Ibid., para 160. See also UN General Assembly, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Joy Ngozi Ezeilo, A/HRC/17/35, 13 April 2011, para 45; UNODC, *Model Law against Trafficking in Persons*, 5 August 2009, Art 19.
85 See e.g., GRETA, *Report on Armenia*, II GRETA(2017)1, para 138; GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 164; GRETA, *Report on Austria*, II GRETA(2015)19, para 148; GRETA, *Report on Belarus*, I GRETA(2017)16, para 160; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 138; GRETA, *Report on Bulgaria*, I, GRETA(2011)19, para 190; GRETA, *Report on Estonia*, I GRETA(2018)6, para 169; GRETA, *Report on Georgia*, II GRETA(2016)8, para 153.
86 GRETA, *8th Report on GRETA's Activities*, para 166.
87 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 194.

GRETA has emphasised that the issue of victim compensation should be included in training programmes for lawyers, law enforcement officials, prosecutors and the judiciary (including labour tribunals and appeal courts).[88] Prosecutors should request compensation orders to the largest extent possible[89] and judges should consider compensation claims in criminal proceedings.[90] **15.27**

Article 15(1) refers to all proceedings by which compensation can be obtained within the national system of a respective country. Administrative proceedings refer to authorities which may have a special responsibility for compensating victims.[91] Relevant proceedings encompass information on criminal or civil proceedings, but also procedures on issuing a residence permit which is frequently an administrative matter but might be subject to judicial review.[92] **15.28**

2. Residence during compensation proceedings

Article 15 does not refer to the issue of a victim's possibility to remain in the country for the duration of the compensation proceedings. However, the Explanatory Report on Article 15 emphasises that especially for victims of trafficking who have no legal entitlement to be in the country concerned it is essential they be informed about the possibility of obtaining a residence permit in accordance with Article 14 of the CoE Convention against Trafficking, which provides an important precondition for obtaining compensation.[93] Article 14 of the CoE Convention against Trafficking shows a victim protection gap concerning the pursuit of a civil claim for compensation as a ground for residence.[94] A victim-centred and human rights-based approach require an extension of the duration of the permit to all compensation proceedings.[95] **15.29**

GRETA has highlighted the particular difficulty for victims of trafficking who have no legal entitlement to be in the country concerned to claim compensation. It is often linked to the limited time victims are allowed to stay in the country which is usually not long enough to obtain compensation from the trafficker or the state.[96] GRETA therefore considered that **15.30**

88 See e.g., GRETA, *Report on Albania*, II GRETA(2016)6, para 142; GRETA, *Report on Armenia*, II GRETA(2017)1, para 138; GRETA, *Report on Belarus*, I GRETA(2017)16, para 160; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 138; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 173; GRETA, *Report on Cyprus*, II GRETA(2015)20, para 116; GRETA, *Report on Greece*, I GRETA(2017)27, para 188; GRETA, *Report on Hungary*, I GRETA(2015)11, para 173.

89 GRETA, *Report on Cyprus*, II GRETA(2015)20, para 116; GRETA, *Report on Poland*, I GRETA(2013)6, para 189; GRETA, *Report on Serbia*, II GRETA(2017)37, para 159; GRETA, *Report on Slovak Republic*, II GRETA(2015)21, para 139; GRETA, *Report on United Kingdom*, I GRETA(2012)6, para 298.

90 GRETA, *Report on Serbia*, II GRETA(2017)37, para 159.

91 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 193.

92 Ibid.

93 Ibid., paras 192, 193.

94 Lorna McGregor, 'The Right to a Remedy and Reparation for Victims of Trafficking in Human Beings', in Ryszard Piotrowicz, Conny Rijken, Baerbel Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2017) 269. Art 14(1)(b) of the CoE Convention against Trafficking does not explicitly extend the duration of the permit to compensation proceedings and refers to cooperation in criminal proceedings and is thereby excluding civil court proceedings.

95 See on this also the Commentary on Art 14 of the CoE Convention against Trafficking. See also UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/69/269, 6 August 2014, Annex, paras 5 and 7(g).

96 GRETA, *Report on Denmark*, I GRETA(2011)21, para 173.

State Parties should grant residence permits for the duration of compensation proceedings.[97] It has also stressed the need for trafficked persons who have already left the country to be able to claim compensation.[98]

3. Right to legal assistance and free legal aid

15.31 Article 15(2) of the CoE Convention against Trafficking requires State Parties to provide '[…] for the right to legal assistance and to free legal aid for victims under the conditions provided by [their] internal law'.[99] The Explanatory Report specifies that given the complexity of court and administrative procedures, 'legal assistance is necessary for victims to be able to claim their rights'.[100] The United Nations Principles and Guidelines on access to legal aid in criminal justice systems[101] define legal aid as:

> legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require.[102]

Earlier instruments of the Council of Europe refer to legal advice and legal aid and describe legal advice as 'supplement to legal aid'.[103]

15.32 The Convention does not provide for an 'automatic right to free legal aid'.[104] Its provision is up to the State Parties' regulations. They are required to take account of the ECtHR's case law on Article 6 ECHR which applies under some circumstances also to victims.[105] The ECHR's requirement for legal aid is contained in Article 6(3)(c) ECHR which refers to criminal proceedings.[106] In *Airey v. Ireland*, the Court has recognised a right to be assisted by a lawyer also in civil proceedings. The decisive factor for granting legal aid is whether legal aid is necessary to ensure a person's effective access to court. To this end, the ECtHR assesses on a case-by-case basis whether the person concerned is able to 'present his/her case properly and satisfactorily'.[107] It takes into account the complexity of the procedure or the case, the person's

97 GRETA, *Report on Denmark*, II GRETA(2016)7, para 135; GRETA, *Report on Norway*, I GRETA(2013)5, para 214.
98 GRETA, *Report on Finland*, I GRETA(2015)9, para 190; GRETA, *Report on Greece*, I GRETA(2017)27, para 188; GRETA, *Report on Poland*, I GRETA(2013)6, para 189; GRETA, *Report on Serbia*, I GRETA(2013)19, para 197.
99 CoE Convention against Trafficking or Convention, Art 15(2).
100 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 195. In most cases free legal assistance will be provided by legal aid; sometimes it might also be provided by free legal support for victims of crime.
101 UNGA, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, A/RES/67/187, 20 December 2012.
102 Ibid., para 8.
103 See Committee of Ministers, Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims (adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies) and Committee of Ministers, Resolution (78)8 on legal aid and advice (adopted by the Committee of Ministers on 2 March 1978 at the 284th meeting of the Ministers' Deputies).
104 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, para 196.
105 See above section B.
106 ECHR, Art 6(3); *Airey v. Ireland*, App no 6289/73 (ECtHR, 9 October 1979) para 26.
107 *Airey v. Ireland*, para 24.

emotional involvement in the situation and whether legal representation is compulsory.[108] It is important to note that the ECHR does not guarantee a right to legal aid for civil rights cases as such.[109] The imposition of further conditions is permissible such as the financial situation and the prospects of success in the proceedings.[110] For victims of trafficking this means that even if the national legislation does not provide for 'free legal assistance in civil matters' by a lawyer, the courts must assess whether it is in the interest of justice in the sense that it is necessary for an effective access to a court according to Article 6 ECHR.[111]

15.33 GRETA has emphasised the importance of providing information on free legal assistance and guaranteeing effective access to legal aid[112] as an essential precondition for exercising the right to compensation. Lawyers should be appointed 'as soon as there are reasonable grounds for believing that a person is a victim of trafficking, before the person makes an official statement and/or decides whether to co-operate with the authorities'.[113] Early access to a lawyer allows victims to undertake civil actions for compensation and redress. It prevents the situation that representation happens only at a very late stage, eventually only in court, which has severe impact on the procedural outcome and interests of the victims.[114] Another issue that arises in this context is the qualification of legal aid lawyers and their remuneration.[115] Effective access to court requires a competent representative.[116]

4. Right to compensation from the perpetrator

15.34 Article 15(3) requires State Parties to provide a trafficked person with a right to claim compensation from the perpetrator according to its internal law. GRETA has repeatedly emphasised that State Parties must 'take measures to facilitate and guarantee access to compensation for victims of trafficking from the offenders' in either civil or criminal proceedings.[117]

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108 Further factors to be taken into account are for instance the complexity of the relevant law or procedure (*Airey v. Ireland*, para 24) or the importance of what is at stake for the applicant (*P., C. and S. v. the United Kingdom*, App no 56547/00 (ECtHR, 16 October 2002), para 100). See on this ECtHR, *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)* (CoE/ECtHR 2019) para 129.

109 Ibid., para 26.

110 See on this ECtHR, *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)* (CoE/ECtHR 2019) para 130 referring to *Steel and Morris v. the United Kingdom*, App no 68416/01 (ECtHR,15 May 2005) para 62.

111 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 196.

112 See e.g., GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 138; GRETA, *Report on Bulgaria*, I, GRETA(2011)19, para 190; GRETA, *Report on Cyprus*, I GRETA(2011)8, para 162; GRETA, *Report on Estonia*, I GRETA(2018)6, para 169; GRETA, *Report on France*, I GRETA(2012)16, para 187; GRETA, *Report on Germany*, I GRETA(2015)10, para 180.

113 GRETA, *8th General Report on GRETA's Activities*, para 167.

114 Ibid., paras 167 and 170.

115 La Strada International, Anti-Slavery International, *European Action for Compensation for Trafficked Persons*, 45.

116 See e.g., Sweden, where legal aid is provided by law firms with experience in supporting trafficking victims or asylum seekers, GRETA, *Report on Sweden*, II GRETA(2018)8, para 163. Further example is the Netherlands, where lawyers entitled to accept legal aid cases need to be registered with the Legal Aid Board and have to comply with certain quality standards, see GRETA, *8th General Report on GRETA's Activities* (2018), para 172.

117 GRETA, *Report on Georgia*, II GRETA(2016)8, para 153; see also GRETA, *Report on Armenia*, II GRETA(2017)1, para 138; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 138.

15.35 If civil liability towards the victims is not established during criminal proceedings, the person must be given the possibility to submit his/her claims to civil courts.[118] Yet, civil procedure involves several risks for the victims. They might have to pay the costs of the civil procedure, for instance when the victim loses the case which may deter them from starting such a procedure.[119] Practice in several states in Europe has shown that legal assistance and through legal aid is often discontinued after the conclusion of the criminal proceedings and that it is not, or often only to a very limited extent, granted for compensation claims with civil courts or employment tribunals or enforcement procedures.[120] GRETA urged for instance in this case to enable victims to exercise their right to compensation by guaranteeing them 'effective access to legal aid'.[121]

15.36 GRETA stresses that State Parties have to facilitate and guarantee non-discriminatory access to compensation (from the perpetrator or the state, see below) for all victims of trafficking, regardless of their nationality, their residence status or whether they are legally in the country.[122] State Parties may have to take particular measures with regard to trafficked persons. For example, GRETA has urged the UK to remove the fee to initiate employment proceedings as well as the requirement to enter into mediation before initiating employment proceedings.[123] Access should also be granted independently of the type of injury sustained.[124]

15.37 Compensation is pecuniary and covers both material injury, for example, the cost of medical treatment, and non-material damage related to the suffering experienced.[125] According to the UNODC Model Law against Trafficking in Persons, for example, material damages include the costs of:

> medical, physical, psychological or psychiatric treatment required by the victim, […] the costs of physical and occupational therapy or rehabilitation required by the victim […] the costs of necessary transportation, temporary childcare, temporary housing or the movement of the victim to a place of temporary safe residence […] lost income and due wages according to national law and regulations regarding wages […] legal fees and other costs or expenses incurred, including costs incurred related to the participation of the victim in the criminal investigation and prosecution process.[126]

Compensation for non-material damages may result 'from moral, physical or psychological injury, emotional distress, pain and suffering suffered by the victim as a result of the crime

118 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 197.
119 Liliana Sorrentino, *Justice at Last – European Action for Compensation for Victims of Crime, Legal Assessment: Compensation Practices* (La Strada International 2018) 28.
120 La Strada International, Anti-Slavery International, *European Action for Compensation for Trafficked Persons*, 44–5 and 51; Sorrentino, 42.
121 GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, paras 135 and 138.
122 See e.g., GRETA, *Report on France*, I GRETA(2012)16, para 187; GRETA, *Report on Austria*, I GRETA(2011)10, para 122; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 173; GRETA, *Report on Cyprus*, I GRETA(2011)8, para 162; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 133; GRETA, *Report on Poland*, II GRETA(2017)29, para 156; GRETA, *Report on Romania*, II GRETA(2016)20, para 151.
123 GRETA, *Report on United Kingdom*, II GRETA(2016)21, para 245.
124 GRETA, *Report on Poland*, I GRETA(2013)6, para 189.
125 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 197.
126 UNODC, *Model Law against Trafficking in Persons*, Art 28; Sorrentino, 19.

committed against him or her; and […] any other costs or losses incurred by the victim as a direct result of being trafficked and reasonably assessed by the court'.[127]

5. Compensation guarantee for victims

15.38 Practice has shown that it is very difficult to obtain (full) compensation from the perpetrator, for instance because assets were moved abroad.[128] In other cases compensation might have been awarded but never paid, because for instance the trafficker declared him- or herself bankrupt.[129] Article 15(4) obliges State Parties therefore to guarantee compensation which is provided by the state. It suggests establishing a victim compensation fund or introducing measures or programmes aimed at social assistance and social integration of victims; it points out that these could be funded by assets of criminal origin.[130]

15.39 GRETA has repeatedly emphasised that access to state compensation should not depend on certain conditions, for example, on the failure to obtain compensation through civil proceedings,[131] on the victim's nationality or residence status,[132] the means used for example, whether force or violation of sexual integrity have been used,[133] or the fact of having sustained grievous physical or mental harm as a result of being trafficked.[134] Access should be guaranteed for all victims irrespective of their nationality[135] and victims of all forms of exploitation including economic exploitation.[136] GRETA has also recommended to review provisions that allow an award of compensation to be withheld or reduced.[137] At the same time, there are practices in State Parties that seek to improve access for trafficked persons to state compensation funds. In the Netherlands, for example, victims of trafficking are exempted from the requirement that their claim should be supported by a statement from a doctor or a psychologist when applying for compensation under the Criminal Injuries Compensation Fund.[138]

15.40 To finance compensation, states are encouraged to resort to legislation on the freezing and forfeiture of the offender's assets and make use of assets confiscated from traffickers.[139]

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127 UNODC, ibid.

128 La Strada International, Anti-Slavery International, *European Action for Compensation for Trafficked Persons (comp.act)*, Guidance on representing trafficked persons in compensation claims, 5.

129 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 198.

130 Ibid. The Netherlands for example established in the criminal justice system a framework to ensure that awarded compensation does result in an actual payment being made. If a payment awarded by a court is not paid by a convicted criminal within eight months, the state accepts responsibility for making 'an advance payment' and for all further efforts to extract the money from the convicted criminal; see on this GRETA, *Report on the Netherlands*, I GRETA(2014)10, para 195.

131 GRETA, *Report on Cyprus*, II GRETA(2015)20, para 116.

132 GRETA, *Report on Croatia*, I GRETA(2011)20, para 110.

133 GRETA, *Report on Slovenia*, II GRETA(2017)38, para 138.

134 GRETA, *Report on Malta*, I GRETA(2012)14, para 155; GRETA, *Report on Spain*, I GRETA(2013)16, para 227.

135 GRETA, *Report on Spain*, II GRETA(2018)7, para 216.

136 GRETA, *Report on Belgium*, I GRETA(2013)14, para 190.

137 GRETA, *Report on United Kingdom*, II GRETA(2016)21, para 246.

138 GRETA, *Report on Netherlands*, I GRETA(2014)10, para 197.

139 See e.g., GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 173; GRETA, *Report on Estonia*, I GRETA(2018)6, para 170; GRETA, *Report on Greece*, I GRETA(2017)27, para 188; GRETA, *Report on Latvia*, II GRETA(2017)2, para 151; GRETA, *Report on Republic of Moldova*, II GRETA(2016)9, para 140.

Criminal assets should be secured as early as possible in the investigations to make confiscation orders effective.[140] In addition to the income from fines, confiscations and eventual donations, states should equally consider allocating additional state funds to the victim compensation fund.[141] In some countries, a trafficked person may be granted a certain lump-sum of payment by the state. GRETA has stressed the need to clarify the nature of such payment, and if granted as compensation, it should be based on the harm suffered and 'disconnected from [the victim's] acceptance of assistance measures'.[142] The state compensation scheme needs to be effectively accessible to trafficked persons.[143] States are required to review procedures for state compensation to allow victims to exercise their right to compensation effectively.[144]

15.41 The Explanatory Report to the CoE Convention against Trafficking suggests that State Parties may draw on the model principles contained in the European Convention on the Compensation of Victims of Violent Crimes or, in the context of EU Member States, on Dir 2004/80/EC when deciding on the compensation arrangements.[145]

6. Data collection and statistics

15.42 As repeatedly recommended by GRETA, State Parties should introduce a system of recording the applications lodged for compensation from the offender and the state and the compensation awards obtained by victims.[146] Furthermore, State Parties should collect statistical information on the compensation awarded.[147]

140 GRETA, *Report on United Kingdom*, II GRETA(2016)21, para 245.
141 GRETA, *Report on Cyprus*, II GRETA(2015)20, para 116.
142 GRETA, *Report on Armenia*, II GRETA(2017)1, para 136.
143 GRETA, *Report on Ireland*, II GRETA(2017)28, para 182; GRETA, *Report on Ireland*, I GRETA(2013)15, para 214.
144 GRETA, *Report on Albania*, I GRETA(2011)22, para 143.
145 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 199.
146 GRETA, *Report on Belgium*, I GRETA(2013)14, para 191; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 174; GRETA, *Report on Croatia*, II GRETA(2015)33, para 137; GRETA, *Report on Denmark*, I GRETA(2011)21, para 174; GRETA, *Report on Estonia*, I GRETA(2018)6, para 170; GRETA, *Report on France*, II GRETA(2017)17, para 216; GRETA, *Report on Finland*, I GRETA(2015)9, para 191; GRETA, *Report on Greece*, I GRETA(2017)27, para 189; GRETA, *Report on Ireland*, II GRETA(2017)28, para 183; GRETA, *Report on Republic of Moldova*, II GRETA(2016)9, para 141; GRETA, *Report on Poland*, II GRETA(2017)29, para 157; GRETA, *Report on Portugal*, II GRETA(2017)4, para 150; GRETA, *Report on United Kingdom*, II GRETA(2016)21, para 247.
147 See e.g., GRETA, *Report on Belarus*, I GRETA(2017)16, para 162.

ARTICLE 16

REPATRIATION AND RETURN OF VICTIMS

Ryszard Piotrowicz and Conny Rijken

1 **The Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay.**

2 **When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.**

3 **At the request of a receiving Party, a requested Party shall verify whether a person is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving Party.**

4 **In order to facilitate the return of a victim who is without proper documentation, the Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving Party shall agree to issue, at the request of the receiving Party, such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.**

5 **Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non-governmental organisations. These programmes aim at avoiding re-victimisation. Each Party should make its best effort to favour the re-integration of victims into the society of the State of return, including re-integration into the education system and the labour market, in particular through the acquisition and improvement of their professional skills. With regard to children, these programmes should include enjoyment of the right to education and measures to secure adequate care or receipt by the family or appropriate care structures.**

6 **Each Party shall adopt such legislative or other measures as may be necessary to make available to victims, where appropriate in co-operation with any other Party concerned, contact information of structures that can assist them in the country where they are returned or repatriated, such as law enforcement offices, non-governmental organisations, legal professions able to provide counselling and social welfare agencies.**

7 **Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child.**

A. INTRODUCTION

16.01 Article 16 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] sets out the duty of states to accept back into their territory their own citizens or permanent residents who are victims of trafficking in another state. It covers both those who have been trafficked transnationally and those who left their own country before being trafficked. The duty to accept back already exists under international law, at least with regard to citizens.[2] It describes the way in which repatriation and return should take place – 'with due regard for the rights, safety and dignity' of the individual,[3] and specifies that it should 'preferably be voluntary'.[4] This formulation reflects the fact that, in the absence of some international protection obligation or other basis for remaining in the destination country, the trafficked victim, as an alien, has no right to remain there and may be removed, if necessary by force.

16.02 There is an obligation to cooperate. Article 16(3) of the CoE Convention against Trafficking requires states, when requested by the receiving country, to verify whether an individual is their citizen or has the right of permanent residence. Furthermore, under Article 16(4), the state of citizenship or permanent residence must, if requested by the receiving state, issue travel documents or similar authorisation sufficient to enable the individual to return.

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 46, 16 September 1963, Art 3(2): 'Nobody shall be deprived of the right to enter the territory of the State of which he is a national.' This probably applies to permanent residents too: International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, Art 12(4). This provision is considered to extend the right of entry to permanent residents in at least some cases: Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 93–5.

3 This clearly references basic human rights, and the Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 202 elaborates on this: '[s]uch rights include, in particular, the right not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of his/her identity'.

4 CoE Convention against Trafficking, Art 16(2).

Article 16(5) requires that states establish repatriation programmes aimed at avoiding re-victimisation, and these should involve relevant international institutions (for example, the IOM) as well as civil society organisations. In other words, it is not enough that the state just accepts people back and leaves them to continue with their lives (unless that is what they want); nor that the returning state simply puts the person on a plane and sends them back home. The provision recognises that trafficked victims may be extremely vulnerable (indeed it may have been their vulnerability that led them to be trafficked in the first place); and that they need support. All states are required to engage in such efforts – both the repatriating and the receiving state. **16.03**

Article 16(6) stipulates that State Parties must adopt measures to enable repatriated or returned persons to get information on support agencies and bodies that might be able to assist them. Finally, in Article 16(7), it is stressed that a child may not be returned to a state if this would not be 'in the best interests of the child'. **16.04**

B. DRAFTING HISTORY

The different elements of Article 16 remained largely the same throughout its drafting history. There were no real key issues discussed during the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meetings. The aspects that were considered and which led to the final wording of Article 16 are discussed below. **16.05**

1. Preparatory documents

Recommendation No. R (2000)11[5] introduces a right of return and rehabilitation. The Explanatory Memorandum in the appendix to the Recommendation notes that, apart from the trauma, indebtedness often creates a barrier to re-integration in the country of origin, as may the cost of the return journey. Victims run the risk of being rejected by their families or the community, especially if they are victims of sexual exploitation. Therefore, Recommendation No. R(2000)11 proposed some mitigating strategies which include means to settle their debts in the form of a compensation scheme, social support provided upon return and occupational re-integration measures.[6] **16.06**

2. Best interests of the victim

During the 1st meeting of the CAHTEH, experts discussed repatriation in view of the victim's trauma, and considered that return should not take place immediately. Here, the idea of a reflection period and a subsequent residence permit gained ground.[7] **16.07**

During this 1st CAHTEH meeting, it was stressed that the best interests of the victim should always prevail when taking repatriation decisions, and that the victim should not be repatriated **16.08**

5 Committee of Ministers, Recommendation to Member States on action against trafficking in human beings for the purpose of sexual exploitation No. R(2000)11, 19 May 2000.

6 Ibid., paras 39, 40 and 41.

7 See on this the Commentary on Arts 13 and 14.

if there is a risk of falling again into the hands of the traffickers. This text was included in paragraph 5 of the draft (para 2 of the final text) but later dropped.[8]

3. Scope of protection

16.09 The scope of the protection in case of repatriation and return was discussed during the 3rd CAHTEH meeting. It was decided that the *Soering* case law[9] on extradition also applied in situations of deportation. This means that the scope of protection is determined by Article 3 of the ECHR, which protects against torture and inhuman or degrading treatment or punishment. However, the draft text at that time referred to 'the safety of that person' and 'the best interests of the victim'.[10]

16.10 The phrase 'best interests of the victim' was later deleted, since the 'best interest' was considered to be related to provisions dealing with children.[11]

16.11 During the 6th CAHTEH meeting, and on a proposal from NGOs, it was decided that the reference to taking due regard for 'the safety' of the victim in relation to repatriation and return, as referred to in the drafts of paragraph 1 and 2, be replaced with due regard to the rights, dignity and safety of the victim.[12]

16.12 Various NGOs suggested to include a risk assessment prior to repatriation or return, e.g. Amnesty International and Anti-Slavery International, as well as the Committee on Equal Opportunities for Women and Men.[13] However, it was decided not to include a risk assessment for adults in the text of Article 16.

4. Prohibition of revealing victimhood

16.13 Included in an early version of the Article was the prohibition of the home state to reveal that the returned person is a trafficking victim.[14] During the 3rd CAHTEH meeting, it was decided that such a provision was difficult to uphold, and actually fell within the scope of Article 12 on the protection of victims' private life (now Art 11 of the Convention). Therefore, it was decided to delete this paragraph.[15]

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8 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, paras 53–57.

9 *Soering v. the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

10 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, paras 25–41 and 44.

11 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings – Contribution by the delegation of the Commission of the European Communities*, CAHTEH (2004)17, Addendum II, 30 August 2004, 6.

12 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, paras 51–61.

13 Amnesty International and Anti-Slavery International, *Joint NGO Statement on the draft European Convention against Trafficking in Human Beings*, IOR 61/001/2005, January 2005, 14; CAHTEH, *Council of Europe Draft Convention on action against trafficking in human beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 8.

14 CAHTEH, *Revised preliminary draft – European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 9, para 4 in the draft.

15 CAHTEH, *3rd meeting*, CAHTEH(2004)RAP3, para 35.

5. Terminology

16.14 Concerning the use of 'repatriation' and 'return' it was decided to use the same terminology as in Article 8 of the Palermo Protocol.[16] In the final text, both terms are used without being further explained. During the 6th CAHTEH meeting, it was decided to amend the title of the provision from 'Repatriation of Victims' to 'Repatriation and Return of Victims', to not only cover voluntary return (repatriation), but also non-voluntary return (return).[17]

6. Repatriation programmes

16.15 The content of the repatriation programmes was discussed during the 3rd CAHTEH meeting, where it was agreed to include the strengthening of women's life skills and the mechanisms of child protection.[18] During the 6th CAHTEH meeting, references to the repatriation programmes were thoroughly discussed. It was agreed that the purpose of such programmes was to prevent re-victimisation after return, and that, with that in view, re-integration into society should be promoted. Some delegations felt that education and employment were key factors in social re-integration.[19]

7. Interests of the child

16.16 During the 3rd CAHTEH meeting, it was noted that the situation regarding children was special compared with other victims, and it was agreed to deal with the return and repatriation of children in a separate paragraph, now Article 16(7) of the Convention, with a general reference that return and repatriation should only take place if this is in the best interests of the child.[20]

16.17 During the 3rd CAHTEH meeting, the draft Directive 2004/81 EC was discussed, and it was recognised that it was necessary for EU countries to coordinate the negotiations on Article 16 of the Convention in the CAHTEH with those for draft Directive 2004/81/EC.[21]

C. ARTICLE IN CONTEXT

1. Relation with the Palermo Protocol

16.18 The first four paragraphs of Article 16 of the CoE Convention against Trafficking are almost identical to Article 8 of the Palermo Protocol. As with the definition of human trafficking, which the Convention copies almost verbatim from the Palermo Protocol, this reduces the scope for confusion because of conflicting obligations.

16 CAHTEH, *3rd meeting*, CAHTEH(2004)RAP3, para 26, see further below, 'Article in context'.
17 CAHTEH, *6th meeting*, CAHTEH(2004)RAP6, para 52.
18 CAHTEH, *3rd meeting*, CAHTEH(2004)RAP3, para 30.
19 CAHTEH, *6th meeting*, CAHTEH(2004)RAP6, para 58.
20 CAHTEH, *3rd meeting*, CAHTEH(2004)RAP3, para 31.
21 Ibid., para 8.

2. Relation with EU legislation

(a) Directive 2004/81/EC[22]

16.19 Dir 2004/81/EC provides for the granting of residence permits to victims of trafficking who agree to cooperate with the competent authorities. The UK, Ireland and Denmark did not take part in the adoption of the Directive and were not bound by it. The essence of this Directive is that the residence permit is only granted in return for cooperation by the victim with the investigation or judicial proceedings with regard to THB; in other words, it is not for the direct benefit of the victim, whose purpose here is purely to facilitate the work of the police and the prosecution. This is quite the opposite of the human rights-based approach adopted by the Council of Europe and, later, the Directive 2011/36/EU.[23] In fact, anyone granted a residence permit in accordance with Dir 2004/81/EC might be at even greater risk later, since the permit could be withdrawn for a variety of reasons after they have cooperated,[24] or simply not renewed if the relevant proceedings have terminated.[25] Support programmes for victims who cooperate can be aimed at preparation of their assisted return to their country of origin.[26] No further references to return are included in this Directive.

(b) Directive 2008/115/EC[27]

16.20 Dir 2011/36/EU does not address return and repatriation; at the EU level, this is covered by the so-called 'Returns Directive'. That instrument is in a sense narrower than Article 16 of the CoE Convention against Trafficking, since it applies only to 'illegally staying third-country nationals' whose states have not negotiated free movement agreements with the EU.[28] Furthermore, all trafficked non-citizens are addressed in Article 16 of the CoE Convention against Trafficking, both those staying legally and illegally.

16.21 Under Article 6(1) of Dir 2008/115/EC, Member States 'shall issue a return decision to any third-country national staying illegally in their territory', subject to certain exceptions. Most notably, Article 6(4) of Dir 2008/115/EC allows a state to grant an autonomous residence permit or some other authorisation of a right to stay 'for compassionate, humanitarian or other reasons'. Under Article 5 of Dir 2008/115/EC, when implementing the Directive, states must

22 Directive 2004/81/EC of the Council of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L261/19) (thereinafter Dir 2004/81/EC). For commentary, see Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers' (2002) 14 *International Journal of Refugee Law*, 263.

23 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

24 Dir 2004/81/EC, Art 14.

25 Ibid., Art 8.

26 Ibid., Art 12(1).

27 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348/98) (thereinafter Returns Directive).

28 Returns Directive, Art 3(1); Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L77/1), Art 2(5).

take 'due account' of the best interests of the child, family life and the state of health of the persons concerned, and they must 'respect' the principle of *non-refoulement*.

Article 11 of Dir 2008/115/EC provides for mandatory and optional entry bans for those who have been removed. However, there is an exception for most victims of trafficking in human beings who have entered the country illegally and who, having agreed to cooperate with the authorities, have been issued a residence permit pursuant to Council Dir 2004/81/EC. Again, the UK, Ireland and Denmark opted out. **16.22**

(c) Directive 2011/95/EU[29]

While the UK, Ireland and Denmark are not bound by the Qualification Directive, the first two states did agree to be bound by its predecessor, adopted in 2004. The Qualification Directive is significant because it clearly establishes a right to international protection for trafficked persons, or persons at risk of being trafficked, in certain situations.[30] **16.23**

(d) Directive 2012/29/EU[31]

The Victims' Rights Directive sets out basic minimum rights for victims of crime, as well as standards for how they are treated and protected by state authorities. Recital 57 provides: **16.24**

> Victims of human trafficking (…) tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation. Particular care should be taken when assessing whether such victims are at risk of such victimisation, intimidation and of retaliation and there should be a strong presumption that those victims will benefit from special protection measures.

In conducting risk assessments prior to returning a victim of trafficking or person at risk, or considering whether such person might be entitled to international protection, their status as a victim of crime will be relevant, and will need to be taken into account by the decision maker.

3. Relation with the ECHR

A person's right to enter the territory of the state of which he or she is a national was enshrined in Article 3(2) of Protocol No. 4 to the ECHR.[32] While Article 16 of the CoE Convention against Trafficking does not mention the ECHR, the requirement specified in Article 16(1), that return must be with due regard for the rights, safety and dignity of the individual, clearly acknowledges the human rights obligations of both the returning and the receiving states. **16.25**

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29 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), (OJ L 337/9) (thereinafter Qualification Directive).

30 See below section E.

31 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/22/JHA, (thereinafter Victims' Rights Directive).

32 This right is noted also in the Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 201.

16.26 Return would not be lawful were it to result in exposure to a possible violation of the ECHR, in particular Articles 4 and 3. The relevance of Article 4 is obvious. While it does not mention trafficking, but rather the duty to prevent slavery, forced labour and servitude, there has been no doubt, since the *Rantsev* case at least, that trafficking in human beings is covered by Article 4.[33] The return of a person to a territory where they are at real risk of being the victim of a violation of Article 4 would itself be an indirect violation of that provision. It might also violate Article 3 of the ECHR by exposing that person to the risk of inhuman or degrading treatment, or even torture.[34] Article 3 prohibits expulsion of an alien where there is a real risk ('substantial grounds') of that person being exposed to torture or to inhuman or degrading treatment or punishment in the receiving country.[35] Exposing a person to re-victimisation, re-trafficking and social exclusion might in some cases qualify as such.

4. Relation with the United Nations Convention relating to the Status of Refugees

16.27 Although neither the drafting history nor the Explanatory Memorandum refers to the 1951 Refugee Convention, GRETA in its evaluations does consider that instrument relevant, especially in relation to Article 40(4) of the CoE Convention against Trafficking, and particularly in relation to the application of the principle of *non-refoulement*.[36] In fact, GRETA has consistently for several years, in the context of Article 16, reminded states of the obligation of *non-refoulement*; and has furthermore called upon states to give 'full consideration' to the UNHCR's Guidelines on the application of the Refugee Convention to trafficked people.[37]

16.28 The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking[38] also addressed return several years before the Convention was adopted. Principle 11 provides:

> Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.

33 *Rantsev v. Cyprus and Russia*, App No 25965/04, (ECtHR,7 January 2010), para 282.

34 *MSS v. Belgium and Greece*, App No 30696/09, (ECtHR, 21 January 2011).

35 Ibid., para 365, citing, amongst others, *Soering v. United Kingdom*, paras 90–91 and *Vilvarajah and Others v. United Kingdom*, (ECtHR, 30 October 1991) para 103. The Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 203 made explicit reference to the *Soering* judgment as well as other relevant judgments, in noting the clear duty not to expose a person to a violation of Art 3 by removing them from the territory.

36 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 377.

37 UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking*, HCR/GIP/06/07, 7 April 2006. States have been reminded of their obligation to respect the principle of *non-refoulement* as far back as 2014: GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 172. References to the UNHCR's Guidelines appear at least as far back as 2016. See, e.g.: GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 255.

38 UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.

D. ISSUES OF INTERPRETATION

16.29 Article 16 seeks to promote a coordinated response by states to a transnational issue. It aims to reduce the possibilities for a trafficked person to be stranded in the destination country (by requiring the state of citizenship to facilitate return), while aiming also to avoid the risks that may confront victims of trafficking returning to their own country. Furthermore, it clearly requires states to cooperate with relevant international organisations and civil society in these endeavours. This is important not only because it engages the specialised expertise of such organisations, but also because it may help to reassure traumatised victims who do not trust state authorities.

16.30 GRETA in its evaluations has not hitherto paid significant attention to Article 16, and often reiterates the text of the provision. For instance, in relation to the best interests of the child, it does not further explain how this should be addressed, and what this entails in relation to repatriation and return.

1. Obligations for non-state Parties

16.31 It is of course stating the obvious, that the Convention binds only the Parties to it. This means that only those states are obliged by Article 16 to cooperate in return and repatriation. However, many victims of trafficking come from countries that are not Parties: from outside Europe, as well as the Russian Federation. The Council of Europe has no authority to bind these third states; however, general international law requires that states admit their own citizens when they present themselves at the border.[39] This duty is narrower than the obligation under Article 16, because that requires states to admit the person, but additionally imposes certain duties with regard to their welfare and re-integration. The general duty under international law to admit citizens and, probably, residents, does not include any obligations regarding reception conditions, nor any duty regarding the provision of welfare.[40]

16.32 Article 8 of the Palermo Protocol is of more importance in these situations. In case the requested or the victim's home state is not a party to the CoE Convention against Trafficking and thus not bound by its Article 16, it might be bound by the same or similar obligations under Article 8 of the Palermo Protocol, if it is a party thereto. However, the provisions in Article 8 are less far-reaching and less detailed, especially in relation to reintegration programmes. That said, the sending state, party to the Convention, remains bound by Article 16, including the provisions in Article 16(5).

2. *Non-refoulement*

16.33 Noting the significance of the principle of *non-refoulement* and the possible entitlement of trafficked persons to international protection, including refugee status, GRETA has systematically reiterated its view that states should give full consideration to this possibility, and called upon states, in doing so, to give full consideration to the UNHCR's Guidelines on the application of the Convention relating to the Status of Refugees to trafficked persons and

39 See footnote 2, above.

40 But, see ICCPR, Art 7, which, like Art 3 of the ECHR, prohibits inhuman and degrading treatment.

persons at risk of being trafficked,[41] when considering applications for asylum.[42] The need to screen effectively to identify victims of trafficking amongst undocumented migrants and unaccompanied minors has been noted because of the risk of victims being returned without sufficient efforts being made to identify them.[43]

16.34 GRETA takes the view that the principle of *non-refoulement* should apply when a victim of trafficking is at risk of being re-trafficked.[44] It furthermore states that, if a country cannot comply with Article 16(5) and (6) of the Convention, either because of lack of capacity or lack of cooperation from the authorities of the country of return, the execution of forced removals may run contrary to the obligation of *non-refoulement* referred to in Article 40(4) of the Convention. This means that lack of opportunities for social re-integration, including re-integration in the educational and labour system, need to be taken into account in return and repatriation decisions. Here GRETA has referred to the case of *Hirsi Jamma and others v. Italy*.[45]

16.35 The obligation of *non-refoulement* is wider than the obligation not to return refugees. The Convention relating to the Status of Refugees allows limited exceptions to the principle. However, human rights law stipulates that there are certain situations in which a person can never be returned to their own country, principally where they are at risk of a serious violation of their human rights, including a threat to their lives.[46]

16.36 Those trafficked persons, or those at risk of being trafficked, who meet the criteria for refugee status should be permitted to remain in the destination country because of the threat they might face in their home states. As noted above, GRETA has routinely called upon states to take into account the UNHCR's Guidelines on the application of the Convention relating to the Status of Refugees to victims of trafficking or to persons at risk of being trafficked, as a means of reminding states of this duty or, in certain cases, perhaps seeking to make them aware of it.[47]

16.37 However, the numbers of trafficking victims who qualify for refugee status are likely to be limited.[48] For those who do not meet these criteria, which will be most trafficked persons or

41 Convention Relating to the Status of Refugees, 189 UNTS 137, July 28, 1951, entered into force April 22, 1954 as amended by the Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967, entered into force 4 October 1967.

42 For instance, GRETA, *Report on Belgium*, II GRETA(2017)26, para 168.

43 For instance, GRETA, *Report on* Norway, II GRETA(2017)18, para 148.

44 Ibid and GRETA, *Report on Denmark*, II GRETA(2016)7, para 143.

45 GRETA, *Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings*, GRETA(2016)29, 30 January 2017.

46 Chetail, 186–99.

47 GRETA, *Report on Belgium*, II GRETA(2017)26, para 168; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 146; GRETA, *Report on Denmark*, II GRETA(2016)7, para 143; GRETA, *Report on Estonia*, I GRETA(2018)6, para 176; GRETA, *Report on France*, II GRETA(2017)17, para 224; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 134.

48 UNHCR, *Guidelines on International Protection No.7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07. Ryszard Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2005) 24 *Australian Yearbook of International Law*, 159.

persons at risk, subsidiary protection may be available. Subsidiary protection is available to any third-country national or stateless person:

> who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm … and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.[49]

16.38 'Serious harm' is defined in Article 15 of the Qualification Directive to include the death penalty or execution; serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict; and torture or inhuman or degrading treatment or punishment in the country of origin. When one considers the various types of physical, sexual and psychological violence to which trafficked persons are regularly subjected, and to which they might be subjected again by their traffickers if returned to their home state, it is clear that they could be at risk of serious harm.

16.39 Furthermore, the threat does not have to come from the state. Article 6 of the Qualification Directive specifies that actors of persecution can be the State Parties or organisations controlling the state or a substantial part of the territory of the state, or else non-state actors, where it can be demonstrated that the state or body controlling part of the state, including international organisations, 'are unable or unwilling to provide protection against persecution or serious harm'. This clearly could encompass traffickers.

16.40 Many parties to the Convention are of course not bound by EU law and hence the Qualification Directive. However, the notion of subsidiary, or complementary, protection has been recognised outside the EU.[50] At the very least, states must not remove those whose lives are at risk or who are at risk of a violation of their basic human rights.[51] Accordingly, states will have to carry out some form of risk assessment to establish whether a person can be returned.

(a) Forced returns

16.41 GRETA has expressed significant concern about the negative effects that forced returns can have on victims of trafficking, in particular when there is a lack of follow-up after their return and risks of re-victimisation and re-trafficking.[52]

16.42 Also, in fulfilment of their obligations under Article 16, states have been enjoined to develop cooperation with the authorities and relevant NGOs in countries of origin of victims of trafficking, so as to ensure proper risk assessments prior to return or repatriation, as well as effective rehabilitation and re-integration.[53] Thus, through this obligation to cooperate, the obligations under Article 16 have effect in non-state parties.

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49 Qualification Directive, Art 2(f).

50 Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press 2007), 285 et seq.

51 Ibid, especially at 301 et seq.

52 GRETA, *Report on Italy under Rule 7 of the Rules of Procedure*, para 69.

53 For instance, GRETA, *Report on Belarus*, I GRETA(2017)16, para 148.

3. Risk assessment

16.43 As mentioned in GRETA reports, return in line with rights, safety and dignity includes informing victims about existing programmes, protecting them from re-victimisation and re-trafficking and, in the case of children, fully respecting the principle of the best interests of the child.[54] Furthermore, GRETA recommends state parties to ensure proper or comprehensive risk assessment prior to the return/repatriation of the victims,[55] even though such a risk assessment is not part of the text of Article 16, but only made explicit in Article 16 in relation to child victims.

16.44 However, a risk assessment must be seen as indispensable for compliance with the principle of *non-refoulement* and return or repatriation with due regard for the victim's rights, safety and dignity. This also includes threats from individuals and groups, and is not limited to threats by governmental authorities. Thus, a risk assessment for trafficking victims should specifically focus on the risk of re-victimisation and re-trafficking, and, if such risk exists, it should be enough to prevent forced repatriation.

16.45 As mentioned above, a risk assessment is an important provision in both Dir 2011/36/EU and the Victims' Rights Directive. Dir 2011/36/EU in Article 12(3) provides for an individual risk assessment to identify protection needs. Similarly, Article 22 of the Victim's Rights Directive aims to identify vulnerable victims and victims with special protection needs, based on an individual assessment, and to determine whether a victim is particularly vulnerable to secondary and repeat victimisation.[56] However, these provisions only apply in criminal investigations and proceedings and before and after such proceedings, thus not in relation to repatriation and return. Furthermore, only a few Member States have implemented these provisions.[57]

16.46 Even if such risks exist, states seem to be reluctant to consider them to be sufficient to justify non-repatriation or non-return.[58] Within the EU, this mechanism is further exacerbated by

54 GRETA, *Report on Albania*, II GRETA(2016)6, para 149; GRETA, *Report on Croatia*, II GRETA(2015)33, para 142; GRETA, *Report on Estonia*, I GRETA(2018)6, para 177; GRETA, *Report on France*, II GRETA(2017)17, para 224; GRETA, *Report on Georgia*, II GRETA(2016)8, para 158; GRETA, *Report on Italy*, I GRETA(2014)18, para 175; GRETA, *Report on Latvia*, II GRETA(2017)2, para 155; GRETA, *Report on Malta*, I GRETA(2012)14, para 159; GRETA, *Report on Norway*, II GRETA(2017)18, para 148; GRETA, *Report on Germany*, I GRETA(2015)10, para 186; GRETA, *Report on Greece*, I GRETA(2017)27, para 196; GRETA, *Report on Lithuania*, I GRETA(2015)12, para 148.

55 GRETA, *Report on Belarus*, I GRETA(2017)16, para 167; GRETA, *Report on Italy*, I GRETA(2014)18, para 175; GRETA, *Report on Malta*, I GRETA(2012)14, para 160; GRETA, *Report on Norway*, II GRETA(2017)18, para 148; GRETA, *Report on Portugal*, I GRETA(2012)17, para 158; GRETA, *Report on Germany*, I GRETA(2015)10, para 186; GRETA, *Report on Lithuania*, I GRETA(2015)12, para 148; GRETA, *Report on Moldova*, I GRETA(2011)25, para 139.

56 See on this also Art 28 in this Commentary.

57 Emanuela Biffi et al., *IVOR-Report. Implementing Victim-Oriented Reform of the criminal justice system in the European Union* (2016), 151–63.

58 For instance Andreas Schloenhardt and Mark Loong, 'Return and Re-integration of Human Trafficking Victims from Australia' (2011) 23 *International Journal of Refugee Law*, 143–73.

the Dublin-regime,[59] based on which the state responsible for the examination of an asylum request is determined, with the result that the state of first entry is often responsible.[60] Thus, anyone who claims to be a trafficking victim, risks being transferred to the state of first entry without further consideration of their victim status.[61] GRETA has stressed that such application runs counter to the obligation to assist and protect trafficking victims.[62] However, some states do make an exception to the application of the Dublin regime. For instance, Belgium does not transfer a person under the Dublin regime while the procedure for identifying a possible victim of trafficking is in progress, and such transfer will not be carried out in case of identification of a person as a victim of trafficking.[63]

4. Repatriation programmes and social integration

16.47 GRETA has regularly called upon states to ensure that return of trafficked persons to their home states is in fact carried out with due regard to their rights, safety and dignity. This has been stated to include a substantial number of practical measures. Victims need to be informed about programmes that can help to protect them from re-victimisation and re-trafficking; and the best interests of the child must be fully respected. National authorities are also called upon to develop international cooperation in order to ensure proper risk assessment and return, as well as effective re-integration of victims of trafficking, and to ensure full compliance with the principle of *non-refoulement*.[64] Furthermore, in some cases, GRETA has called upon national authorities to ensure that funds are available to pay for return, as part of the duty arising out of Article 16(5).[65] This is important because it is unlikely that victims of sexual or labour exploitation will have any financial means to pay for themselves.

16.48 GRETA has noted that repatriation assistance arrangements should be suitable for all victims of trafficking, however without further explaining what these arrangements should include.[66] Here we can find inspiration in the work of organisations such as IOM,[67] OSCE[68] and UNODC,[69] which have developed concrete guidelines to be taken into account in cases of return or repatriation of trafficking victims.

59 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180/31) (Dublin III Regulation).

60 European Migration Network, *Synthesis Report – Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures* (March 2014), 13–14.

61 For instance, in the Netherlands an amendment of the Aliens Circular has been made on 1 August 2019 to facilitate such return based on the Dublin Regulation even if the victim has reported the trafficking to the police.

62 For instance, GRETA, *Report on Switzerland*, II GRETA(2019)14, para 136. Although a non-EU state, it has signed the Dublin III Regulation.

63 GRETA, *Report on Belgium*, II GRETA(2017)26, para 167.

64 For instance, GRETA, *Report on Albania*, II GRETA(2016)6, para 149.

65 For instance, GRETA, *Report on Malta*, I GRETA(2012)14, para 159.

66 GRETA, *Report on Belgium*, I GRETA(2013)14, para 196.

67 IOM, *Enhancing the Safety and Sustainability of the Return and Re-integration of Victims of Trafficking* (IOM 2017).

68 OSCE, *Guiding Principles on Human Rights in the Return of Trafficked Persons* (OSCE/ODIHR 2014).

69 UNODC, *Toolkit to Combat Trafficking in Persons* (UNODC 2008).

16.49 The importance of states having in place repatriation programmes that work effectively by providing assistance and protection to trafficked persons who are returning (whether voluntarily or not) has been noted by GRETA on several occasions.[70] Protection in the home country should not be dependent on whether or not the victim participated in the criminal proceedings in the country where the victim was identified.[71]

5. Transferability of victim status

16.50 Return and repatriation with due regard for the rights, safety and dignity of the victim can only take place if both the requesting and requested state recognise the victim status. This however is a competence of each state individually, which means that a victim status granted in one state does not automatically have effect in another. This might lead to the denial of victim status by the requested state and consequently a denial of protection, re-integration and re-socialisation after return or repatriation. Automatic recognition of the victim status granted in one of the State Parties by other State Parties would be an important step in terms of victim protection and a human rights-based approach to human trafficking.

16.51 Within the EU, such automatic recognition could fairly easily be realised based on the principle of mutual recognition as adopted in Article 67(4) TFEU. This provides that (judicial) decisions taken in one Member State also apply in another Member State as if the decision was taken in the latter, because EU Member States evaluate their decision-making bodies or systems as equal.[72] This would mean that recognition of victim status in one EU Member State would also be recognised in other EU Member States. More broadly, it would be interesting to see if such automated recognition of victim status could be introduced among State Parties to the CoE Convention against Trafficking, as they are all bound by it and thus provide for equal guarantees and safeguards in the combating of human trafficking, including victim protection.

16.52 An interesting mechanism, proposed by the IOM and ICMPD, is the Transnational Referral Mechanism (TRM), which can serve as a first step in the development towards the adoption of mutual recognition of victim status.[73] It can be defined as:

> the concept of a co-operative agreement for the cross-border comprehensive assistance and/or transfer of identified or potential trafficked persons, through which state actors of different countries fulfil their obligations to promote and protect the human rights of trafficked persons. (…) a TRM should be an operational framework linking the different stakeholders from two or more countries involved in identification, referral, assistance, repatriation, and monitoring by defining clear roles for each

70 For instance, GRETA, *Report on France*, II GRETA(2017)17, para 224.

71 GRETA, *Report on Slovenia*, I GRETA(2013)20, paras 148–149.

72 For further discussion, see Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford Studies in European Law 2014).

73 See IOM, *Enhancing the Safety and Sustainability of the Return and Re-integration of Victims of Trafficking* and ICMPD, *Guidelines for the Development of a Transnational Referral Mechanism for Trafficked Persons in Europe: TRM-EU* (ICMPD 2010).

stakeholder, along with procedures to follow, to ensure the protection of the victims' human's rights all along their re-integration path.[74]

Such a mechanism would ensure a continuum of care and protection of trafficking victims.

6. Best interests of the child

16.53 GRETA has consistently expressed particular concern for the predicament of children, and this applies to the return and repatriation process too. States have regularly been informed that they should conduct full and effective risk assessments before returning children, and in doing so also take account of the best interests of the child.[75] Guidance on how to conduct such assessments can be found, for instance, in a publication by the OSCE, with concrete steps that states should take in case of return,[76] and the methodology developed by the UNHCR to identify the relationship between risk assessment and the best interests of the child.[77]

E. CONCLUSION

16.54 Although GRETA has not paid significant attention to compliance with Article 16, this provision does address a number of issues that are important for the protection of, and assistance to, victims and therefore to a human rights-based approach that the Convention seeks to promote. First, it is interesting that the text of the article overlaps to a large extent with Article 8 of the Palermo Protocol. This means that the same regime of repatriation and return can also be applied by states that are not party to the Convention, which of course is relevant to victims whose country is not a party to the Convention, but which might be party to the Palermo Protocol.

16.55 Secondly, the principle of *non-refoulement* should be applied in full in relation to repatriation and return of trafficking victims. Based on Article 40 of the Convention, its application should be in line in particular with the Refugee Convention. Moreover, and following the Explanatory Report, Article 3 of the ECHR is fully applicable either directly, or indirectly via Article 4 of the ECHR. In addition, a broader obligation to protect against return and repatriation is in place for EU Member States because the Qualification Directive prohibits return in case of risk of serious harm, and requires the granting of subsidiary protection or refugee status. Following the text of Article 16, a risk and security assessment only needs to be carried out for children. However, in order to comply with all obligations under this provision, a risk and security

74 IOM, 47, also referring to OSCE, *Guiding Principles on Human Rights in the Return of Trafficked Persons* (OSCE/ODIHR 2014).

75 For instance, GRETA, *Report on Denmark*, I GRETA(2011)21, para 182. The guiding principle of the Convention on the Rights of the Child (Art 3) is further determined by General Comment No. 14 of the UN Committee on the Rights of the Child (General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 4, para. 1), CRC/C/GC/14 (29 May 2013). The best interest principle applies to all children, also unaccompanied or separated children, see General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6 (1 September 2005.

76 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Child Trafficking and Child Protection: Ensuring that Child Protection Mechanisms Protect the Rights and Meet the Needs of Child Victims of Human Trafficking* (OSCE 2018) 59 et seq.

77 UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR 2018).

assessment for all victims has to be conducted. Such assessment includes at least the risk of re-victimisation, risk of re-trafficking, and options for reintegration and societal participation, including access to the labour market and education. Following this interpretation of Article 16 of the Convention, a risk assessment not only with regard to persecution but also for re-trafficking and lack of integration opportunities is an essential part of a correct implementation of Article 16, as is consistently reiterated by GRETA.

16.56 Thirdly, a number of organisations, including the IOM, OSCE and UNODC, have developed guidelines for safe return for victims of trafficking. States should be encouraged to use these guidelines when implementing Article 16 and, as such, GRETA could use these guidelines to evaluate states' efforts towards correct implementation and application of this provision.

16.57 Finally, and beyond the direct realm of Article 16, a human rights-based approach to human trafficking could be strengthened if State parties would automatically recognise the victim status granted to a trafficking victim by another State party. This could be a mechanism similar to the principle of mutual recognition used in the EU, would avoid duplication of victim determination procedures and prevent a victim from losing protection because of denial of victim status.

ARTICLE 17

GENDER EQUALITY

Siobhán Mullally

Each Party shall, in applying measures referred to in this chapter, aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of the measures.

A. INTRODUCTION

17.01 Article 17 directly addresses the gender dimension of measures adopted by State Parties to protect and promote the rights of victims of trafficking. States are required to promote gender equality and to use the tools of gender mainstreaming in design and implementation of such measures, and in assessment of their impact. The requirement to 'ask the gender question' is placed at the heart of this Chapter of the Convention, imposing an obligation on State Parties to reflect on the potentially different impact of laws, policies and procedures. Importantly, the use of gender mainstreaming as a policy tool, is placed within the wider obligation on states to promote gender equality, reflecting a concern to avoid discriminatory measures adopted under the guise of victim protection. Article 17 should be read in conjunction with Article 1, which places gender equality at the heart of the statement of purposes of the Convention and Article 3, on non-discrimination.

17.02 The inclusion of a dedicated Convention provision on gender mainstreaming builds on earlier international instruments including the Nairobi Forward-looking Strategies and the Beijing Platform for Action.[1] The positive obligation imposed on states in Article 17 builds on the development of gender mainstreaming as a policy measure in UN and regional bodies, tasked with integrating gender equality into actions to combat violence against women including trafficking in persons. The wider gender dimension of human trafficking, including the impact of measures adopted on men and boys and on sexual minorities or gender variant persons, is

1 The Nairobi Forward-looking Strategies for the Advancement of Women adopted by the World Conference to review and appraise the achievements of the UN Decade for Women: Equality, Development and Peace (15–26 July 1985); Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women (4–15 September 1995), para 123.

rarely considered in such actions and is only recently becoming more visible as critical to a wider understanding of gender equality in the context of human trafficking.

B. DRAFTING HISTORY

17.03 The drafting history of Article 17 reveals a concern to address the particular impact of human trafficking on women and girls, as the highest proportion of identified victims. The emergence of Article 17 also reflects a concern not to limit the gender equality dimension of the Convention to an obligation of non-discrimination, but to firmly place the guarantee of gender equality at the heart of State Parties' positive obligations to protect and promote the rights of victims. Recommendation 1610 (2003) of the Parliamentary Assembly of the Council of Europe specifically recommended the drafting of the CoE Convention against Trafficking, as an international instrument that would bring 'added value', with its 'clear human rights and victim protection focus and the inclusion of a gender perspective'.[2] An early draft text of the Convention does not include a specific provision on gender equality. Reference to 'gender equality issues' was added on to the title of Chapter III on the rights of victims.[3]

17.04 Commenting on the preliminary draft of the CoE Convention against Trafficking, the observer of the ILO welcomed the title of the Convention as being about human beings, and therefore potentially including men, who as irregular migrant workers, were increasingly being recognised as victims of trafficking in research carried out by the ILO in Europe. It was also noted, however, that this early gesture towards inclusion was not followed through in the draft text of the Convention, with a return to an approach that 'lumped together' women and children in a provision titled, 'special actions to prevent trafficking in women and children'. The ILO, noting the shift away from this presumption of women and children as similarly in need of protection in recent policy declarations, calls for a separate focus on the 'special needs of children' as distinct from the 'special needs of women', which they note could be better addressed as the gender aspect of action against trafficking.[4]

17.05 At the 2nd CAHTEH meeting, gender equality was discussed in the context of preventive measures, Chapter II of the Convention. The Committee decided to draft a new Article 5(3), on promoting a human rights-based approach and adopting a gender perspective in the development and realisation of policies and programmes to prevent trafficking in human beings.[5] The repeated linking of a gender perspective to a human rights based-approach reflects the attention given in international instruments to gender mainstreaming and to the recognition of 'women's rights as human rights' in the context of standard-setting on violence against women, in particular. An early draft Explanatory Report, in a comment on a new Article 17 – titled 'Gender Equality Aspects' – clearly situates State Parties' obligations to

2 Parliamentary Assembly, Recommendation No. 1610 (2003) Migration connected with trafficking in women and prostitution, 25 June 2003.

3 CAHTEH, *Revised Preliminary Draft of the European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 7.

4 CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegations of Sweden and by the observer of the International Labour Office (ILO)*, CAHTEH(2003)8 rev 2 Addendum I, 28 November 2003, 9.

5 CAHTEH, *2nd meeting (8–10 December 2003) – Meeting report*, CAHTEH(2003)RAP2, 26 January 2004, para 38.

promote gender equality within the expanding body of soft law human rights instruments addressing violence against women, including the Vienna Programme of Action[6] and the Declaration on the Elimination of Violence against Women.[7] [8] While the reference in the draft Explanatory Report is to gender equality aspects, gender is clearly included to indicate women, as victims. Trafficking in human beings, it is noted, above all for the purposes of sexual exploitation but also for other purposes, mainly concerns women.[9] It is notable that little attention is given to other purposes of exploitation, which are repeatedly referenced as an add-on, rather than a core concern of the drafting process. The progressive development of international law within which the attention to gender equality in the CoE Convention against Trafficking fits, begins from the International Convention for the Suppression of the White Slave Traffic, later supplemented by the International Convention for the Suppression of the Traffic in Women and Children and the International Convention for the Suppression of the Traffic in Women of Full Age. The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others replaced, in parts, the provisions of the earlier international instruments.[10] While attention is given to the concept of forced labour, and the work of the International Labour Organisation, it is relatively cursory, and is not explicitly linked to the gender equality commitment in Article 17, or in Article 1 of the Convention.

17.06 The early draft Explanatory Report directly addresses the gender dimension as requiring State Parties to address the 'double marginalisation' of women, as women and as victims of trafficking. Formal *de jure* equality is not enough to achieve equality *de facto*. The draft Report notes that positive measures to achieve equality between women and men are required, including by supporting specific policies for women, who are more likely to be exposed to practices, which qualify as torture or inhuman or degrading treatment, such as trafficking in persons.[11] New approaches, new methods and new strategies are required. Gender mainstreaming is identified as a key 'new strategy', its aim being to achieve gender equality.

17.07 Despite its mention in the early draft Explanatory Report, subsequent meetings of the CAHTEH do not include any reference to a provision on gender equality. It is not until the 7th CAHTEH meeting that the specific provision on gender equality re-appears. As it was intended to apply to the whole of Chapter III, concerning the promotion and protection of the rights of victims, it was initially proposed as Article 16 *bis*, but later becomes the stand-alone provision Article 17. The draft text of the Convention following the 7th CAHTEH meeting includes as draft text Article 17:

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6 Adopted by the World Conference on Human Rights (Vienna, 14–25 June 1993)

7 UNGA resolution 48/104, 20 December 1993.

8 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings – Draft Explanatory Report*, CAHTEH(2004)27 Addendum I, 4 February 2004, 9–10.

9 Ibid., para 52.

10 International Convention for the Suppression of the White Slave Traffic, 3 LNTS 278, 4 May 1910, entered into force 8 August 1912; International Convention for the Suppression of Traffic in Women and Children, 9 LNTS 415, done 30 September 1921, entered into force 15 June 1922; International Convention for the Suppression of the Traffic in Women of Full Age, 150 LNTS 431, done 11 October 1933, entered into force 24 August 1934; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 UNTS 271, done 2 December 1949, entered into force 25 July 1951.

11 CAHTEH(2004)27 Addendum I, 4 February 2004, paras 55–56.

> […] each Party shall, in applying measures referred to in this chapter, aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of the measures.[12]

17.08 The need for 'terminological clarity' led to a recommendation from the Parliamentary Assembly of CoE, to replace the words 'also taking gender equality aspects into consideration' in Article 1 sub-paragraph a and in Chapter III with 'guaranteeing gender equality', and deleting the word 'aspects' from the heading of Article 17.[13] The final text of Article 17 guaranteeing gender equality in measures to combat human trafficking, and requiring State Parties to adopt gender mainstreaming as a policy tool in such measures, was adopted at the 8th CAHTEH meeting. The Explanatory Report clearly highlights the reliance on data, which reveals women as the main target group of trafficking in human beings. The relative invisibility of men and boys, is not addressed, nor are concerns relating to failures to acknowledge related gender dimensions of targeting of sexual minorities or gender variant persons. Women, as a group, are identified as 'susceptible to being victims,' and marginalisation as women is linked to higher prevalence of poverty and unemployment among women.[14]

C. ARTICLE IN CONTEXT

17.09 As Otto has noted, the institutionalisation of feminist ideas, particularly in the context of crisis responses, 'will always extract a price of compromise and dilution'.[15] In the migration context, the question whether this compromise is ultimately damaging to the pursuit of gender equality, requires close analysis of how anti-trafficking measures have evolved and are being implemented on the ground. Feminists continue to advocate for further law reform at national and international levels, seeking to mobilise law to prevent and to respond to the egregious human rights violations that occur in the context of human trafficking. It is important to reflect, however, on the potential for law reform to be complicit in reinforcing gender inequalities and in limiting women's agency. This potential is particularly relevant in the context of human trafficking measures, where the tendency to slide into protective measures is ever present and frequently works against the recognition of trafficked women as bearers of rights.[16] The concern to respond to women's apparent vulnerability continues to be a core motivating impulse in the anti-trafficking movement, both at national and international levels. The normative re-emergence of this protective impulse may limit the trafficked woman's agency and mobility, and may also lend support to the creeping expansion of the criminal law and of immigration control politics.

17.10 It is evident from the drafting history that Article 17 is intended to require positive action on the part of State Parties, and to complement the requirement of non-discrimination. The

12 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, 51.

13 Parliamentary Assembly, *Opinion No. 253 (2005) on the Draft Council of Europe Convention on Action against Trafficking in Human Beings*, 26 January 2005, para 15.

14 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 210.

15 Dianne L. Otto, 'Decoding Crisis in International Law: A Queer Feminist Perspective' in Barbara Stark (ed), *International Law and Its Discontents: Confronting Crisis* (Cambridge University Press, 2015) 136.

16 Dianne L. Otto, 'Women's Rights', in Daniel Moeckli et al (eds), *International Human Rights Law* (Oxford University Press 2010) 360.

specific attention given to women and children in the Palermo Protocol,[17] and in the SAARC Convention,[18] is reflected in the drafting process and the Explanatory Report of the CoE Convention against Trafficking. The later EU Directive 2011/36/EU,[19] builds upon the gender equality perspective of the Convention text, and addresses the gender-specific phenomenon of trafficking, commenting in the Opening Recital 3, that women and men are often trafficked for different purposes. For this reason, it is noted, assistance and support measures should also be gender-specific where appropriate.[20] Apart from the reference in Article 1 of the Directive to the gender perspective, the Dir 2011/36/EU does not include a specific guarantee or statement of positive obligation concerning gender equality. The ASEAN Convention against Trafficking in Persons, especially women and children, retains the specific reference in its title and statement of objectives, to women and children and with reference to State Parties obligations of prevention.[21] In other regional instruments, trafficking in persons is also closely linked to gender equality, and specifically to norms of non-discrimination and standards relating to violence against women.

17.11 The concern to avoid an assumption of collective vulnerability can also be seen in the text of the Protocol on the Rights of Women in Africa, Article 4(g) of which imposes obligations on all State Parties to take 'appropriate and effective measures' to prevent and condemn trafficking in women and to protect those women most at risk.[22] A specific focus on women as victims of human trafficking is also evident in Article 6 of the American Convention on Human Rights, which prohibits slavery and involuntary servitude, 'in all their forms', and separately prohibits 'the slave trade and traffic in women'.[23]

17.12 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará') includes trafficking in persons within the definition of violence against women (Art 2), and requires State Parties to:

> […] take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons.[24]

The Inter-American Declaration against Trafficking in Persons ('Declaration do Brasiliá'), stresses the need for states to prevent trafficking in persons by:

17 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000.

18 SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution, 5 January 2002, entered into force 15 November 2005.

19 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1)

20 Ibid., Recital 3.

21 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017, Arts 1 and 11.

22 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 1 July 2003, entered into force 25 November 2005.

23 American Convention on Human Rights, adopted 22 November 1969, entered into force 18 July 1978.

24 Adopted on 9 June 1994, entered into force 5 March 1995, Art 9.

> […] designing, improving, and implementing public policies that address social, economic, cultural, security, and migration-related variables that adversely affect women.[25]

17.13 The UN Human Rights Committee in its General Comment No. 28 provides that states should provide information on steps taken in accordance with their obligations under Article 8 of the ICCPR, to eliminate trafficking in women and children.[26] Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) sets out State Parties' legal obligation to, 'take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women'.[27] The CEDAW Committee's Draft General Recommendation on Trafficking,[28] limits its scope to trafficking in women and girls in the context of global migration.

17.14 Of interest in the opening paragraphs of the Draft Recommendation, is the commitment to using a gender-transformative approach to overcome the impasse in combating human trafficking and the continued widespread impunity enjoyed by perpetrators.[29] The Draft Recommendation clearly situates measures to combat trafficking in women and girls within the pursuit of substantive equality, noting that the root causes of trafficking in women is rooted in gender-based discrimination, gender-based structural inequality and the feminisation of poverty.[30] The Committee is clearly concerned to avoid the pitfalls of earlier anti-trafficking instruments, that assume a common vulnerability of women and girls. The Draft Recommendation notes that women are not a homogenous group and that their experiences as trafficking victims are diverse. State Parties are required to proactively address the rights of women and girls who are marginalised and subjected to multiple forms of discrimination, including in particular women and girls with an irregular migration status.[31] Citing its previous General Recommendations on Violence against Women, the Committee reiterates its view that trafficking in women and girls is unequivocally a phenomenon rooted in gender-based discrimination and inequality and constitutes gender-based violence against women.[32]

D. ISSUES OF INTERPRETATION

17.15 Reviewing the monitoring reports of GRETA, most attention is paid to the gender equality dimension of combating human trafficking, in evaluating State Parties' prevention and awareness-raising actions (Articles 5 and 6). In the first evaluation round reports, GRETA

25 Adopted on 5 December 2014 by the Permanent Council of the Organization of American States, Art 2.

26 Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, CCPR/C/21/Rev.1/Add.10, 29 March 2000, para 12.

27 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979, entered into force 3 September 1981.

28 Committee on the Elimination of Discrimination against Women, *Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration* (April 2020), para 3, https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CallTraffickingGlobalMigration.aspx (accessed 11 August 2020).

29 Ibid., para 3.

30 Ibid., para 20.

31 Ibid., para 18.

32 Ibid., para 14, citing CEDAW, General Recommendations: No. 19 (1992) (HRI/GEN/1/Rev.9 (Vol. II)), para 14; No. 28 (2010) (CEDAW/C/GC/28), para 21; No. 30 (2013) (CEDAW/C/GC/30), para 39; No. 32 (2014) (CEDAW/C/GC/32), paras 14, 15, 55; No. 35 (2017) (CEDAW/C/GC/35), para 12; No. 37 (2018) (CEDAW/C/GC/37), para 75.

repeatedly highlights the need for states to address trafficking in human beings: '[…]as a form of violence against women and to take account of gender-specific types of exploitation'.[33]

17.16 The concern to reinforce the normative framework linking trafficking to violence against women, is found also in references to State Parties' obligations to take 'positive measures' to achieve equality. Again, it is primarily within the context of combating violence against women that such positive measures are countenanced and addressed. Equality, GRETA notes, must be promoted:[34]

> […] by supporting specific policies for women, who are more likely to be exposed to human rights violations such as physical violence, rape and trafficking for the purpose of sexual exploitation.

17.17 Recommendations are also routinely included on the adoption of national action plans to combat trafficking, and to ensure that 'gender issues' are addressed 'in a gender-sensitive way and that gender mainstreaming is reflected in all elements of the country's anti-trafficking policies[35] and takes full account of the gender dimension of trafficking.[36]

17.18 Several evaluation reports comment on the importance of education and training, specifically including the promotion of gender equality and the eradication of gender-based violence.[37] A number of country reports note specific initiatives in the context of promoting gender equality in school curricula, for example, where the topic of trafficking in human beings is included in subjects on human rights and gender equality,[38] as part of school curricula on health,[39] or through the training of teachers and schools administration on gender mainstreaming and gender equality.[40]

17.19 In the context of prevention of trafficking, and the positive obligations on State Parties, (Art 5 of the Convention), GRETA frequently urges the authorities to strengthen their efforts

33 GRETA, *Report on Armenia*, I GRETA(2012)8, para 33; GRETA, *Report on Belarus*, I GRETA(2017)16, para 36; GRETA, *Report on Belgium*, I GRETA(2013)14, para 46; GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 49; GRETA, *Report on Croatia*, I GRETA(2011)20, para 30; GRETA, *Report on Cyprus*, I GRETA(2011)8, para 33; GRETA, *Report on Denmark*, I GRETA(2011)21, para 40; GRETA, *Report on Estonia*, I GRETA(2018)6, para 33; GRETA, *Report on Finland*, I GRETA (2015)9, para 41; GRETA, *Report on Greece*, I GRETA(2017)27, para 41; GRETA, *Report on Hungary*, I GRETA(2015)11, para 38; GRETA, *Report on Iceland*, I GRETA(2014)17, para 41; GRETA, *Report on Italy*, I GRETA(2014)18, para 39; GRETA, *Report on Lithuania*, I GRETA(2015)12, para 32; GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 31; GRETA, *Report on the Republic of Moldova*, I GRETA(2011)25, para 36; GRETA, *Report on North Macedonia*, I GRETA(2014)12, para 45; GRETA, *Report on Portugal*, I GRETA(2012)17, para 38; GRETA, *Report on San Marino*, I GRETA(2014)19, para 26; GRETA, *Report on Slovenia*, I GRETA(2013)20, para 31; GRETA, *Report on Spain*, I GRETA(2013)16, para 48; GRETA, *Report on Switzerland*, I GRETA(2015)18, para 30; GRETA, *Report on the United Kingdom*, I GRETA(2012)6, para 59.

34 GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 73; GRETA, *Report on Montenegro*, I GRETA(2012)9, para 62.

35 GRETA, *Report on Georgia*, I GRETA(2011)24, para 67; GRETA, *Report on Malta*, I GRETA(2012)14, para 65; GRETA, *Report on Montenegro*, I GRETA(2012)9, para 65.

36 GRETA, *Report on Italy*, I GRETA(2014)18, para 68; GRETA, *Report on Spain*, I GRETA(2013)16, para 79.

37 GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 88; GRETA, *Report on Montenegro*, I GRETA(2012)9, para 102; GRETA, *Report on Poland*, I GRETA(2013)6, para 121.

38 GRETA, *Report on Armenia*, I GRETA(2012)8, para 86.

39 GRETA, *Report on Cyprus*, II GRETA(2015)20, para 53.

40 GRETA, *Report on Estonia*, I GRETA(2018)6, para 105; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 68.

through social, economic and other measures for groups vulnerable to trafficking, 'by promoting gender equality, combating gender-based violence, and supporting specific policies for the empowerment of women as a means of addressing the root causes of THB'.[41] Reference is made by the Turkish authorities, for example, to the focus on gender-based violence and trafficking in human beings as a component of this state response.[42]

17.20 The wider gender dimension of assistance and protection measures for victims of trafficking is increasingly addressed in later reports, which highlight the absence of dedicated shelters for male victims, and relative invisibility of men and boys as victims of trafficking for the purpose of sexual exploitation. The targeting of sexual minorities and gender diverse persons is also noted occasionally as an emerging trend, but with limited attention given to the need for specific assistance or protection measures.[43] GRETA's 8th General Report on its Activities, includes a thematic focus on assistance to victims, and highlights the gender dimension of trafficking and obligations of assistance.[44]

17.21 In reviewing assistance services, including shelters, GRETA's Report notes that these are designed and tailored primarily to the needs of female victims, in particular those subjected to sexual exploitation. In its country reports on France and Spain, GRETA welcomes the increased resources provided for assistance and reintegration programmes, in particular, for women and girls victims of sexual exploitation. However, concern is also expressed that insufficient resources are made available to assist female victims of other forms of exploitation, reflecting again the focus on sexual exploitation in laws and policies on human trafficking. Concern is also expressed in relation to the children of victims of trafficking, at risk of secondary victimisation and the gender dimension of such risks.[45]

17.22 The Report notes that the number of male victims of trafficking has increased across State Parties to the Convention, linked to an increase in identified cases of trafficking for the purpose of labour exploitation. However, it is noted that there remains a marked shortage of assistance projects for male victims of trafficking.[46] GRETA's 7th General Report, focusing on labour exploitation, highlighted the higher number of identified male victims of trafficking for the purpose of labour exploitation, and the need for targeted assistance measures, recognising this gender dimension. It was noted also that men may be less likely to be recognised as vulnerable to exploitation. The need for greater awareness-raising, and targeted programmes recognising men and boys as potential victims, is highlighted as being critical to ensuring identification and referral to assistance.[47]

41 GRETA, *Report on Belgium*, II GRETA(2017)26, para 78; GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 70; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 104; GRETA, *Report on Georgia*, II GRETA(2016)8, para 76; GRETA, *Report on Lithuania*, I GRETA(2015)12, para 93; GRETA, *Report on North Macedonia*, II GRETA(2017)39, para 81; GRETA, *Report on Portugal*, II GRETA(2017)4, para 90; GRETA, *Report on Romania*, II GRETA(2016)20, para 78; GRETA, *Report on Slovenia*, II GRETA(2017)38, para 71.

42 GRETA, *Report on Turkey*, I GRETA(2019)11, para 110.

43 GRETA, *Report on Austria*, II GRETA(2015)19, para 13.

44 GRETA, *8th General Report on GRETA's Activities* (May 2019) 37–72, especially 44–5.

45 Ibid., para 113.

46 Ibid., para 114.

47 Ibid.

GRETA has urged several State Parties to provide specialised assistance, including safe accommodation, for male victims of trafficking, and has also called on states to carry out needs assessments to ensure that assistance plans address the needs of male victims. In a small number of countries, Austria, Portugal, Norway and Luxembourg, GRETA has highlighted the opening of a limited number of men-only shelters.[48] **17.23**

E. CONCLUSION

Attention to the gender dimension of trafficking in the CoE Convention against Trafficking and in the monitoring work of GRETA, reflects the wider concern in law and practice on human trafficking, with sexual exploitation and women and girls as the highest number of identified victims. The significance of gender inequality, gender-based violence against women and girls and extreme poverty, continue to be recognised as root causes of trafficking. The importance to ensure that women, as survivors, take a leading role in responses to human trafficking, and in designing prevention and assistance programmes is gaining recognition, but is limited. The wider gender dimensions, of constructions of vulnerability and the relative invisibility of men and boys as victims, particularly in the context of sexual exploitation remains a serious concern. **17.24**

48 Ibid., paras 130–134.

ARTICLE 18

CRIMINALISATION OF TRAFFICKING IN HUMAN BEINGS

Vladislava Stoyanova

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally.

A. INTRODUCTION

18.01 Article 18 of the Council of Europe's (CoE) Convention on Action against Trafficking in Human Beings imposes an obligation upon the State Parties to criminalise human trafficking in their national legislation.[1] For determining the scope of the criminalisation, Article 18 refers to Article 4 of the Convention that defines human trafficking. Besides influencing substantive criminal law at national level, Article 18 is of importance for the purposes of facilitating international co-operation in criminal matters. This co-operation, for example extradition and mutual legal assistance, might be dependent on the principle of dual criminality, which implies that certain conduct has to be qualified as a crime in the requested and in the requesting country.[2]

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention). A similar obligation is imposed by Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol) and Art 2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

2 See, e.g., European Convention on Extradition, ETS No. 24, 18 April 1960:

> Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

Given its strong focus on criminal law, the CoE Convention against Trafficking can be also characterised as a transnational criminal law treaty. More generally, transnational criminal law strives for the 'indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects'.[3] The international treaties that belong to the transnational criminal law framework, known as suppression conventions, are crime control treaties concluded for the purpose of suppressing harmful behaviour by non-state actors. Their function is to penalise forms of undesirable conduct committed by individuals.[4] These conventions are meant to suppress 'crimes of international concern'.[5] The origin of suppression conventions is international law, however, the penal proscription is national as the locus of penal power remains in the state.[6] **18.02**

B. DRAFTING HISTORY

Article 18 did not raise major controversial issues during its drafting process and the wording remained unchanged throughout the drafting. Still, it is of interest to observe that during the drafting, Sweden observed that it foresaw 'difficulties pertaining to the principle of legality and foreseeability'.[7] This observation is still pertinent and relates to the difficulties in understanding the different elements of the definition of human trafficking as outlined in Article 4 of the Convention and in applying these elements in the settings of the national criminal law, where certain fundamental principles, such as legality and foreseeability, need to be adhered to. This is a point that will be further discussed below. **18.03**

The only contentious issue that emerged during the drafting of the provision revolved around the phrase 'when committed intentionally'. The CoE Parliamentary Assembly recommended that this phrase be deleted since it was superfluous.[8] In particular, Article 18 already referred to **18.04**

In contrast, no sentencing threshold and no double criminality requirements are raised for the application of the European Convention on Mutual Assistance in Criminal Matters, ETS No. 030, 9 April 1960. The EU law criminal law regime has its own standards and peculiarities. See, e.g., Art 2(2) of the Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States 2002/584/JHA of 13 June 2002 (OJ L 190/1) where, if the arrest warrant is issued with respect to the crime of human trafficking, double criminality is not required.

3 Neil Boister, 'Transnational Criminal Law' (2003) 14(5) *European Journal of International Law* 953, 955. Boister explains that transnational criminal law has to be distinguished from international criminal law. Unlike international criminal law, it does *not* create individual penal responsibility under international law and jurisdiction of a permanent international court. It is an indirect system of interstate obligations generating national penal laws; the individual criminal responsibility is entirely in terms of national law. It has to be also distinguished from purely national crimes, which are criminalised solely at the decision of the state and are not initiated through international treaties. For the criminalisation of human trafficking in the context of international criminal law see Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 222.

4 Boister, 955; see also Frank Gregory, 'Private Criminality as a Matter of International Concern' in James Sheptycki (ed), *Issues in Transnational Policing* (Routledge 2000) 100.

5 Roger Clark, 'Offences of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg' (1988) 57 *Nordic Journal of International Law* 49.

6 Boister, 955–75.

7 CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Sweden and by the observer of the International Labour Office (ILO)*, Restricted CAHTEH (2003)8 rev 2, Addendum I, 28 November 2003, 6.

8 Parliamentary Assembly, *Opinion No. 253 (2005) on the draft Council of Europe Convention on Action against Trafficking in Human Beings*, 26 January 2005, para 14.

the acts mentioned in Article 4 of the Convention, which were always intentional since they were committed 'for the purpose of exploitation'. The suggestion for deletion was discussed by the Drafting Committee during its 8th session, when it was decided not to delete the expression. Major opposition against the deletion was exercised by the European Union (EU) Member States that adopted a common position that opposed the removal of the expression 'when committed intentionally'.[9] Ultimately, however, the addition of 'when committed intentionally' cannot have the restricting function that the CoE Parliamentary Assembly might have expected in terms of imposition of a demanding standard as to the *mens rea* element of the crime, which might make convictions more difficult to achieve. In particular, the Explanatory Report to the Convention clarifies that '[t]he interpretation of the word "intentionally" is left to domestic law'.[10] It is therefore eventually the national substantive criminal law that determines the approach to the *mens rea* element. As it will be showed below, there might be different approaches in different countries: some more demanding that can make convictions more difficult and some more flexible.

18.05 Confusingly, after stating that the interpretation of 'intentionally' is left to domestic criminal law, the Explanatory Report adds that:

> It is nonetheless necessary to bear in mind that Article 4(a) provides for a specific element of intention in that the types of conduct listed in it are engaged in 'for the purpose of exploitation.' *For the purposes of the Convention*, therefore, there is trafficking in human beings only when the specific intention is present [emphasis added].[11]

18.06 The first sentence of the above quotation seems to underscore that human trafficking cannot be constituted if the purpose element of the definition, that is, 'for the purpose of exploitation' is not present. The second sentence seems to refer to a context other than the national criminal law, for example 'for the purpose of the Convention', where the specific intention needs to be demonstrated. Such a context might be the definition of a victim contained in Article 4(e) of the Convention that is of relevance for the application of the assistance measures.[12] In sum, the above quoted paragraph might underpin an approach that could imply an unfortunate divergence as to the application of the element of intention in the context of criminal law (where ultimately national law determines how intention is understood, which might imply flexibility) as opposed to the context of assistance of victims (where the Explanatory Report insists on the element of intention).

C. ARTICLE IN CONTEXT

18.07 As the text of the provision suggests, Article 18 is intertwined with Article 4 of the CoE Convention against Trafficking that defines human trafficking. This means that all the complications surrounding the meaning and the scope of the definition of human trafficking are transposed in the context of Article 18. In contrast to Article 4, however, once human

9 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, 17.

10 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 228.

11 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 228.

12 These measures are outlined in Art 12 of the CoE Convention against Trafficking.

trafficking is incorporated as a criminal offence at national level, the interpretation of the crime has to obey the rules of interpretation that are applicable in this specific legal context. When the definition of the crime of human trafficking is interpreted for the purposes of criminal investigation, prosecution or conviction of perpetrators, the interpretative exercise would have to be subjected to the interpretative precepts of criminal law. These precepts include the principles of personal responsibility, presumption of innocence, fair labelling and legality.[13] Such stringent rules are not necessarily applicable for interpreting the definition of human trafficking for the purpose of identifying individuals as victims who are in need of support and assistance.[14] This is further supported by the position that victim identification needs to be a process that is distinct from crime investigation.[15]

D. ISSUES OF INTERPRETATION

1. Establishment of criminal jurisdiction

18.08 The obligation of criminalising implies the adoption of national legislation so that states establish their criminal jurisdiction.[16] Note should be taken of the difference between the establishment of criminal jurisdiction and its exercise.[17] The State Parties have to legislate to establish criminal jurisdiction. This is necessary to ensure that criminals do not take advantage of national boundaries to avoid prosecution and punishment, yet this does not carry with it an obligation of exercising that jurisdiction in any particular case.[18] Therefore, the provisions in the CoE Trafficking Convention related to criminal jurisdiction ensure that the State Parties have the legal ability to undertake investigations and prosecutions domestically. There is, however, no obligation to submit the case to the competent national authorities for the purpose

13 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 2009) 58–95; Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012).

14 Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law*, 101.

15 See on this also the Commentary on Art 10.

16 On criminal jurisdiction and the principles for establishing it see Michael Akehurst, 'Jurisdiction in International Law' (1973) 46 *British Yearbook of International Law* 145.

17 A distinction is made between, on the one hand, 'prescriptive' jurisdiction, which refers to the right of each state to prescribe rules, and 'enforcement' jurisdiction, which refers to the right of the state to enforce the rules and to actually exercise its jurisdiction. Enforcing and exercising criminal jurisdiction implies investigation and prosecution of crimes. 'Distinct from the power to make decisions or rules (the prescriptive or legislative jurisdiction) is the power to take executive action in pursuance of or consequent on the making of decisions or rules (the enforcement or prerogative jurisdiction).' See Ian Brownlie, *Principles of Public International Law* (Oxford University Press 2008) 299. 'Enforcement jurisdiction' is in principle limited to the states territory:

> Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissible rule to the contrary – it may not exercise its powers in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; *it cannot be exercised by a State outside its territory* except by virtue of a permissive rule derived from international custom or from a convention [emphasis added].

The Case of The S.S. 'Lotus' (1927) PCIJ Report Series A No.10, 18–19, para 45. See also Vaughan Lowe and Christopher Staker, 'Jurisdiction' in Malcom Evans (ed), *International Law* (Oxford University Press 2010) 316.

18 David McClean, *International Organized Crime. A Commentary on the UN Convention and its Protocols*, (Oxford University Press 2007) 167.

of investigation and prosecution.[19] Yet it should be taken into consideration that without the establishment of criminal jurisdiction (i.e., criminalisation) there can, in a legal sense, be no substantive crime. In addition, once the criminal jurisdiction has been established, this enables the enforcement of that jurisdiction against those who commit crimes. Thus, establishment of criminal jurisdiction makes potential enforcement possible.[20]

2. Criminalisation of all actions

18.09 In relation to territoriality as a basis for the establishment of criminal jurisdiction, it is important to highlight the following clarification in the Explanatory Report to the CoE Trafficking Convention:

> […] a Party in whose territory someone is recruited by one of the means and for one of the exploitation purposes referred to in Article 4(a) has jurisdiction to try the human trafficking offence laid down in Article 18. The same applies to Parties through or in whose territory that person is transported.[21]

Accordingly, states have to establish criminal jurisdiction when *any* of the actions included in the definition of human trafficking are committed on their territory. Only one of the actions (e.g., the recruitment) might have been committed in a given state territory. Still, the State Parties are under the obligation to ensure the criminalisation of this single action. This obligation became evident in the case of *Rantsev v Cyprus and Russia*, where the European Court of Human Rights (ECtHR) observed that '[t]he failure to investigate the recruitment aspect of alleged trafficking would allow an important part of the trafficking chain to act with impunity'.[22] The Court held that the Russian authorities were under the obligation to 'investigate the possibility that individual agents or networks operating in Russia were involved in trafficking Rantseva to Cyprus.[23]

3. Criminalisation under the specific label of 'human trafficking'

18.10 As clarified above, the State Parties are under the obligation to criminalise at the domestic level, abuses falling within the definition of human trafficking. A question that emerges at this point is whether the State Parties are under an obligation to have the *specific criminal law label* of human trafficking. Such an obligation cannot be directly extracted from the text of the treaty;[24] this means that it might be indeed possible for a state to have various substantive

19 Such a positive obligation might, however, arise under the ECHR. See Stoyanova, *Human Trafficking and Slavery Reconsidered*, 351–68.

20 State Parties are obliged to establish criminal jurisdiction based on the territoriality principle (see Arts 31(1) and 32(2) CoE Convention against Trafficking). In contrast, the establishment of criminal jurisdiction based on the nationality and passive nationality principles is not obligatory.

21 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 328.

22 *Rantsev v Cyprus and Russia*, App no 25965/04 (ECtHR, 7 January 2010) para 307.

23 Ibid. Russia was found to have failed to fulfil this obligation since 'the authorities took no steps to identify those involved in Ms Rantseva's recruitment or the methods of recruitment used'.

24 For similar arguments in relation to the criminalisation of slavery, servitude and forced labour at national level see Stoyanova, *Human Trafficking and Slavery Reconsidered* (2017) 338. Contra see Maria Eriksson, 'The Prevention of Human Trafficking – Regulating Domestic Criminal Legislation through the European Convention on Human Rights' (2013) 82 *Nordic Journal of International Law* 339, 352.

criminal law provisions that carry labels different from 'human trafficking' but that substantively cover the same criminal conduct. This, however, might make it difficult to monitor compliance with the CoE Convention against Trafficking. It might also hamper international co-operation in criminal matters.

18.11 As the Group of Experts on Action against Trafficking in Human Beings (GRETA) reports demonstrate, states have in practice incorporated the specific label of human trafficking. GRETA has also maintained that: 'The Convention provides a definition of trafficking in human beings and requires parties to criminalise THB *according to this definition*, whether by means of a single criminal offence or by combining several offences [emphasis added]'.[25]

18.12 It is important to observe that without the specific criminal law label of human trafficking, it might be difficult for the national substantive criminal law to keep pace with important interpretative standards and any developments in these standards. Applying a different label might also diminish the gravity of the offence. A different criminal law label might not also reflect the essence of the wrongdoing. The gravity and the essence of the abuses might not be represented if they were labelled as, for example, ordinary coercion or fraud.

18.13 In this context, the principle of 'fair labelling' plays an important role. This principle relates to questions of how the content of the criminal law should be structured, how we should distinguish wrongs from each other and how the content of the wrongs should be articulated.[26] The principle of 'fair labelling' requires that 'the label of the offence should fairly express and signal the wrongdoing of the accused, so that the stigma of conviction corresponds to the wrongfulness of the act'.[27] Such labelling reflects the moral judgments that the public makes about the relevant conduct.[28] Therefore, if migrants are subjected to abuses which in terms of content correspond to 'human trafficking', as defined in the CoE Convention against Trafficking, these abuses should be labelled as such in compliance with the principle of 'fair labelling'. This argument is even more powerful given the enormous emphasis that has been placed on human trafficking in the last two decades.

4. Incorporation of the definition in the context of national criminal law

18.14 Having clarified that in practice states have incorporated the specific label of human trafficking in their substantive criminal law (and that implicitly they might be under the obligation to do so), the next question is whether states are under the obligation to verbatim incorporate the international law definition of human trafficking in their criminal laws. Are states under the obligation to define 'human trafficking' at national level in the same way as 'human trafficking' is defined in Article 4 of the CoE Convention against Trafficking?

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25 GRETA, *4th General Report on GRETA's Activities*, March 2015, 36.

26 Victor Tadros, 'Fair Labelling and Social Solidarity' in Zedner and Roberts (eds), 68, 69; Hilmi Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford University Press 2014) 25–33.

27 For a detailed discussion of the 'fair labelling' principle and the functions that it serves see James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217; see also Barry Mitchell, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64(3) *Modern Law Review* 393, 398.

28 Ashworth, 78–80.

18.15 Although there has been a strong tendency by states to copy the elements of the definition of human trafficking and to paste them at national level,[29] it is hard to extract an obligation of verbatim incorporation. GRETA has taken the following position on this issue:

> While parties are *not obliged to copy verbatim* into their domestic law the definition of THB in the Convention, they must cover its concepts in a manner consistent with the principles of the Convention and offer an equivalent framework for implementing it. In this connection, GRETA stresses the fundamental importance of using a definition of trafficking in human beings on which there is international consensus. [emphasis added][30]

18.16 GRETA has also urged states to bring their criminal law definitions in conformity with the definition in the Convention.[31] It has criticised countries that have definitions that diverge from the definition in Article 4 of the Convention. GRETA has observed that in some countries, 'the means were not a constituent component of the definition of THB in the national legislation'.[32] The monitoring body has also reproached countries that have not explicitly indicated in their national provisions criminalising human trafficking that the consent of the victim is irrelevant.[33] GRETA has maintained that 'there are benefits in stating explicitly in legislation that consent is irrelevant to determining whether the crime of human trafficking has occurred'.[34]

18.17 Despite the benefits of verbatim incorporation that GRETA has highlighted in its reports, better appreciation is still necessary of the possible dangers and problems that might emerge when the national legislator simply copies and pastes the wording of the prohibited conduct from the international legal instrument.[35] The copy and paste method does appear to be a safe method for a state that wishes to live up to its obligations (or at least to give an appearance that it has met its international law obligations).[36] Yet the verbatim method might lead to the introduction of a terminology into the national criminal law that may not be compatible with the national criminal justice system and could thus lead to distortion.[37] More specifically, the definition of human trafficking as laid out in the CoE Trafficking Convention might contain

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29 Many states have simply incorporated the international law definition of human trafficking in national legislation without defining in their criminal legislation exploitation, slavery, servitude and forced labour. See GRETA, *Report on Croatia*, I GRETA(2011)20, paras 34–35; GRETA, *Report on Denmark*, I GRETA(2011)21, paras 44–45; GRETA, *Report on Slovak Republic*, I GRETA(2011)9, para 36. It has been reported that the direct incorporation of the international law definition of human trafficking in Poland has led to uncertainty and complications since the national authorities have to use terms and notions with unclear meanings which are foreign to the domestic legal system. See Celina Nowak, 'The Europeanisation of Polish Substantive Criminal Law: How the European Instruments Influenced Criminalisation in Polish Law' (2012) 3 *New Journal of European Criminal Law* 363, 378–9.

30 GRETA, *4th General Report on GRETA's Activities*, March 2015, 36.

31 Ibid.

32 Ibid. An example of such a country is Bulgaria. For an in-depth analysis see Stoyanova, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law' (2013) 5(1) *Amsterdam Law Forum* 64–79.

33 GRETA, *7th General Report on GRETA's Activities*, March 2018, para 83.

34 GRETA, *Report on Denmark*, II GRETA(2016)7, para 149; GRETA, *Report on Armenia*, II GRETA(2017)1, para 151.

35 Stoyanova, *Human Trafficking and Slavery Reconsidered*, 77.

36 This is especially relevant in the context of EU law, where there are stronger enforcement mechanisms in comparison with the CoE system. Fear of possible sanctions by the EU Commission might lead EU Member States to opt for transposing pertinent directives verbatim. See Maria Kaiafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law' (2011) 1(1) *European Criminal Law Review* 7, 27.

37 André Klip, *European Criminal Law* (Intersentia 2009) 204.

terms, words and phrases that are alien to the national criminal law, and their direct importation may thus lead to a lack of understanding as to their meaning. What is even more important, the national criminal law has to comply with the principle of legality. This principle concerns the qualitative standards that have to be met by the national substantive criminal law. These standards might not be complied with when the definition of the crime contains vague and unclear terms.

18.18 Some further elaboration of the principle of legality is pertinent now. The principle requires that definitions of crimes be construed strictly to provide fair notice to individual actors and to constrain the arbitrary exercise of states' coercive power.[38] In the field of criminal law a conduct that is considered a criminal offence must be precisely defined. If it is not, this might conflict with the defendant's human rights.[39] This requirement for a clear definition of the offence is satisfied 'where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable'.[40] In addition, crimes cannot be extensively interpreted or interpreted by analogy.[41] It should be also kept in mind, however, that progressive development of criminal law is not precluded.[42] Therefore, there is no absolute and rigid adherence to the principle of legality.[43] Yet, this principle has a central and crucial role in the context of criminal law.

18.19 Let us assess the international law definition of human trafficking against the principle. The definition contains elements (exploitation, deception, abuse of positive of vulnerability, etc.) which are ambiguous and, therefore, it might be difficult for a criminal court to convict an alleged perpetrator for human trafficking without entering into serious interpretation problems.[44] This was precisely the situation faced, for example, by the UK Court of Appeal in *Regina v SK*,[45] where the national court observed that:

> We do not think that, when read fairly as a whole, the judge's summing-up provided the jury with *a proper definition of exploitation* for the purposes of Section 4 of the 2004 Act. In describing the ingredients of the offence the judge did not identify and explain the relevant core elements of Article 4 [of the European Convention on Human Rights (ECHR)]. In our judgment, he focused too much on the economics of the relationship between the appellant and the complainant, thus diluting the test the jury had to apply to one appropriate to an employment law context but not strong enough to

38 See Paul Robinson, 'Fair Notice and Fair Adjudication: Two Kinds of Legality' (2005) 154 *University of Pennsylvania Law Review* 335; see generally Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009); Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21(4) *Leiden Journal of International Law* 925, 946–7.

39 See Art 7 of the ECHR; See also *Sunday Times v The United Kingdom*, App no 6538/74 (ECtHR, 26 April 1979).

40 *Korbely v Hungary* App no 9174/02 (ECtHR, 19 September 2008) para 70.

41 *E.S. v Sweden*, App no 5786/08 (ECtHR, 21 June 2012) para 69. For elucidation of the general principles, which the ECtHR applies in relation to *nullum crime, nulla poena sine lege* see *Kasymakhunov and Saybatalov v Russia* App no 26261/05 and 26377/06 (ECtHR, 14 March 2013) paras 76–78.

42 *Korbely v Hungary*, para 71.

43 Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) (2) *Journal of International Criminal Justice* 1007; *Kokkinaksi v Greece* App no 14307/88 (ECtHR, 25 May 1993) para 40.

44 See on the difficulties in interpreting human trafficking also the Commentary on Article 4. As to how the national courts in the Netherlands have approached the difficulty see L B Esser and C E Dettmeijer-Vermeulen, 'The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking' (2016) 6 *Anti-Trafficking Review* 91.

45 *Regina v SK* [2011] EWCA Crim 1691, 8 July 2011.

> establish guilt of the criminal offence with which the appellant was charged. […] What the jury had to concentrate on in this case was not the fact that the complainant was paid 'a mere pittance' or an 'exploitative' wage, but whether, when the appellant arranged for the complainant to come to the United Kingdom, she had intended to exploit her in such a way as would violate her rights under Article 4 [of the ECHR] [emphasis added].[46]

18.20 The Court of Appeal thus decided that the conviction of SK for human trafficking was unsafe. The above quotation illustrates the difficulties in interpreting just one element of the definition, namely 'for the purpose of exploitation'. National legislation that has incorporated the concept of exploitation as an element of the crime of human trafficking, yet without further defining it, might thus face serious issues as to how expansively or narrowly to interpret this term.[47] GRETA has also reported that 'countries have adopted open-ended lists of exploitative purposes or broad formulations such as "other forms of abuse of human dignity"'.[48] Using 'human dignity' as a standard in the context of criminal law might be problematic, as the judgments in *Siliadin v France* and *C.N. and V. v France* actually revealed. More specifically, in *Siliadin v France* the concept of 'human dignity' as interpreted at national level was found inadequate,[49] precisely because of its ambiguities and openness to divergent interpretations by different national courts.

18.21 'Exploitation' is not the only concept that might cause difficult interpretative issues in the context of national criminal law. 'Abuse of position of vulnerability', one of the means elements in the definition of human trafficking as outlined in Article 4 of the CoE Convention against Trafficking, might be a similarly problematic concept. Usefully, the EU Anti-trafficking Directive has defined 'position of vulnerability' in the following way: 'a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved'.[50] This might serve as useful guidance as to how generously to interpret this element for the purposes of criminal law. As some of the GRETA reports demonstrate, the national authorities of the State Parties might use various indicators that denote vulnerability.[51]

18.22 In conclusion, a simplistic incorporation of the international law definition of human trafficking might lead to inadequacies. This definition was crafted in a particular legal context,

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46 Ibid, para 44.

47 Many national jurisdictions have incorporated the term 'exploitation' into national legislation. See, e.g., GRETA, *Report on Austria*, II GRETA(2015)19, para 158; Pursuant to Art 104(a)(3) of the Austrian Criminal Code, 'exploitation' includes 'sexual exploitation, exploitation through organ transplantation, labour exploitation, exploitation of begging and the exploitation to commit criminal activities'.

48 GRETA, *4th General Report on GRETA's Activities*, March 2015, 37.

49 *Siliadin v France* App no 73316/01 (ECtHR, 16 October 2005) para 142. After the delivery of these two judgments, France amended its criminal legislation. See Bénédicte Bourgeois, 'Statutory Progress and Obstacles to Achieving an Effective Criminal Legislation Against the Modern Day Forms of Slavery: The Case of France' (2017) 38(3) *Michigan Journal of International Law* 455.

50 Dir 2011/36/EU, Art 2(2).

51 The courts have considered age (19 years), lacking verbal and/or written language skills and self-esteem, poor social or very different cultural background, as well as poor economic situation in the country of origin as criteria for considering victims of trafficking to have been in a vulnerable situation.

See GRETA, *Report on Denmark*, II GRETA(2016)7, para 150. 'According to the [Serbian] authorities, the term "abuse of difficult circumstances of another" is construed to cover 'abuse of a position of vulnerability.' The criteria used for assessing 'difficult circumstances' cover the person's economic situation, history of violence (psychological, physical, sexual), substance abuse and social exclusion. See GRETA, *Report on Serbia*, II GRETA(2017)37, para 169.

namely that of transnational organised crime, which pursues its own particular objectives.[52] In contrast, national criminal law has to live up to higher standards in terms of definitional determinacy so that it can comply with the principle of legality.

5. 'when committed intentionally'

18.23 A final interpretative issue that merits attention concerns the required *mens rea* for the commission of the crime of human trafficking. This was an issue that was touched upon above as the only controversial issue during the drafting of Article 18 of the CoE Convention against Trafficking.[53] The definition of human trafficking requires that each of the actions of recruitment, transportation, transfer, harbouring or receipt, has to be committed 'for the purpose of exploitation', a phrase which relates to the mental element (the *mens rea*; the state of mind of the perpetrator). The person who transports should not only execute the transportation by means of, for example, deception, but should also have the necessary *mens rea* in order to be convicted for human trafficking. If not, this person might be a smuggler rather than a human trafficker.[54]

18.24 Here it is important to observe that different national jurisdictions might have different traditions as to how to interpret intention. Intention might be interpreted to the effect that this mental element must be established in relation to both the act, and the designated purpose of the act.[55] In relation to the act, it must be demonstrated that the trafficker meant to engage in it be recruiting, transporting, etc. In relation to the purpose of the act, it must be proven that he/she meant to cause it; he/she meant to cause the consequence, namely exploitation. Within this interpretation, intention is a mental element that demands a high threshold. It certainly implies a higher threshold than mere knowledge (e.g., the person who recruits only knows that the victim might be exploited, but he/she does not intend the exploitation) or mere negligence (the person who recruits is negligent and disregards what might happen to the victim after the recruitment).[56]

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52 The main objective of transnational organised crime is efficient international co-operation:

> The main reason for defining the term "trafficking in persons" in international law was to provide some degree of consensus-based standardization of concepts. That, in turn, was intended to form the basis of domestic criminal offences that would be *similar enough to support efficient international co-operation* in investigating and prosecuting cases [emphasis added].

UNODC, *Legislative Guides for the Implementation of the United Nations Organized Crime Convention and Protocols thereto* (United Nations 2004) 269; See also Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 216.

53 See also Art 2 of Dir 2011/36/EU: 'Member States shall take the necessary measures to ensure that the following *intentional* acts are punishable [emphasis added].' Art 5(1) of the Palermo Protocol also contains the addition 'when committed intentionally'.

54 Human smuggling is defined in Art 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 UNTS 507, 28 January 2004 'procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.

55 Johan van der Vyver, 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law' (2005) 12 *University of Miami International and Comparative Law Review* 57, 100–101.

56 The term 'victim' is used in a general fashion without prejudice to any formal recognition of the affected person as a victim of trafficking or any convictions of perpetrators for the crime of human trafficking.

18.25 At the level of national substantive criminal law, states can adopt different approaches that could be more liberal (with the required *mens rea* being only knowledge or negligence) or more restrictive (when the required *mens rea* is intention). The more restrictive approach might make convictions more difficult as it needs to be proven to the required standard that, for example, the recruiter not only intended to recruit the victim, but he/she also intended the exploitation.

E. CONCLUSION

18.26 Article 18 of the CoE Convention against Trafficking imposes an obligation upon the State Parties to criminalise human trafficking at domestic level. No direct obligations are imposed for incorporating the specific label of human trafficking and for copying the international law definition of human trafficking within the national substantive criminal law. However, the fulfilling of the purposes of the Convention (i.e., combating human trafficking, protection of victims and promotion of international co-operation in criminal matters)[57] might require the incorporation of the specific label and the internationally agreed definition of human trafficking. Crucially, this definition is open to divergent interpretations and ambiguities, not only in relation to the 'action', 'means' and 'purpose' elements, but also in relation to the *mens rea* standard. These ambiguities will have to be resolved within the context of national substantive criminal law to ensure the principle of legality is complied with.

57 CoE Convention against Trafficking, Art 1.

ARTICLE 19

CRIMINALISATION OF THE USE OF SERVICES OF A VICTIM

Siobhán Mullally

Each Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a of this Convention, with the knowledge that the person is a victim of trafficking in human beings.

A. INTRODUCTION

Article 19 requires State Parties to consider criminalising, through legislation or other measures, the use of services, which are the 'object of exploitation' as defined by Article 4(a) of the CoE Convention against Trafficking.[1] The appropriate *mens rea* for the criminal offence is that of 'knowledge' that the person providing the service concerned, is a victim of trafficking. As such, lower standards for criminal liability, such as recklessness or strict liability are not required by the Convention, but are of course open to State Parties to adopt in domestic law. **19.01**

The objects of exploitation are listed in Article 4(a) of the Convention, and include sexual exploitation, 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. These forms of exploitation are listed as a minimum, and other forms of exploitation such as forced criminality or forced marriage may also be covered by State Parties. **19.02**

The impulse motivating the inclusion of Article 19 was the desire to discourage demand, which drives or fuels the crime of trafficking in human beings. Using the services of victims of trafficking was considered to be akin to a form of aiding or abetting the crime of trafficking, not already covered under the Convention's criminal law provisions. **19.03**

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (CoE Convention against Trafficking or Convention).

19.04 The criminal law response envisaged in Article 19 goes beyond the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[2] or the requirements of the Framework decision at EU level.[3] This expansion beyond the criminal law framework already agreed at UN and EU level attracted commentary and criticism during the drafting stages from states. Its inclusion reflects a concern to deploy the tools of criminal law, and to expand its reach, as both a deterrent and punitive measure. The continuing limited impact of Article 19 in domestic law and practice of State Parties reflects a continuing reservation as to its effectiveness and its reach.

B. DRAFTING HISTORY

19.05 The drafting history of Article 19 reveals significant differences between states, on the desirability of expanding the criminal law response to clients as well as to traffickers. While adopting a human rights-based approach in a Council of Europe Convention was viewed as adding to the normative framework of international human rights law, the progressive development proposed in the draft criminal law chapter of the Convention and Article 19, in particular, was questioned by states. Its inclusion, and the momentum to expand the reach of the criminal law was justified as seeking to punish the buyer of services in the same way that laws criminalise those receiving the products of a criminal offence. Difficulties of proof, it was argued, were not unusual in the realm of criminal law, and offences of indirect involvement in the commission of an offence were familiar to domestic criminal law frameworks. The difficulties of securing evidence were noted in the draft Explanatory Report following the 5th meeting of the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH).[4] The requirement to prove knowledge was recognising as a potentially difficult matter for the prosecution authorities. However, it was noted that similar difficulty arises with other types of criminal law offences, where evidence is required of a non-material ingredient of an offence. In such context, the difficulties encountered were not considered to be a sufficient argument against criminalising the conduct of the buyer or user of services.

19.06 Several states, however, questioned the proposal to extend the Convention's criminal law provisions beyond the requirements of the Palermo Protocol. A focus on prevention rather than punishment and prosecution was favoured by some of those participating in the debate. Of interest, given subsequent developments in Sweden on criminalising the purchase of sexual services, is the stated opposition of the Swedish delegation to the inclusion of a criminal law provision, which was targeted on clients or buyers. Specifically, the Swedish delegation commented that it foresaw difficulties pertaining both to the principle of legality and to foreseeability. Heralding a debate that continues on the impact of extending criminalisation, the Norwegian Government expressed doubt that criminalising the buying of sexual services, 'even from victims of trafficking' was the right way to protect victims. The impact of

2 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

3 Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, (OJ L 203/1), later replaced by Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, (OJ L 101/1) (thereinafter Dir 2011/36/EU).

4 CAHTEH, *Draft explanatory report concerning provisions which have been examined in second reading*, CAHTEH(2004)20, 23 September 2004, para 145.

criminalisation, they argued, could worsen the situation of victims pushing prostitution further underground in a way that would yield greater power to traffickers over both the sex industry and victims of the crime of trafficking.[5] Given subsequent developments in both Sweden and Norway, pioneering the Nordic model of criminalising the client, this caution and scepticism, expressed at the time of drafting is particularly significant, albeit one that was not sustained.

19.07 The position taken by the delegation of the Netherlands is one that it has maintained, and that continues to shape its response to the crime of trafficking for the purpose of sexual exploitation, and the regulation of prostitution. Questioning the advisability of the expanded scope and reach of this new criminal law offence, they argued that clients could, 'not be expected to inquire about a prostitute's status'. The provision was, in their view, not enforceable, amounting only to a token legislative response.[6] Similar questions were raised by the Swiss delegation, who viewed the intended impact as illusory, and raised also concerns as to the precise meaning of the reference to services.[7] This concern was addressed, in part, by the later inclusion of reference to the objects of exploitation, listed in Article 4(a).

19.08 Both the USA and the Netherlands questioned the value of an extended criminal law chapter. The Netherlands delegation commented that seeking to combat trafficking through treaty provisions on the criminal law had no added value, and should not in any case go further than the Palermo Protocol or the EU Framework Decision. This view was echoed by the observer delegation from the USA, who called for the deletion of the criminal law chapters, expressing concern that they were undermining and calling into question the effectiveness of the Palermo Protocol. This, in turn, could lead the delegation argued, to a reduction in the numbers of states choosing to ratify the Palermo Protocol, with increased numbers opting instead for the Council of Europe treaty. Despite being open to wider ratification, the CoE Convention against Trafficking was viewed as likely only to have regional impact. Given the global nature of trafficking, the US delegation argued that it would be preferable to strive for as many countries as possible to ratify the Palermo Protocol, and thereby to become bound by the same principles of criminalisation and judicial cooperation.[8] Including criminal law chapters in the CoE Convention against Trafficking with a proposal for a new criminal offence targeting clients, was considered as potentially undermining the momentum towards greater harmonisation of criminal law responses through the Palermo Protocol.

19.09 To address the concerns expressed during the drafting process, it was proposed that a note on the diverging regulation of prostitution at domestic level should be included under Article 4(a) of the Convention, similar to the Interpretive Note on Article 3 of the Palermo Protocol: 'The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not

5 CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Sweden and by the observer of the International Labour Office*, CAHTEH(2003)8 rev2 Addendum I, 28 November 2003, 6 and CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Norway and the observer of Mexico*, CAHTEH(2003)8 rev 2 Addendum II, 1 December 2003, 7.

6 CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings: Contribution by the delegations of Austria, Netherlands and by the observer of UNICEF*, CAHTEH(2004)1, 26 January 2004, 9–10.

7 CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Switzerland*, CAHTEH(2004)1 Addendum II, 29 January 2004, 9.

8 CAHTEH, *Preliminary Draft of European Convention on Action against Trafficking in Human Beings: Contributions by the observer of the United States of America*, CAHTEH(2004)1 Addendum I, 29 January 2004, 4.

defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws'.[9] This discussion continued throughout the drafting process, with a note included in the Explanatory Report that clearly states the limited scope of the Convention in regulating prostitution, and its intention not to target those using the services of those engaged in prostitution, as such.

19.10 While much of the discussion on the scope and reach of the criminal law offence was covered by Article 19, related to trafficking for the purpose of sexual exploitation, it was clearly intended also to reach businesses using the services of trafficked persons made available by a trafficker. This expanded reach was intended to cover a situation, where the business in question might not otherwise be liable, where the actions or means required in the elements of the crime were not present. Similarly, it was intended to cover the situation where the services of a trafficker were knowingly used to secure an organ.

19.11 Contributions from civil society during the drafting process reflect concern about the language and scope of Article 19. The Coalition against Traffic in Women (CATW) was critical of the use of the term 'services', arguing that traffickers, particularly traffickers for the purpose of sexual exploitation, used persons and their bodies, and not only their services. CATW proposed to replace the term 'services' with 'victims', to enact a new provision requiring State Parties to criminalise the use of a victim.[10] Terre des Hommes expressed concern at the relative weakness of the criminal law provisions of the Convention on trafficking of children. The specific vulnerabilities of children and their situation of dependence, which heightened the risks faced, was not adequately captured in their view, by the draft Convention's text.[11]

19.12 A proposal to strengthen Article 19 by requiring State Parties to criminalise the use of services of a victim was voted upon and rejected.[12] The final text requires states to consider the criminalisation of use of services, reflecting a continuing concern about the scope and reach of this criminal law offence and its perceived novelty.

C. ARTICLE IN CONTEXT

19.13 Article 19 sits somewhat uneasily with Article 6 of the CoE Convention against Trafficking, which specifically addresses the obligations of states to combat demand in the context of State Parties' positive obligations of prevention. Article 6, which imposes an immediate obligation on State Parties, focuses primarily on preventive measures in the field of public awareness, education, information campaigns and research. While both Article 6 and Article 19 were adopted in the context of concerns to target demand, Article 6 imposes binding obligations on State Parties, while Article 19 imposes only an obligation to consider criminalisation. The

9 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 151.

10 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings*: *Contribution by the Coalition Against Trafficking in Women (CATW) and the Gender Equality Grouping of the international NGOs enjoying participatory status with the Council of Europe*, CAHTEH(2004)17 Addendum IX, 24 September 2004, 4.

11 Terre des Hommes, *Comments on the draft Convention of the Council of Europe on Action against Trafficking in Human Beings as adopted by CAHTEH after the first reading of the text (4th meeting/11–14 May 2004)*, 29 June 2004.

12 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 152 and see also CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, para 60.

distinction between the approaches adopted was deliberate and the subject of extensive discussion, reflecting diverging views between states on the appropriate reach and scope of criminal law, in particular in regulating prostitution. During the drafting process of Article 6, the CoE's Committee on Equal Opportunities for Women and Men suggested to make using services of trafficked persons a criminal offence,[13] which was rejected by EU Member States and by the CAHTEH.[14] There was concern to distinguish the obligations imposed by Article 6 from the lesser obligation to 'consider' in Article 19.[15] The arguments against imposing obligations to criminalise the use of services, even where limited specifically to the context of trafficking in persons prevailed during the drafting process. A focus on prevention rather than prosecution was preferred.[16]

19.14 Divisions, seen in the drafting of the Palermo Protocol, between regulatory and abolitionist positions on the regulation of prostitution continued to manifest themselves in the context of proposals to criminalise the purchase of sexual services, including the services of a trafficked person. States' positive obligations to prevent human trafficking are increasingly linked to these debates. While the regulation of prostitution is left to states, it is argued that there is a positive obligation on states to combat demand for exploitative commercial sexual services that are viewed as facilitating and fuelling trafficking in persons, ultimately engaging states obligations of deterrence and prevention.

19.15 The UN CEDAW Committee, drawing on the wording of Article 6 of the CEDAW Convention[17] has focused on the duty to eliminate the exploitation of prostitution of others, and ensuring effective access to protection for victims of trafficking. Its Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration[18] follows the approach taken in the CoE Convention against Trafficking and the Palermo Protocol, focusing on obligations of prevention primarily in the context of education and awareness-raising, but targeting also the role of business and the private sector in the context of supply chains. The Committee recommends steps to address demand including educational, social or cultural measures, including in particular those targeted toward potential users of trafficked goods or services, and calls for closer regulation of supply chains to remove goods and services produced by trafficked persons.[19] The use of the criminal law and criminal sanctions is also recommended, 'where applicable', to target users of goods and services, and to investigate, prosecute and convict, 'all perpetrators involved in the trafficking of persons, including those on the demand side'.[20] The language used in the Draft Recommendation

13 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 4 November 2004, 4.

14 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, para 15.

15 See on the final vote of the delegations concerning formulating Art 19 as legally binding, CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, para 60.

16 Ibid., para 58.

17 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979, entered into force 3 September 1981.

18 Committee on the Elimination of Discrimination against Women, *Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration* (April 2020), https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CallTraffickingGlobalMigration.aspx (accessed 11 August 2020).

19 Ibid., paras 27 (a) and (c).

20 Ibid., paras 27 (b) and (d).

suggests a compromise between advocates of expanded recourse to criminal law and penal sanctions, and those reluctant to rely on criminal justice responses to combat human trafficking. Indeed the opening paragraphs of the Draft Recommendation are critical of both the over-reliance on the criminal justice system and restrictive migration policies, which it notes are barriers to access to justice, and to social and psychological support.

19.16 Article 18(4) of Dir 2011/36/EU draws specifically on Article 19 of the CoE Convention against Trafficking, again imposing an obligation to consider the criminalisation of the use of services of a trafficked person, with knowledge that the person is a victim of the offence of trafficking, as defined in Article 2 of the Dir 2011/36/EU. The obligation is placed, however, specifically in the context of Member States' obligations to combat demand and linked explicitly to positive obligations of prevention. It is also linked to other EU legislation such as the Employers' Sanctions Directive,[21] and to the context both of labour exploitation as well as that of sexual exploitation.[22]

19.17 It is important to note, in the context of broad compliance with the obligation of criminalisation imposed by the Employers' Sanctions Directive, that it is of more limited scope, applying only to third-country nationals illegally staying in the EU; it is not applicable to victims of trafficking who are EU nationals or third-country nationals lawfully residing in the EU.[23] The scope of the Employers' Sanctions Directive is also limited to instances of 'dependent employment', and does not cover situations, where victims are considered to be self-employed or where the user is not the employer, but nonetheless may benefit from the exploitation endured by victims. Article 18(4) of Dir 2011/36/EU extends further, but its impact has been limited.

19.18 Similarly to practice on implementation of Article 19 of the CoE Convention against Trafficking, state practice across the EU in implementing the requirement of Article 18 (4) of Dir 2011/36/EU has been mixed, with increasing divergence between Member States on the measures required to combat demand and the appropriate reach of criminal sanctions.[24] A Report by the European Commission assessing the impact of Article 18(4) measures in Member States, notes the limited availability of reliable data and statistics on investigations and convictions, with a limited body of research on the impact of criminalising users highlighting difficulties in establishing the necessary *mens rea* of knowledge for such offences. The Report notes an incomplete and diverse legal framework at national level on the treatment of users of victims of trafficking. Incremental measures targeting only the use of services provided by victims of trafficking for sexual exploitation, or relying on other related criminal law provisions are reported by Member States. In Spain, for example, it was noted that were there was knowledge of the state of vulnerability of a victim, offences against the integrity and

21 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 on minimum standards on sanctions and measures against employers of illegally staying third country nationals (OJ L 168/24), Art 9.

22 See Directive 2011/36/EU, recital 26.

23 European Commission, *Report from the Commission to the European Parliament and the Council of 2 December 2016, assessing the impact of existing national law, establishing as a criminal offence the use of services, which are the objects of exploitation of trafficking in human beings, on the prevention of trafficking in human beings, in accordance with Article 23 (2) of the Directive 2011/36/EU* (Brussels, COM(2016) 719 final) 5.

24 Ibid., 3–4.

sexual freedom of the person under the Penal Code would be applicable.[25] The Report concludes that restricting criminal liability only to situations, where the user has 'direct and actual knowledge' that the person is a victim of human trafficking creates a 'very high threshold for achieving prosecutions', and recommends considering the level of knowledge that should be required for this offence.[26] Despite the variance in legal frameworks at national level, the Commission continues to advocate strongly for criminalisation of users as being essential to the effectiveness and attainment of the objectives of Dir 2011/36/EU.[27] The absence of criminalisation, it is argued, fosters a culture of impunity for traffickers.

D. ISSUES OF INTERPRETATION

19.19 Comments on the use of the term services reflect both caution that the criminal activity impugned should not be viewed as a disembodied transactional offence and concern as to the meaning and scope of the offence. Given the absence of a definition of exploitation in the Convention, the potential for differing views on the criminal activity impugned by the term 'use of services' was highlighted. Rather than terminological debates, however, it is the motivation behind the criminal law provision and its effectiveness that attracted most comment, and continues to do so in the State Parties.

19.20 Questions of how to establish the necessary *mens rea* of knowingly using the services of a victim of trafficking were also raised,[28] but were considered to be part of a wider context of evidence and proof in complex areas of criminal law, not limited to the criminal law framework on trafficking in persons. The Explanatory Report to the Convention suggests that intention may be inferred from the factual circumstances surrounding the impugned activity, referring in this context to the approach taken in the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[29] Recognising these difficulties, states have moved towards offences of strict liability or have criminalised the purchase of sexual services per se. The wider question of what criminal offences relating to trafficking for the purpose of labour

25 Ibid., 6.

26 European Commission, *Report from the Commission to the European Parliament and the Council, assessing the impact of existing national law, establishing as a criminal offence the use of services, which are the objects of exploitation of trafficking in human beings, on the prevention of trafficking in human beings, in accordance with Article 23 (2) of the Directive 2011/36/EU*, Brussels, 2.12.2016, COM(2016) 719 final, <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/report_on_impact_of_national_legislation_related_to_thb_en.pdf>, 8, accessed 20 March 2020.

27 Ibid., 10.

28 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005 suggests to solve this issue by inferring the perpetrator's intention from the factual circumstances, see para 234 referring to Art 6(2)(c) on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

29 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 235; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No. 141, 8 November 1990, entered into force 1 September 1993, Art 6(2)(c). See also the discussion on the impact of Dir 2011/36/EU, where it is noted that in most Member States, the burden of proof continues to rest with the prosecutor, with the suspect/defendant benefiting from the presumption of innocence. The Report notes that only in the case of Ireland, the burden of proof shifts to the defendant to show that he or she did not know, and had no reasonable grounds for believing, that the person against whom the offence was committed was a victim of human trafficking, European Commission, *Report on assessing the impact of existing national law, establishing as a criminal offence the use of services*, 7–8.

exploitation[30] or organ removal are now covered by Article 19, and that cannot fall within the scope of Article 4 of the Convention, itself, has attracted less attention. Given the potentially broad scope of interpretation of actions linked to harbouring or receiving persons, there is potential for further disputes and conflict on the interpretive scope of Article 19. A question that attracted only minor comment, but is worthy of much deeper reflection in criminal law, is how this new offence fits with the established doctrine and practice on aiding and abetting crimes.[31]

19.21 The monitoring reports by GRETA, combined with the thematic sections of its General Reports on labour exploitation and on children, in particular, highlighted the limited impact of Article 19 in the domestic law and practice of State Parties. Several State Parties have not yet enacted criminal law offences on the use of services of trafficked persons.[32] Where such offences do exist, there is very limited prosecutorial activity[33] as well as limited knowledge of the scope or import of the offence.

19.22 In its country evaluation reports, GRETA has highlighted the divergence in legal frameworks in State Parties to the CoE Convention against Trafficking. Partial criminalisation in several states reflects the dominant focus in trafficking law and policy on combating demand in the context of sexual exploitation. Little attention is given to the users of victims of trafficking for the purpose of other forms of exploitation, which constitutes a concern repeatedly highlighted by GRETA, and remains a significant gap in compliance with the Convention's obligations.[34] Where criminalisation is partial only, GRETA invites states to consider expanding criminalisation to include users of victims of trafficking for all forms of exploitation[35] and has repeatedly reminded states of the obligatory reach and scope of Article 19.[36]

19.23 GRETA's 3rd General Report on its activities included a discussion of the factors driving demand for trafficking in persons, and highlighted the role of the private sector, in particular,

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30 See for instance, Council of Europe, *Explanatory Report*, para 232.

31 See for instance for a discussion on this matter in the context of corporate liability for trafficking in human beings in supply chains: Yasmin van Damme and Gert Vermeulen, 'Towards an EU Strategy to Combat Trafficking and Labor Exploitation in the Supply Chain. Connecting Corporate Criminal Liability and State-Imposed Self-Regulation Through Due Diligence?' in Dominik Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer International Publishing 2014), 191, concluding that using participation would be preferred over establishing a separate crime.

32 See, e.g., GRETA, *Report on Belgium*, II GRETA(2017)26, para 175; GRETA, *Report on Denmark*, II GRETA(2016)7, para 153; GRETA, *Report on Iceland*, II GRETA(2019)02, para 155; GRETA, *Report on Italy*, II GRETA(2018)28, para 231; GRETA, *Report on Poland*, II GRETA(2017)29, para 169; GRETA, *Report on San Marino*, II GRETA(2019)01, para 91; GRETA, *Report on the Slovak Republic*, II GRETA(2015)21, para 147; GRETA, *Report on Spain*, II GRETA(2018)7, para 227; GRETA, *Report on Ukraine*, II GRETA(2018)20, para 187.

33 GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 226 and II GRETA (2015)32, para 185, four convictions in 2014 in GRETA, *Report on North Macedonia*, II GRETA(2017)39, para 150 and two convictions in the period 2014–2017 in GRETA, *Report on Serbia*, II GRETA(2017)37, para 175.

34 See, e.g., GRETA, *Report on Estonia*, I GRETA(2018)6, paras 184 and 187; GRETA, *Report on France*, I GRETA(2012)16, para 207; GRETA, *Report on Ireland*, I GRETA(2013)15, paras 117 and 123; GRETA, *Report on the Republic of Moldova*, I GRETA(2011)25, para 145; GRETA, *Report on the Netherlands*, I GRETA(2014)10, para 211.

35 GRETA, *Report on France*, I GRETA(2012)16, para 207; GRETA, *Report on Luxembourg*, II GRETA(2018)18, para 156; GRETA, *Report on Norway*, I GRETA(2013)5, para 114.

36 GRETA, *Report on Finland*, I GRETA (2015)9, para 112; GRETA, *Report on Sweden*, II GRETA(2018)8, para 178; GRETA, *Report on Ireland*, I GRETA(2013)15, para 124.

in combating such demand.[37] GRETA's 7th General Report included a thematic focus on labour exploitation, and reflected on the links between expanding UN and CoE standards in business and human rights[38] and the obligation to target users of services provided by victims of trafficking. In reflecting on states' practice, GRETA notes that while a significant number of countries had adopted criminal law provisions targeting the use of services of trafficked persons, few prosecutions or convictions related to Article 19 criminal law offences were reported. Countries that had reported convictions included Belgium, Bulgaria, Romania and North Macedonia.[39] In their concluding comment, GRETA highlights both the normative import of Article 19, its awareness-raising function (potentially), as well as its intended punitive effect as an instrument of the criminal law.[40] It is this normative import, however, which attracts questioning and diverging practice when the criminal law is expanded to target a wider group – purchasers of sexual services. In its monitoring of State Parties to the CoE Convention against Trafficking, GRETA has repeatedly commented that criminalising the purchase of sexual services is not required by Article 19 as such, or other provisions of the Convention targeting demand.[41] The crime policy approach adopted by the Convention is limited to the criminal offence of trafficking in persons, and related positive obligations of prevention and criminalisation. The normative distinctions made, however, specifically in the context of prostitution and trafficking for the purpose of sexual exploitation, is contested, as is the scope of State Parties' obligations to combat demand.

E. CONCLUSION

19.24 Debate continues to focus on the application of Article 19 in the context of trafficking for the purpose of sexual exploitation, and its intention to stem the demand that fuels the crime of trafficking in human beings. While few resources appear to be allocated by law enforcement authorities to investigation or prosecution of users, recourse to the criminal law continues to be viewed as an effective tool not only to combat impunity for trafficking but also to deter and prevent the commission of the crime itself. As such, we see continued focus on criminalisation in particular in relation to sexual exploitation, and to an expansion of the reach of criminal law to users or buyers of sexual services not only in the context of trafficking but more broadly in prostitution itself. While this move is not required or recommended by the Convention, State Parties have argued that it is an effective move to combat demand. Exploitation, from this perspective, is a continuum.

37 GRETA, *3rd General Report on GRETA's activities*, October 2013, 45–50.

38 Committee of Ministers, Recommendation CM/REC(2016)3 of the Committee of Ministers to Member States on human rights and business, adopted on 2 March 2016.

39 GRETA, *7th General Report on GRETA's activities*, March 2018, para 167.

40 Ibid., para 168.

41 GRETA, *Report on Norway*, I GRETA(2013)5, para 113, for example. GRETA has noted that imposing fines on persons engaged in prostitution, and/or their clients does not specifically correspond to the obligation under Art 19 of the Convention, which is to criminalise the use of services provided by a person known to be a victim of trafficking; GRETA, *Report on Spain*, I GRETA(2013)16, para 127.

ARTICLE 20

CRIMINALISATION OF ACTS RELATING TO TRAVEL OR IDENTITY DOCUMENTS

Julia Planitzer

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conducts, when committed intentionally and for the purpose of enabling the trafficking in human beings:

a. forging a travel or identity document;
b. procuring or providing such a document;
c. retaining, removing, concealing, damaging or destroying a travel or identity document of another person.

A. INTRODUCTION

20.01 The criminalisation of certain acts in relation to travel or identity documents as criminal offences when committed to allow trafficking in human beings should help identify channels through which false documents pass. This may lead to the criminal networks engaged in trafficking in human beings. Articles 20(a) and (b) of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] are based on the Protocol against the Smuggling of Migrants by Land, Sea and Air.[2] Article 20(c) was added as new text, since 'traffickers very often take trafficking victims' travel and identity papers from them as a way of exerting pressure on them'.[3] The intention of adding this new text during the drafting process was to create a further offence which could be relatively simply proven and should therefore be used as an additional effective law-enforcement tool against traffickers.[4]

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (CoE Convention against Trafficking or Convention).
2 Protocol against Smuggling of Migrants by Land, Sea and Air, 2241 UNTS 507, 15 November 2000 (thereinafter Migrant Smuggling Protocol).
3 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 241.
4 Ibid.

B. DRAFTING HISTORY

20.02 An early draft of Article 20 referred to criminalising (i) producing a fraudulent travel or identity document, (ii) procuring or providing such a document and (iii) possessing such a document.[5] The provision is modelled after Article 6(1)(b) of the Migrant Smuggling Protocol. In comparison to the Migrant Smuggling Protocol, the early draft of Article 20 of the Convention had a further conduct added ('possessing such a document'). Opinions among the Member States were divided regarding this addition. Whereas some thought it would not be necessary, others thought it would be valuable to have a possession offence 'since traffickers often confiscated victims' documents and possession of them was an offence that was very easy to prove'.[6] However, as a result of this discussion, it was decided to replace 'possessing such a document' with a provision that criminalises confiscating, destroying, concealing or removing a travel or identity document.[7] At a later stage, the term 'confiscating' was deleted in order not to interfere with the meaning of confiscation as a 'penalty or measure ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property'.[8] Furthermore, the term 'producing' was replaced by 'forging'.[9]

20.03 The United Nations' International Children's Emergency Fund (UNICEF) suggested to include an additional paragraph that should ensure that trafficked children are not prosecuted for being made to use a fraudulent travel or identity document.[10] The suggested text was not included in the final text of the provision. However, a general reference concerning all trafficked persons was decided to be included in the Explanatory Report that would clarify that the Convention does not make persons liable to prosecution for having been subjected to the types of conduct this article deals with.[11]

C. ARTICLE IN CONTEXT

20.04 Article 20(a) and (b) is based on Article 6(1)(b) of the Migrant Smuggling Protocol, whereas the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[12] does not include a similar provision.

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5 CAHTEH, *Revised Preliminary Draft of the European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 10.

6 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, para 50.

7 Ibid., para 51.

8 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 159, referring to Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No. 141, 8 November 1990, entered into force 1 September 1993, Art 1.

9 Parliamentary Assembly, *Draft Council of Europe Convention on Action against Trafficking in Human Beings*, Opinion 253(2005), 26 January 2005, para 14(xii) and CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, para 61.

10 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Amendments to Preamble and to Articles 1 to 24 proposed by national delegations and observers*, CAHTEH(2004)14, 11 June 2004, 36.

11 CAHTEH, *3rd meeting – Meeting Report*, CAHTEH(2004)RAP3, para 51 and CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, 96.

12 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

20.05 The Explanatory Report stresses that often trafficked persons are provided with false documents by the traffickers. Hence, trafficked persons should not be liable to prosecution for having been subjected to the types of conduct included in Article 20 of the CoE Convention against Trafficking.[13] This underlines, although not referred to, that trafficked persons should not be penalised for unlawful behaviour, 'to the extent that they have been compelled to do so', as foreseen in Article 26 of the CoE Convention against Trafficking ('Non-punishment provision'). Earlier drafts of Article 26 of the CoE Convention against Trafficking explicitly referred to non-punishment for illegal acts such as the using of forged documents or falsification and alteration of documents.[14] Hence, the drafting history shows that the wording of the final Article 26 ('involvement in unlawful activities') intends to include also unlawful acts in relation to travel or identity documents. The EU Directive 2011/36 refers explicitly in the context of the non-punishment provision to the use of false documents as one of the criminal activities to which trafficked persons might be compelled to commit or which are a direct consequence of being subject to trafficking.[15]

20.06 According to Article 21(2) of the CoE Convention against Trafficking, State Parties have to make the attempt of forging a travel or identity document (Art 20(a) of the CoE Convention against Trafficking) for the purpose of enabling trafficking in human beings an offence.[16] Concerning the other conducts listed in Article 20(b) and (c), it is considered that an attempted commission of these acts might 'be too tenuous to be made an offence'.[17] On the same matter, the Migrant Smuggling Protocol uses weaker language as it includes the qualification of 'subject to the basic concepts of its legal system',[18] since 'not all legal systems incorporate the concept of criminal attempts'.[19] Concerning aiding or abetting the offences listed in Article 20, the CoE Convention does not differentiate between the various conducts listed in Article 20. Without any limitation, State Parties have to establish as criminal offences aiding or abetting the commission of all offences in Article 20 of the CoE Convention against Trafficking.[20]

D. ISSUES OF INTERPRETATION

20.07 The conduct of Article 20(a) of the CoE Convention against Trafficking ('forging a travel or identity document') results in a fraudulent document. Article 20(b) criminalises the procuring or provision of a fraudulent document. In order to define 'fraudulent document', the Explanatory Report refers to Article 3(c) of the Migrant Smuggling Protocol.[21] A document is

13 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 240.
14 CAHTEH, *Revised draft Europe Convention on Action against Trafficking in Human Beings: Following the 3rd meeting of the CAHTEH (3–5 February 2004)*, CAHTEH (2004)8, 12 February 2004, 15.
15 Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, (OJ L 101/1) (thereinafter Dir 2011/36/EU), Recital 14 and Art 8.
16 Council of Europe, *Explanatory Report-CoE Convention against Trafficking*, CETS No. 197, para 245.
17 Ibid.
18 Migrant Smuggling Protocol, Art 6(2)(a).
19 UNODC, *Legislative Guides for the Implementation of the United National Convention against Transnational Organized Crime thereto* (United Nations 2004) 345–6, para 44.
20 Council of Europe, *Explanatory Report-CoE Convention against Trafficking*, CETS No. 197, para 244.
21 Ibid., para 239.

considered fraudulent, when it is (1) falsely made or altered in some material way by anyone other than an authorised person or agency, (2) improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner or (3) used by a person that is not the rightful holder of the document.

20.08 Article 20(c) however encompasses fraudulent and authentic documents, since in terms of pressure on and intimidation of the victim, it is irrelevant whether the documents withheld are fraudulent or authentic. Hence, State Parties have to criminalise the retaining, removal, concealing, damage or destruction of authentic documents and, in addition, are 'free to decide whether to make it a criminal offence' to, for instance, damage a fraudulent document.[22]

20.09 As far as domestic implementation of Article 20(a) of the CoE Convention against Trafficking is concerned, some State Parties have criminalised the forging of documents when conducted for the purpose of trafficking in human beings.[23] Several State Parties refer to general criminal law provisions on document forgery that can be also applied in the context of trafficking in human beings.[24] The situation with regard to Article 20(b) is similar and only a few State Parties' criminal law provisions on forging documents explicitly mentions the context of trafficking in human beings.[25]

20.10 'Retaining, removing, concealing, damaging or destroying a travel or identity document of another person' for the purpose of enabling trafficking in human beings (Art 20(c)) is criminalised by only a few State Parties as well.[26] Referring to other, more general criminal offences such as blackmailing or extortion is considered as not sufficient for an implementation of Article 20(c).[27]

22 Council of Europe, *Explanatory Report-CoE Convention against Trafficking*, CETS No. 197, para 242.

23 See for instance GRETA, *Report on Albania*, II GRETA(2016)6, para 155; GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 181; GRETA, *Report on Luxembourg*, II GRETA(2018)18, para 149.

24 See for instance GRETA, *Report on Germany*, I GRETA(2015)1, para 193; GRETA, *Report on the Netherlands*, I GRETA(2014)10, para 208; GRETA, *Report on Norway*, I GRETA(2013)5, para 232; GRETA, *Report on Poland*, I GRETA(2013)6, para 199; GRETA, *Report on Serbia*, I GRETA(2013)19, para 209.

25 See for instance GRETA, *Report on Bosnia and Herzegovina*, I GRETA(2013)7, para 140; GRETA, *Report on Italy*, I GRETA(2014)18, para 183.

26 For example by Iceland, see GRETA, *Report on Iceland*, I GRETA(2014)17, para 164 and Portugal, see GRETA, *Report on Portugal*, II GRETA(2017)4, para 158.

27 See for instance GRETA, *Report on France*, I GRETA(2012)16, para 210.

ARTICLE 21

ATTEMPT AND AIDING OR ABETTING

Katerina Simonova

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 18 and 20 of the present Convention.

2 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, an attempt to commit the offences established in accordance with Articles 18 and 20, paragraph a, of this Convention.

A. INTRODUCTION

21.01 The purpose of Article 21 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] is to establish additional offences relating to attempted commission and aiding or abetting commission of several offences defined in the Convention.[2] The aim of the drafters in connection with Article 21 is clear. It is supposed to punish not only the offence of trafficking of human beings, but also criminalise those acts that do not necessarily qualify as human trafficking, yet are important in relation to this crime. However, this attempt to reach to all levels of the trafficking chain brings several conceptually complicated questions and ambiguity. This includes the question whether certain act should be punished as an offence of trafficking in human beings (Art 18) or an attempt or aiding to commit such an offence (Art 21).

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 243.

B. DRAFTING HISTORY

21.02 During the 1st CAHTEH meeting, taking into account other CoE conventions on criminal matters, experts agreed that attempt and aiding and abetting should be made offences and thus, criminalised as well.[3] The first draft Article 21 was inspired by Article 11 of the Convention on Cybercrime.[4] The early draft obliged State Parties to criminalise aiding or abetting the commission of the offences of trafficking in human beings (Art 17 at that time), conducts related to fraudulent documents (Art 19 at that time), other offences related to trafficking in human beings (such as money laundering, Art 20 at that time).[5]

21.03 Article 21 was discussed in depth during the 3rd CAHTEH meeting. The experts highlighted that attempt, aiding, or abetting has to be committed intentionally, as all other offences established under the CoE Convention against Trafficking.[6] Similarly, Article 21(2) obliges State Parties to criminalise an attempt to commit these offences, with an exception of Article 19(iii),[7] criminalising possession of fraudulent document. In connection with Article 21(2), several delegations pointed out that their domestic legislation sets specific limits as regards offences for which attempt was allowed to be punished.

21.04 During its 5th meeting, the CAHTEH came to a conclusion that several types of conducts concerning the known use of exploitative services (now, Art 19) are not suitable for criminalising also an attempt to commit these conducts. Consequently, the CAHTEH amended the text and included a reference to (then) Article 19(a), limiting the criminalisation of attempts only to production of a fraudulent travel or identity document.[8]

C. ARTICLE IN CONTEXT

21.05 Being modelled on Article 11 of the Cybercrime Convention, the wording of Article 21 does not differ extensively from this provision, with one important exception. Article 11(3) of the Cybercrime Convention allows State Parties to submit a reservation and not to apply Article 11(2) ('Attempt'). Although there was also disagreement on including an attempt provision and for which offences an attempt should be criminalised during the CAHTEH negotiations, Article 21 remained without a similar exception.

21.06 At the EU level, Article 3 ('Incitement, aiding and abetting, and attempt') of the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[9] includes an additional mode of participation. Besides the obligation to criminalise aiding,

3 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 36.
4 Convention on Cybercrime, ETS No. 185, 23 November 2001, entered into force 1 April 2004.
5 CAHTEH, *Revised Preliminary Draft of the Convention*, CAHTEH(2003)9, 27 November 2003, 10.
6 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, para 54.
7 In the final version of the CoE Convention against Trafficking, Art 20.
8 CAHTEH, *5th meeting (29 June-2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 166.
9 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

abetting or attempting to commit trafficking in human beings, EU Member States have to ensure that 'inciting' is criminalised.

21.07 Formally slightly different, however, from the substantive point of view, a similar approach was adopted by the Palermo Protocol.[10] Its Article 5(2) requires State Parties to establish as criminal offences: (a) attempting, (b) participating as an accomplice, or (c) organising or directing other persons to commit an offence set forth in Article 3 (trafficking in persons).

D. ISSUES OF INTERPRETATION

21.08 According to Article 21(1), State Parties are obliged to criminalise aiding or abetting the commission of trafficking in human beings as defined in Article 18 or of acts relating to travel or identity documents (Art 20). This provision aims to criminalise a conduct where the person who commits a crime (specified above) is aided by another person, with a condition that the aiding person intends the crime to be committed.[11] When it comes to the sanctions for aiding or abetting, GRETA reports indicate that the practice among State Parties is not unified. Some reports note that aiding or abetting is punished as if the person had perpetrated the actual offence, with a possibility of reducing the penalty.[12]

21.09 Article 21(2) also requires State Parties to criminalise as an offence the attempt to commit the offences established according to Articles 18 (criminalisation of trafficking in human beings) or 20(a) (criminalisation of forging a travel or identity documents). Similarly as concerning aiding or abetting, also here the drafters concluded that criminalising the attempt to commit the use of services (offence established in accordance with Art 19) would be conceptually difficult.[13] Furthermore, the attempted commission of the offences established according to Article 20, with an exception of Article 20(a) (criminalisation of forging a travel or identity documents) was perceived as too weak to be made an offence.[14]

21.10 It should be noted that the concept of an attempt differs in the national criminal laws of State Parties. Some countries consider acts committed in the preparation phase for a criminal offence as an attempt to commit the offence.[15] In other State Parties only acts that were undertaken in the course of an unsuccessful effort to commit the offence qualify as an attempt.[16] Also concerning the sanctions for attempts, a harmonised approach is lacking. Some

10 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

11 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 244.

12 GRETA, *Report on Germany*, I GRETA(2015)10, 3 June 2015, para 191; GRETA, *Report on Hungary*, I GRETA(2015)11, 29 May 2015, para 189.

13 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 245.

14 Ibid.

15 UNODC, *Model Law against Trafficking in Persons* (UNODC 2009) 46.

16 Ibid.

State Parties apply the same penalty for an attempt as for the basic crime.[17] Others apply a lower penalty for the attempt, or include the possibility for the penalty to be reduced.[18]

21.11 As already outlined in the introduction, obligations laid down in Article 21 lead to conceptual challenges. One of the challenges is first of all to assess a certain act as fulfilling the definition of trafficking in human beings.[19] Further challenge is the question whether a specific behaviour qualifies rather as trafficking in human beings itself, as an attempt to it or as aiding and abetting the commission of trafficking.

21.12 It is crucial to highlight that human trafficking is typically an offence which relies on the interaction and cooperation of a number of different persons and functions, for example, recruitment, transfer, manipulation of the victim, exploitation, etc. To fulfil the definition of trafficking in human beings enshrined in Article 4, it is enough that the perpetrator commits only one out of the five actions listed in the definition, in combination with the other two elements.[20] In relation to this, the Explanatory Report clearly states that the definition is meant to 'encompass the whole sequence of actions that leads to exploitation of the victim'.[21] [22] Hence, the definition of trafficking in human beings (Art 4) 'has the objective of including the preparation and the assistance of the potential or actual exploitation'.[23]

21.13 Since the preparatory acts are also encompassed by the definition of trafficking in human beings itself, it is challenging to distinguish attempts to commit the offence of trafficking in human beings from committing the full offence itself. A typical example of an attempt could be a situation when someone has been recruited (action) for an exploitative job (purpose) and was promised false wages (means), but the person did not show up at the agreed meeting place for the transport. Such act may be perceived as constituting already the 'action' and 'means' element of the trafficking definition itself. Together with the necessary intention for exploitation, it could be seen as an attempt to commit or even committing trafficking in human beings itself, since it is not a requirement that the exploitation of a person has actually taken place.[24]

21.14 In general, the criminal law envisages apart from the primary liability also secondary forms of criminal liability, the so-called accessory or accomplice liability. It is important to note that there are considerable differences at the domestic level in 'how different modes of criminal liability are conceptualized'.[25] The CoE Convention against Trafficking refers to direct

17 For example Austria. See Austrian Criminal Code (BGBl. Nr. 60/1974), 23 January 1974 as amended, s 15(1). See further GRETA, *Report on France*, II GRETA(2017)17, para 235.

18 GRETA, *Report on Bosnia and Herzegovina*, I GRETA(2013)7, para 141.

19 See on this also the Commentary on Art 4.

20 Ibid.

21 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 78.

22 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 47.

23 Ibid., 43.

24 See on this also the Commentary on Article 4.

25 Stoyanova, 48. See, for instance, also Markus Dubber, 'Criminalizing Complicity: A Comparative Analysis' (2007) 5 *Journal of International Criminal Justice*, 977.

commission (Art 18) as well as to attempt and aiding or abetting (Art 21).[26] Nevertheless, such an aiding or abetting (secondary participation) 'is not a crime *per se*'.[27] In general, the accomplice (the secondary party) is criminally liable only if the crime was in fact committed.[28] Therefore, when applying the general principles of criminal law, a person who transports a victim for the purpose of exploitation could be held criminally liable for aiding the commission of trafficking, while the principal offender would be a person, who made all necessary arrangements for the situation leading to the exploitation of the victim, and who would be held liable for committing the offence of human trafficking as such.[29]

21.15 Nevertheless, as was already emphasised, in case of trafficking in human beings, a person may be held criminally liable for committing the offence of human trafficking even when the exploitation as such did actually not take place. Moreover, regardless of whether the exploitation took place or not, all persons 'who act together with a common purpose', thus for example, the recruiter, the transporter, and the person who accommodates the victim, may be prosecuted as principal offenders.[30] Consequently, it is very difficult to draw a clear distinction between attempting, aiding or abetting the commission of offences referred to in Article 21 and committing these offences. In the end, it will strongly rely on how the different modes of criminal liability are conceptualised in the domestic legislation of particular State Parties.

26 CoE Convention against Trafficking, Art 21.

27 Stoyanova, 49.

28 Andrew Simester and John Spencer, *Simester and Sullivan's Criminal Law Theory and Doctrine* (Hart Publishing 2010) 245.

29 For similar analogy see Stoyanova, 48.

30 Stoyanova, 49.

ARTICLE 22

CORPORATE LIABILITY

Julia Planitzer

1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention, committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
- **a a power of representation of the legal person;**
- **b an authority to take decisions on behalf of the legal person;**
- **c an authority to exercise control within the legal person.**

2 Apart from the cases already provided for in paragraph 1, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

3 Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

4 Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

A. INTRODUCTION

22.01 Article 22 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] defines an obligation to establish corporate liability for criminal offences defined by the Convention, including trafficking in human beings (Art 18 of the Convention) or the criminalisation of the use of services of a victim (Art 19 of the Convention). Corporate liability for trafficking in human beings plays an important role concerning ensuring access to remedy for business-related human rights violations or abuses. In order to support the process of the implementation of the UN Guiding Principles on Business and Human Rights[2] by the states based on their human rights obligations at the European level, the CoE Committee of Ministers adopted a Recommendation on human rights and business[3] which refers also to the application of legislative or other measures to ensure that 'business enterprises can be held liable' under criminal or other equivalent law for the commission of trafficking in human beings.[4]

22.02 The requirements for liability of legal persons are: (1) trafficking in human beings or aiding or abetting to trafficking in human beings must have been committed; (2) the offence must have been committed by a natural person for the benefit of the legal person; (3) this natural person has to have a leading position within the legal person and has to act either individually or as part of an organ of the legal person, and (4) the person in a leading position must have acted on the basis of one of his or her powers, which are according to Article 22(1)(a) to (c) 'a power of representation of the legal person', 'an authority to take decisions on behalf of the legal person' and 'an authority to exercise control within the legal person'.[5]

22.03 Article 22(2) regulates that corporate liability also has to be established when a person within the legal person who is not holding a leading position commits the crime. In this case, three conditions have to be fulfilled: (1) the offence was committed by an employee or agent of the legal entity that is not working in a leading position; (2) the offence must have been committed for the legal person's benefit, and (3) it has to be shown that there was a lack of supervision or control by a person in a leading position that made the commission of the offence possible.[6]

22.04 The liability of a corporation for trafficking in human beings does not have to be exclusively of criminal form. The State Parties can also establish administrative or civil liability. However,

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1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of human rights and transnational corporations and other business enterprises, John Ruggie,'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework'*, A/HRC/17/31, 21 March 2011 and UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Protect, Respect and Remedy: A Framework for Business and Human Right*s, A/HRC/8/5, 7 April 2008.

3 Committee of Ministers, Recommendation CM/REC(2016)3 of the Committee of Ministers to Member States on human rights and business, adopted on 2 March 2016.

4 Ibid., para 44.

5 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, para 248.

6 Ibid., para 249.

concerning the sanctions for legal persons, Article 23(2) of the Convention applies.[7] Therefore, criminal or non-criminal sanctions or measures have to be effective, proportionate and dissuasive. Sanctions can include, for example, monetary sanctions.[8] Article 22(4) clarifies that corporate liability does not exclude parallel individual liability of the person who has committed the offence.[9]

22.05 Despite the obligation to establish corporate liability for trafficking in human beings, which is also included in the United Nations (UN) Convention against Transnational Organized Crime (UNTOC)[10] and Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims,[11] research shows that the prosecution of corporations for trafficking in human beings is still very rare.[12] GRETA was able to identify relevant cases in only a small number of State Parties.[13] Reasons for this can be, for instance, that prosecution of legal persons is a relatively recent issue, which leads to gaps in the practice of applying the relevant provisions among state prosecutors.[14] A quite frequent obstacle for the prosecution of legal persons can be also the bankruptcy of the corporations involved.[15] Furthermore, difficulties in investigating and gathering evidence on trafficking in human beings, in general, can be obstacles.[16] Blurred lines between trafficking in human beings for the purpose of labour exploitation and other legal provisions such as social fraud or underpayment can also contribute to a rare application of corporate liability for trafficking in human beings.[17] Due to the limited application of corporate liability, GRETA regularly recommends to State Parties to examine the reasons why no legal entities have been punished for trafficking-related acts[18] and to keep

7 See CoE Convention against Trafficking, Art 23(2): 'Each Party shall ensure that legal persons held liable in accordance with Article 22 shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions or measures, including monetary sanctions.'

8 CoE Convention against Trafficking, Art 22(3) and Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 250.

9 Council of Europe, ibid., para 251.

10 UN Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003, Art 10.

11 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (thereinafter Dir 2011/36/EU) (OJ L 101/1).

12 See Julia Planitzer and Nora Katona, 'Criminal Liability of Corporations for Trafficking in Human Beings for Labour Exploitation' (2017) 8 *Global Policy* 506. Silvia Rodríguez-López, 'Criminal Liability of Legal Persons for Human Trafficking Offences in International and European Law' (2017) 1 *Journal of Trafficking and Human Exploitation* 96. On the European Union see, European Commission, *Study on Case-Law Relating to Trafficking in Human Beings for Labour Exploitation* (European Commission 2015) 83.

13 Relevant cases of corporate liability were identified for instance in the following States Parties: GRETA, *Report on Belgium*, I GRETA(2013)14, para 208; GRETA, *Report on Belgium*, II, GRETA(2017)26, para 177; GRETA, *Report on Cyprus*, II GRETA(2015)20, para 136; GRETA, *Report on Malta*, II GRETA(2017)3, para 142; GRETA, *Report on Netherlands*, II GRETA(2018)19, para 203; GRETA, *Report on Portugal*, II GRETA(2017)4, para 169; GRETA, *Report on Romania*, II GRETA(2016)20, para 172; GRETA, *Report on Slovenia*, I GRETA(2013)20, para 156; GRETA, *Report on Slovenia*, II GRETA(2017)38, para 158; GRETA, *Report on Spain*, II GRETA(2018)7, para 230. See also GRETA, *7th General Report on GRETA's Activities*, March 2018, paras 204–210.

14 Planitzer and Katona, 508; Rodríguez-López, 105.

15 Planitzer and Katona, 508.

16 Rodríguez-López, 109.

17 Planitzer and Katona, 508.

18 GRETA, *Report on Albania*, I GRETA(2011)22, para 161; GRETA, *Report on Albania*, II GRETA(2016)6, para 158; GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 179; GRETA, *Report on Denmark*, II GRETA(2016)7, para 155; GRETA, *Report on Republic of Moldova*, II GRETA(2016)9, para 159.

the application of the legislation on corporate liability under review to improve effective application in practice.[19]

22.06 Companies can be involved in trafficking in human beings in several forms. Liability under Article 22 of the CoE Convention against Trafficking can be established when the company is directly involved in trafficking in human beings. For example, a mushroom farm in the Netherlands recruited workers from Poland, transported them to the Netherlands and exploited them on the farm. In parallel to the conviction of the director and further staff members of the company, the company was also convicted of trafficking in human beings and was fined 75,000 Euro.[20]

B. DRAFTING HISTORY

22.07 Before the drafting process of the CoE Convention against Trafficking had started, the Committee of Ministers already adopted a recommendation which stated that states should provide for rules governing the liability of legal persons in relation to trafficking in human beings for the purpose of sexual exploitation.[21] In the 1st CAHTEH meeting, experts referred to the relevant provisions in the CoE Convention on Cybercrime[22] and the CoE Criminal Law Convention on Corruption[23] and stressed that these provisions also included liability for negligence. Liability for negligence is not covered by the relevant provisions of the UN Convention against Transnational Organized Crime[24] and therefore, most delegations 'considered that the future European Convention might usefully be more complete, precise and binding on this issue'.[25]

22.08 Whereas an early draft of Article 22 of the CoE Convention against Trafficking was modelled on Article 18 of the CoE Criminal Law Convention on Corruption, it was decided at the 3rd CAHTEH meeting to amend the wording and model it on Article 12 of the CoE Convention on Cybercrime.[26] Consequently, the State Parties would not be limited to criminal liability, as would be the case with the CoE Criminal Law Convention on Corruption. In the CoE Convention against Trafficking, liability could be criminal, civil or administrative.

19 GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 160; GRETA, *Report on Croatia*, II GRETA(2015)33, para 150; GRETA, *Report on France*, II GRETA(2017)17, para 245; GRETA, *Report on Luxembourg*, II GRETA(2018)18, para 160; GRETA, *Report on Spain*, II GRETA(2018)7, para 231.

20 04/990004-12, ECLI:NL:RBLIM:2016:9615, Decision of Rechtbank Limburg, 10 November 2016. See also GRETA, *Report on Netherlands*, II GRETA(2018)19, para 203.

21 Committee of Ministers, Recommendation No. R(2000)11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation, 19 May 2000, para 46.

22 CoE Convention on Cybercrime, ETS No. 185, 23 November 2001 (thereinafter Budapest Convention), Art 12.

23 CoE Criminal Law Convention on Corruption, ETS No. 174, 27 January 1999, Article 18.

24 See UNTOC, Art 10.

25 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP 1, 29 September 2003, para 66.

26 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP 3, 6 April 2004, para 57.

C. ARTICLE IN CONTEXT

1. Relationship and differences between Article 22 and Article 19 of the CoE Convention against Trafficking

22.09 Article 22 of the CoE Convention against Trafficking criminalises companies for trafficking in human beings; hence in order to make Article 22 applicable, a person acting on behalf of the legal person, for instance, recruits, transfers and exploits persons for the benefit of the legal person. Article 19 criminalises the use of services of a victim of trafficking in human beings and could be applicable, for instance, when a company hires trafficked workers that have been recruited by third parties, which could take place in the context of subcontracting when using recruitment agencies or temporary employment agencies.[27] In contrast to Article 22 of the CoE Convention against Trafficking, Article 19 is not binding and states 'shall consider' the criminalisation of the use of services. Several reasons led to Article 19 being non-binding, including the argument that prevention should take precedence over punishment[28] and the acknowledgement that collecting evidence that shows that the user 'knowingly use[s] the services of a victim of trafficking' is challenging.[29]

22.10 One of the purposes of Article 19 of the CoE Convention against Trafficking is to have a possibility to criminalise behaviour that could not be criminalised under Article 22. For example, a business owner 'who knew or should have known that he or she was working with trafficked people'[30] would not be criminally liable for trafficking in human beings itself since the owner has not himself or herself recruited the victims and did not use any means referred to in the definition of trafficking. However, Article 19 of the CoE Convention against Trafficking could be applicable to the behaviour of the business owner.[31]

22.11 In the *Carestel* case,[32] a Belgian court convicted a company that owns a motorway-restaurant chain, for being an accomplice to trafficking in human beings. The personnel working in Carestel restrooms, who were subcontracted from a German cleaning company, sometimes had to work 15 hours per day, seven days a week for a very small salary. The German cleaning company was convicted of trafficking in human beings. In addition, the court convicted the motorway-restaurant chain, Carestel, as an accomplice since it must have been aware of the working conditions but accepted these conditions.[33] Several factors contributed to the court's

27 Rodríguez-López, 98.

28 CAHTEH, *8th meeting (22–25 February 2005) – Meeting report*, CAHTEH(2005)RAP8, para 58.

29 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 236.

30 Yasmin van Damme and Gert Vermeulen, 'Towards an EU Strategy to Combat Trafficking and Labor Exploitation in the Supply Chain. Connecting Corporate Criminal Liability and State-Imposed Self-Regulation Through Due Diligence?' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra and Klaus Tiedemann, *Regulating Corporate Criminal Liability* (Springer International Publishing 2014) 175; See also, Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 232.

31 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 232.

32 *Openbaar Ministerie tegen T.C. et al.*, No. 2012/3925, Decision of the First Instance Court of Gent, 19th chamber, 5 November 2012. See for a similar case the 'Quick'-case decided by a Belgian court (First Instance Court of Brussels, 25 May 2016, 59th chamber) in which the same legal construction has been applied, leading however to the acquittal of the company that benefitted from the subcontractor that exploited its staff. See also Planitzer and Katona, 507.

33 *Openbaar Ministerie tegen T.C. et al.*, ibid. See also International Trade Union Confederation, *Joint liability of legal persons in labour trafficking cases – court decision example (Belgium)* (ITUC December 2013).

conclusion that the restaurant chain was aware of the risk but chose to accept it. The company had been informed about previous investigations against the cleaning company for violations of labour standards. Furthermore, the contract was at a very low cost, which was not compatible with Belgian wage norms.[34] The *Carestel* case shows that for the situation of exploitation in subcontracting, it might not be necessary to apply a provision that criminalises the use of services of a victim based on Article 19 of the CoE Convention against Trafficking. It shows that also for a situation like that, trafficking in human beings itself can be applied in order to criminalise the behaviour of the company that subcontracts and the subcontractor itself, which would make Article 19 superfluous.

22.12 A company can be seen as participating in the crime as an accomplice when it is possible to show that the company knew about the illicit activities of a subcontractor, but still chose to continue the business relationship.[35] At length, trafficking for the purpose of labour exploitation in subcontracting can, to a certain extent, fall under Article 22 by using the legal construction of participation in the crime.

2. Corporate liability for trafficking in human beings in other standards

22.13 At the international level, the UNTOC requires states to establish the liability of legal persons for participation in 'serious crimes involving an organized criminal group'[36] and for offences established in accordance with the Convention. This also includes crimes established under the protocols established to supplement the UNTOC, including its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter Palermo Protocol).[37] The UNTOC takes into account that states have different approaches to the liability of legal persons and requests liability to the extent that this is consistent with the national legal principles.[38] The UNTOC offers different options on which form of liability states want to implement: criminal, civil or administrative liability.[39] In contrast to Article 22 of the CoE Convention against Trafficking, the UNTOC does not explain in detail the requirements of making an offence attributable to the company, depending on whether a person in a leading position acts or a person without a leading position.

22.14 At the EU-level, Member States of the EU have to ensure criminal liability of corporations for trafficking in human beings. Article 5 of Dir 2011/36/EU states that Member States have to implement measures which ensure that legal persons are held liable. In comparison to the CoE Convention against Trafficking, Dir 2011/36/EU is more detailed concerning the sanctions. According to Dir 2011/36/EU, sanctions on legal persons should be effective, proportionate and dissuasive, which also includes not only criminal sanctions but also non-criminal fines. Further sanctions suggested are, for instance, the exclusion from entitlement to public benefits

34 van Damme and Vermeulen, 181.
35 Ibid., 180.
36 UNTOC, Art 10(1).
37 UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN 2004) 84, para 279. See also Art 37(4) UNTOC stating that '[a]ny protocol to this Convention shall be interpreted together with this Convention (…)'.
38 UNTOC, Art 10(1) ('consistent with its legal principles'). See on this further Rodríguez-López, 102.
39 Ibid., Art 10(2).

or aid or temporary closure of establishments used by the company.[40] Dir 2011/36/EU allows establishing jurisdiction over the offence of trafficking in human beings when the latter is committed for the benefit of a legal person established in the territory of a Member State but committed even outside the territory of that Member State.[41] Also Dir 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals[42] obliges to establish liability of legal persons in the context of employing 'illegally staying third-country nationals'[43] under particularly exploitative working conditions.[44]

D. ISSUES OF INTERPRETATION

1. Corporate liability for trafficking in human beings in general

22.15 As described in the introduction, liability of a legal person can be established when either a person in a leading position commits a crime or a person not in a leading position commits a crime, which was made possible due to a lack of supervision. Different jurisdictions apply different approaches in defining which natural person in which circumstances are capable of triggering the criminal liability of a corporation. According to the 'model of vicarious liability', offences conducted by any corporate agent or employee can be attributed to the legal person, no matter what has been done to prevent the criminal act. The employee or the agent has to have acted within the scope of his or her employment and for the benefit of the company. The 'identification model' identifies acts of executive bodies, directors, managers and employees with certain responsibilities as acts of the corporation.[45] The model of 'corporate culture' or 'corporate (dis)organization' perceives the legal person as being capable of offending in its own right, for instance, due to inadequate organisational systems and cultures.[46]

22.16 Article 22 of the Convention combines elements of the 'identification model' and the 'model of vicarious liability'. It follows the 'identification model' because according to Article 22(1)(a) of the Convention, a legal person can be held liable for acts of any natural person who has a leading position within the legal person. The 'model of vicarious liability' is included since acts of all other employees or organs can also be attributed to the legal person according to Article

40 Dir 2011/36/EU, Art 6. See also European Commission, *Report from the Commission to the European Parliament and the Council assessing the extent to which Member States have taken the necessary measures in order to comply with Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims in accordance with Article 23(1)*, 2.12.2016 COM(2016) 722 final, 6.

41 Dir 2011/36/EU, Art 10(2) (b), Recital 16.

42 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ L 168/24), Art 11.

43 Ibid., Art 3(1).

44 Ibid., Art 9(1)(c).

45 Mark Pieth and Radha Ivory, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability – Emergence, Convergence, and Risk* (Springer 2011) 21–2. See also Rodríguez-López, 104.

46 Pieth and Ivory, 22.

22(2) of the CoE Convention against Trafficking. However, the criminal offence is made possible due to a lack of supervision or control by the person in the leading position.[47]

2. Definition of 'legal person'

22.17 The Explanatory Report of the CoE Convention against Trafficking describes 'legal persons' as commercial companies, associations and similar legal entities.[48] As the text of the provision is modelled on the CoE Criminal Law Convention on Corruption and the CoE Convention on Cybercrime, further interpretations on the term 'legal person' in these conventions could be supportive in order to further define the term in Article 22 of the CoE Convention against Trafficking.

22.18 The CoE Criminal Law Convention on Corruption refers to national laws of the State Parties and permits them to use their own definition of 'legal person'. However, public bodies are expressly excluded from the scope of the definition, but the State Parties can go further and impose sanctions on public bodies as well.[49] The CoE Convention on Cybercrime does not specifically refer to a definition of the legal person, but it is shown that in some State Parties of the CoE Convention on Cybercrime sanctions may not be levied on public authorities and international organisations.[50]

22.19 At the EU level, Dir 2011/36/EU contains a definition for 'legal person' and thereby follows the definition of the CoE Criminal Law Convention on Corruption. It defines 'legal person' as 'any entity having legal personality under the applicable law, except for states or public bodies in the exercise of state authority and for public international organisations'.[51] However, it has been shown that the majority of EU Member States confer legal personality to their public entities.[52]

3. Article 22(2) of the CoE Convention against Trafficking: 'lack of supervision or control'

22.20 In cases where the offence was committed by a person not holding a leading position within the legal person, the offence is attributable to the legal person, when 'the offence was made possible by the leading person's failure to supervise the employee or agent'.[53] Hence, when a person in a leading position did not take appropriate and reasonable steps to prevent employees from engaging in criminal activities on the entity's behalf. The type of appropriate and

47 Rodríguez-López, 104, refers to this limitation of the 'model of vicarious liability' as a link to the third approach, 'organisation model'. Pieth and Ivory, 21, refer to it as 'qualified vicarious liability', when others had not done enough to prevent the criminal offence.

48 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 247.

49 Council of Europe, *Explanatory Report – CoE Criminal Law Convention on Corruption*, CETS No. 173, para 31.

50 Council of Europe Cybercrime Convention Committee (T-CY), *Implementation of Article 13 Budapest Convention by Parties and Observers: Assessment Report* (9 June 2017), T-CY (2016)25, 30.

51 Dir 2011/36/EU, Art 5(4).

52 Gert Vermeulen, Wendy De Bondt and Charlotte Ryckman, *Liability of Legal Persons for Offences in the EU* (Maklu-Publishers 2012) 40. See further also Rodríguez-López, 105 and Astrid Saraiva Leao, 'Corporate Criminal Liability for Human Trafficking in the EU – a legal obligation for Member States?' (Master's thesis, Uppsala University 2015).

53 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 249.

reasonable steps to prevent this within a company depends on the type of business, size and good practices in force.[54]

Developing compliance programmes to secure adherence to regulations were gaining importance in the United States of America, whereas in Europe 'the legal notion of insufficient organisation was taken up and developed'.[55] Insufficient organisation and supervision form the basis of corporate liability. Hence, due supervision and control are key elements to avoid liability, which can be implemented by compliance programmes.[56] For example, in the context of the German Regulatory Offences Act, supervisory duties include careful selection, appointment and oversight by corporate representatives.[57] Italian legislation directly refers to the implementation of compliance programmes. In a case where a person not holding a leading position commits an offence, the legal person is then liable when there is a lack of supervision and control by persons in leading positions, 'but only if the company has no effective (compliance) program'.[58] In the Austrian context, relevant measures to prevent criminal offences can be appropriate technical, organisational or personnel measures.[59] **22.21**

4. Criminal, civil or administrative liability

Article 22(3) gives the State Parties the possibility to choose among criminal, civil or administrative liability in order to be in line with national legal principles. An analysis of GRETA reports shows that the majority of the State Parties provide for criminal liability[60] and a small number of the State Parties regulate corporate liability as administrative liability.[61] Most of the State Parties mention pecuniary fines as a possible sanction,[62] as well as the termination of legal personality.[63] As indicated above, sanctions have to be effective, proportionate and dissuasive.[64] **22.22**

54 Ibid.

55 Marc Engelhart, 'Corporate Criminal Liability from a Comparative Perspective' in Brodowski et al., *Regulating Corporate Criminal Liability* (Springer International Publishing 2014) 61.

56 Engelhart, 62.

57 Pieth and Ivory, 31.

58 Engelhart, 63.

59 Andrea Lehner, 'The Austrian Model of Attributing Criminal Responsibility to Legal Entities' in Brodowski et al., 83–4.

60 See for instance GRETA, *Report on Finland*, I GRETA(2015)9, para 205; GRETA, *Report on France*, II GRETA(2017)17, para 243; GRETA, *Report on Georgia*, II GRETA(2016)8, para 167; GRETA, *Report on Luxembourg*, II GRETA(2018)18, para 157; GRETA, *Report on Malta*, II GRETA(2017)3, para 141; GRETA, *Report on Republic of Moldova*, II GRETA(2016)9, para 158; GRETA, *Report on Netherlands*, II GRETA(2018)19, para 200; GRETA, *Report on Norway*, II GRETA(2017)18, para 160; GRETA, *Report on Romania*, II GRETA(2016)20, para 171; GRETA, *Report on Slovenia*, II GRETA(2017)38, para 157; GRETA, *Report on Spain*, II GRETA(2018)7, para 229.

61 See for instance GRETA, *Report on Bulgaria*, I, GRETA(2011)19, para 203; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 186; GRETA, *Report on Germany*, I GRETA(2015)10, para 194.

62 See for instance GRETA, *Report on Austria*, I GRETA(2011)10, para 140; GRETA, *Report on North Macedonia*, II GRETA(2017)39, para 151; GRETA, *Report on Serbia*, II GRETA(2017)37, para 176; GRETA, *Report on Slovenia*, II GRETA(2017)38, para 157; GRETA, *Report on Switzerland*, I GRETA(2015)18, para 179.

63 See for instance GRETA, *Report on Cyprus*, II GRETA(2015)20, para 136; GRETA, *Report on France*, II GRETA(2017)17, para 243; GRETA, *Report on Greece*, I GRETA(2017)27, para 202; GRETA, *Report on Luxembourg*, II GRETA(2018)18, para 157; GRETA, *Report on Republic of Moldova*, II GRETA(2016)9, para 158; GRETA, *Report on Portugal*, II GRETA(2017)4, para 168.

64 GRETA, *Report on Austria*, II GRETA(2015)19, para 169; GRETA, *Report on Ireland*, II GRETA(2017)28, para 199; GRETA, *Report on Norway*, II GRETA(2017)18, para 161.

5. Article 22(4) of the CoE Convention against Trafficking: 'Without prejudice to the criminal liability of the natural persons who have committed the offence'

22.23 Article 22(4) of the Convention states that 'corporate liability does not exclude individual liability'. Hence, there can be a liability of the legal entity as a whole and an individual liability established simultaneously.[65] This could create, under certain circumstances, implications with the principle of *ne bis in idem*, meaning that a person has a right not be tried or punished twice for the same criminal offence.[66] This right is enshrined in Article 4 of Protocol No. 7 to the European Convention on Human Rights.[67]

22.24 Article 4 of Protocol No. 7 applies when there are two sets of proceedings and both are criminal in nature.[68] The prohibition on double jeopardy applies to legal persons as well as natural persons.[69] One element of the principle of *ne bis in idem* is the prohibition to face two proceedings (*bis*) that are criminal in nature. The European Court of Human Rights (ECtHR) developed criteria in order to assess whether proceedings are criminal in nature, although these are, for instance, classified by states as administrative rather than criminal.[70] A further element of the *ne bis in idem* principle is the prohibition to be prosecuted for the same offence (*idem*). The ECtHR interprets this as prohibiting the prosecution of a second offence when this arises from identical facts or facts which are substantially the same.[71] As referred to in *A and B v. Norway*, the imposition of penalties under both administrative law and criminal law in respect of the same offence is a widespread practice in the EU Member States.[72] The ECtHR dealt with the issue of being convicted for the same offence under administrative and criminal proceedings for instance in tax matters, in which applicants who have been subject to criminal proceedings concerning tax crimes have also faced proceedings concerning tax surcharges.[73]

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65 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 251.

66 The Austrian Act on the Responsibility of Legal Entities for Criminal Offences (Federal Law Gazette I No. 151/2005) states in its section 3(4) that holding the company liable does not preclude holding natural persons liable for the same offence. This would not violate the principle of *ne bis in idem* since the offence of the natural and the legal person would be sanctioned. See on this the Government Bill 994 BlgNR XXII.GP (Explanatory Report) 10. See on this also a decision of the Estonian Supreme Court stating that this would not infringe the principle of *ne bis in idem*: Jaan Ginter, 'Criminal Liability of Legal Persons in Estonia' (2009) *Juridica International* XVI/2009 155.

67 Protocol No. 7 to the ECHR, ETS No 117, 22 November 1984, entered into force 1 November 1988.

68 William A. Schabas, *The European Convention on Human Rights – A Commentary* (Oxford University Press 2015) 1148.

69 Piet Hein van Kempen, 'The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice?' in Pieth, and Ivory, 376.

70 The ECtHR developed the '*Engel* criteria' in order to assess the nature of the proceedings: (1) the classification of the offence under domestic law; (2) the nature of the offence; and (3) nature and severity of the penalty. For determining the nature of the proceedings, the aim of the offence is important. Are the aims punishment and deterrence, then this offence has a criminal characteristic. See on this matter, Schabas, 1151–2. The '*Engel* criteria' are based on *Engel and Others v. the Netherlands*, App no 5100/71 (ECtHR, 8 June 1976) para 82.

71 *Sergey Zolotukhin v. Russia*, App no 14939/03 (ECtHR, 10 February 2009) para 81 cited after Schabas, 1153.

72 *A and B v. Norway*, App no 24130/11 and 29758/11 (ECtHR, 15 November 2016) para 118.

73 European Court of Human Rights, *Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights – right not to be tried or punished twice* (CoE/ECtHR 2020) para 28 referring for instance to *Pirttimäki v. Finland*, App no 35232/11 (ECtHR, 20 May 2014), in which the Court decided that Art 4 of Protocol No. 7 to ECHR was not violated (inter alia by stating in para 51 that the legal entities involved in these proceedings were not the same (natural person and the company)).

ARTICLE 23

SANCTIONS AND MEASURES

Katerina Simonova

1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 18 to 21 are punishable by effective, proportionate and dissuasive sanctions. These sanctions shall include, for criminal offences established in accordance with Article 18 when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.

2 Each Party shall ensure that legal persons held liable in accordance with Article 22 shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions or measures, including monetary sanctions.

3 Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with Articles 18 and 20, paragraph a, of this Convention, or property the value of which corresponds to such proceeds.

4 Each Party shall adopt such legislative or other measures as may be necessary to enable the temporary or permanent closure of any establishment which was used to carry out trafficking in human beings, without prejudice to the rights of bona fide third parties or to deny the perpetrator, temporary or permanently, the exercise of the activity in the course of which this offence was committed.

A. INTRODUCTION

23.01 From the beginning, the experts and delegations were united in the aim that the Convention should provide for penalties that have a deterrent effect and from which also victims of trafficking in human beings can benefit.[1] Moreover, the experts emphasised that the types and severity of penalties should be harmonised to facilitate international co-operation in criminal matters.[2] Whether Article 23 of the Council of Europe (CoE) Convention on Action against

1 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 41.
2 Ibid., para 41.

Trafficking in Human Beings[3] achieved this goal remains questionable, considering explicit minimum or maximum limits for sanctions have not been established, especially in relation to the deprivation of liberty (in relative contrast to Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims[4]). Article 23 of the CoE Convention against Trafficking requires the State Parties to adjust the sanctions and measures to the seriousness of the offences and establish penalties which are 'effective, proportionate and dissuasive'.[5]

B. DRAFTING HISTORY

23.02 The main discussion on Article 23 took place during the 3rd meeting of the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH).[6] The revised preliminary draft Article 23 was mainly modelled, seen in paragraphs 1–3, on Article 19 of the Criminal Law Convention on Corruption.[7] However, in connection with amending Article 22 (Corporate liability) of the Convention as to match the Convention on Cybercrime, the experts decided to amend Article 23(2) of the Convention to match Article 13 of the Convention on Cybercrime as well.[8]

23.03 Concerning Article 23(4), several delegations thought this provision was vague and as such, may penalise individuals not involved in the offence of trafficking in human beings.[9] On the contrary, other delegations viewed Article 23(4) absolutely necessary in order to fight against trafficking in human beings effectively.[10] Article 23(4) was amended to allow the closure of establishments that were instrumental (later changed to 'used') to carry out trafficking in human beings while at the same time safeguarding the rights of bona fide third parties.[11]

23.04 During the 5th meeting, the CAHTEH examined Article 23 for the second time and discussed final amendments. The experts decided to change the wording of Article 23(4) and included a measure prohibiting traffickers from continuing in the activity in the course of which the offence of trafficking in human beings had been committed.[12]

3 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).
4 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).
5 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 252.
6 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP 3, 6 April 2004, para 59.
7 CAHTEH, *Revised Preliminary Draft of the European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 12.
8 CAHTEH, *3rd meeting – Meeting Report*, CAHTEH(2004)RAP3, para 59.
9 Ibid., para 63.
10 Ibid., para 63.
11 Ibid., para 64.
12 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 173.

C. ARTICLE IN CONTEXT

23.05 The United Nations Convention against Transnational Organized Crime (UNTOC)[13] leaves sentencing to the considerably wide discretion of the State Parties and, same as the CoE Convention against Trafficking, does not set minimum or maximum penalties. Nevertheless, Article 11(2) of the UNTOC obliges the State Parties to use discretionary powers (relating to the prosecution of offences covered by the UNTOC, including offences established under the protocols) with 'due regard to the need to deter the commission of such offences' and to 'maximize the effectiveness of law enforcement measures'.

23.06 At the EU level, Article 4(1) of the Dir 2011/36/EU establishes a minimum for the maximum penalty of at least five years of imprisonment for the offence of trafficking in human beings and Article 4(2) sets a minimum limit for the maximum penalty of at least ten years of imprisonment where the offence of trafficking in human beings was committed in specific (aggravating) circumstances. Although the intention to harmonise the severity and types of penalties is more apparent in this case, in fact the Dir 2011/36/EU does not determine specific minimum or maximum penalties as well.[14]

D. ISSUES OF INTERPRETATION

23.07 Article 23(1) contains a general obligation to set forth sanctions (for the offences established in accordance with Arts 18–21) which are 'effective, proportionate and dissuasive' and hence provides relatively broad discretion to the State Parties in terms of determining a sentence. The only limitation of state discretion is the obligation to provide the sanction of deprivation of liberty in the case of a natural person committing the offence established in accordance with Article 18 ('trafficking in human beings'). This sanction shall be capable to give rise to extradition. In the light of Article 2 of the European Convention on Extradition, this means that the offence of trafficking in human beings should be punishable by at least deprivation of liberty or a detention order for a maximum period of at least one year or a harsher penalty.[15]

23.08 Neither the Explanatory Report nor the Group of Experts on Action against Trafficking in Human Beings (GRETA) reports provide clear guidance in the interpretation of the clause 'effective, proportionate and dissuasive' sanction. However, in very few instances it is possible to discern some pattern. For example, in its report on Switzerland, GRETA noted the lack of a minimum threshold for the prison sentence regarding the general offence of trafficking in human beings and the low threshold of the prison sentence (at least one year if the victim is a child). In this regard, GRETA called for sanctions that are commensurate with the gravity of the offence of trafficking in human beings.[16] Such weak sanctions may have a negative impact on the criminal justice efforts and on the victims as well by not offering them sufficient

13 UN Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003.

14 See also Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 146.

15 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 252.

16 GRETA, *Report on Switzerland*, I GRETA(2015)18, para 176.

protection.[17] On the other hand, in its report on Albania, GRETA noted that the minimum prison sentence of five years for the offence of trafficking in human beings can be considered as constituting a dissuasive sanction.[18] In addition to imprisonment, several State Parties provide additional sanctions, including deprivation of certain civic rights (e.g., the right to vote)[19] or monetary sanctions.[20]

23.09 In terms of sanctions for legal entities that are held liable in accordance with Article 22, Article 23(2) requires, similarly as in the case of natural persons, that sanctions are 'effective, proportionate and dissuasive'. The drafters agreed to explicitly highlight in the Explanatory Report that Article 23(2) ensures that these sanctions may be criminal, administrative or civil and requires the State Parties to include the possibility to impose monetary sanctions.[21] Common sanctions for the legal entities held liable for the offence of trafficking in human beings established in the domestic laws of the State Parties are pecuniary fines,[22] termination of legal personality,[23] or confiscation of assets.[24] Dir 2011/36/EU further proposes sanctions such as exclusion from entitlement to public benefits/aid or placement under judicial supervision (Article 6(a) and (c)).

23.10 Article 23(3) obliges the State Parties to adopt appropriate legislative or other measures that would enable them to confiscate or otherwise deprive (e.g., civil confiscation) the offenders of the instrumentalities and proceeds of criminal offences established under Article 18 (Criminalisation of trafficking in human beings) and Article 20(a) (Criminalisation of acts relating to travel or identity documents) of the Convention. According to the Explanatory Report, this provision must be interpreted in the light of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[25] [26] According to GRETA, the confiscation of criminal assets plays an important role 'as a way of reinforcing the effect of the penalty as well as ensuring the payment of compensation to the victim'.[27]

23.11 According to Article 23(4), the State Parties are obliged to enable two additional measures. The first one is a closure of 'any establishment which was used to carry out trafficking in human beings'. The rationale behind this measure is to take action against establishments that might be used to cover the offence of trafficking in human beings.[28] The Explanatory Report specifies that the term 'establishment' means 'any place in which any aspect of trafficking in human beings occurs' and that the State Parties are not obliged to provide for closure of

17 OHCHR, *Human Rights and Human Trafficking: Fact Sheet No. 36* (United Nations 2014) 38.
18 GRETA, *Report on Albania*, I GRETA(2011)22, para 154.
19 GRETA, *Report on Belgium*, I GRETA(2013)14, para 203.
20 GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 198.
21 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 253.
22 GRETA, *Report on Norway*, II GRETA(2017)18, para 160.
23 GRETA, *Report on Latvia*, II GRETA(2017)2, para 166.
24 GRETA, *Report on Poland*, I GRETA(2013)6, para 200. See on this also the Commentary on Art 22.
25 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No. 141, 8 November 1990, entered into force 1 September 1993.
26 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 254.
27 GRETA, *Report on Denmark*, I GRETA(2011)21, para 193. See on this also the Commentary on Art 15.
28 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 257.

establishments as a criminal penalty.[29] The second measure covered by Article 23(4) provides for the possibility to (either temporarily or even permanently) ban the offender from continuing in the activity in the course of which the offence was committed.

29 Ibid., para 258.

ARTICLE 24

AGGRAVATING CIRCUMSTANCES

Katerina Simonova

Each Party shall ensure that the following circumstances are regarded as aggravating circumstances in the determination of the penalty for offences established in accordance with Article 18 of this Convention:

a the offence deliberately or by gross negligence endangered the life of the victim;
b the offence was committed against a child;
c the offence was committed by a public official in the performance of her/his duties;
d the offence was committed within the framework of a criminal organisation.

A. INTRODUCTION

24.01 When determining the sentence, courts have to consider a wide range of aggravating or mitigating factors related to the offence. These factors (circumstances) are a matter of 'great importance'[1] since the aggravating circumstances have a potential to significantly affect the severity of the sentence, just as the mitigating factors have the opposite effect. Despite a strong opposition by the Netherlands,[2] Article 24 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[3] sets forth a non-exhaustive list of aggravating circumstances in the determination of the penalty for trafficking in human beings.

B. DRAFTING HISTORY

24.02 The Preliminary Draft of Article 24 obliged the State Parties to ensure that the circumstances specified in sub-paragraphs (a), (b), and (c) are regarded as aggravating circumstances in the

1 Andreas von Hirsch, 'Foreword' in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) xiii.
2 CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contribution by the delegations of Austria, Netherlands and by the observer of UNICEF*, CAHTEH(2004)1, 26 January 2004, 9.
3 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

determination of the penalty for all offences established in accordance with the Convention.[4] However, during the Ad hoc Committee on Action against Trafficking in Human Being's (CAHTEH) 3rd meeting, several delegations argued that aggravating circumstances were not relevant to all offences established under the Convention. These delegations demanded to apply this provision only to the offence of trafficking in human beings. Consequently, the CAHTEH decided to amend Article 24 and refer only to the offence of trafficking in human beings (established according to Art 18 (Criminalisation of trafficking in human beings)).[5] Finally, during the 5th meeting, the CAHTEH decided to add the situation where the offence had involved a criminal organisation, as a new and last aggravating circumstance.[6]

C. ARTICLE IN CONTEXT

24.03 Neither the United Nations Convention against Transnational Organised Crime (UNTOC)[7] nor the Palermo Protocol[8] contain a similar provision as to Article 24 of the CoE Convention against Trafficking.[9] Conversely, Article 4 of the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[10] sets a maximum penalty limit of at least ten years of imprisonment for the offence of trafficking in human beings when any of the circumstances listed in this provision are involved. Dir 2011/36/EU expands the existing circumstances already listed in Article 24 of the Convention and introduces circumstances such as when the offence of trafficking in human beings was committed against a victim who was particularly vulnerable which shall include at least child victims (Art 4(2)(a) of the CoE Convention against Trafficking) or was committed by use of serious violence or has caused particularly serious harm to the victim (Art 4(2)(d) of the CoE Convention against Trafficking).

24.04 Similarly, the Association of South East Asian Nations (ASEAN) Convention against Trafficking in Persons, Especially Women and Children[11] contains an extensive list of aggravating circumstances, including where the offence exposed the victim to a life threatening illness (Art 5(3)(c) of the ASEAN Convention against Trafficking in Persons) or where the offence involves more than one victim (Art 5(3)(d)).

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4 CAHTEH, *Revised Preliminary Draft of the European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 12.

5 CAHTEH, *3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, 6 April 2004, para 65.

6 CAHTEH, *5th meeting (29 June–2 July 2004) – Meeting Report*, CAHTEH(2004)RAP5, 30 August 2004, para 179.

7 UN Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003.

8 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000, entered into force 25 December 2003 (thereinafter Palermo Protocol).

9 The fact that the UNTOC and Palermo Protocol do not contain a provision on aggravating circumstances was used as an argument against including Art 24 into the draft Convention. See, e.g., CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the observer of the United States of America*, CAHTEH(2004)1 Addendum I, 29 January 2004, 4.

10 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1.

11 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017.

D. ISSUES OF INTERPRETATION

24.05 Article 24 of the Convention obliges the State Parties to ensure that circumstances, further specified in sub-paragraphs (a), (b), (c) and (d) are regarded as aggravating circumstances when determining the penalty for the offence of trafficking in human beings (established in accordance with Art 18). The first aggravating circumstance is where the offence of trafficking in human beings deliberately or by gross negligence endangered the victim's life. Another aggravating circumstance is where the offence was committed against a child, meaning a person under 18 years of age (Art 24(b)) or by a public official in the performance of his or her duties (Art 24(c)).

24.06 The last aggravating circumstance prescribed by Article 24 of the Convention is where the offence involved a criminal organisation (Art 24(d)). In order to determine the term 'criminal organisation', the Explanatory Report explicitly invites the State Parties to use a definition from any other international instrument defining this term. As an example, the Explanatory Report mentions the UNTOC. According to Article 2(a) UNTOC, an organised criminal group is 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit'.[12]

24.07 According to GRETA reports, the majority of the State Parties have already established all four circumstances listed in Article 24 as aggravating circumstances for the purpose of determining the sentence.[13] Nevertheless, a considerable number of countries have still not done so in relation to one or more aggravating circumstances prescribed by Article 24.[14] Due to these gaps, GRETA requested several State Parties to include the missing aggravating circumstances into the respective domestic law.[15] In some State Parties, GRETA considered these gaps to be so extensive that they even constitute a violation of the Convention.[16] On the contrary, a number of State Parties consider, as an aggravating circumstance, the means element instead of using it as a constituent component of the trafficking in human beings definition according to Article 4 (Definitions) of the Convention.[17] Although GRETA admitted that this approach may facilitate the prosecution of traffickers in terms of evidential requirements,[18] it may pose several risks as well, for example, confusion with other criminal offences, the interpretation of Article 4(b) of the Convention regarding victim's consent, or difficulties concerning mutual legal assistance.[19]

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12 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 264.

13 See for instance GRETA, *Report on Poland*, I GRETA(2013)6, 6 May 2013, para 197; GRETA, *Report on France*, I GRETA(2012)16, 28 January 2013, para 201.

14 For example GRETA, *Report on Italy*, I GRETA(2014)18, 22 September 2014, para 180; GRETA, *Report on Slovak Republic*, I GRETA(2011)9, 19 September 2011, paras 128–130.

15 GRETA, *4th General Report on GRETA's Activities*, March 2015, 38.

16 GRETA, *4th General Report*, Appendix 8, 72.

17 These State Parties are Belgium, Bulgaria, France, Luxembourg and Slovenia. GRETA, *4th General Report*, 36.

18 GRETA, *Report on Slovenia*, I GRETA(2013)20, 17 January 2014, para 40.

19 GRETA, *4th General Report*, 36.

24.08 Additionally, the Convention does not contain an analogous provision to Article 4 of the Dir 2011/36/EU discussed above, establishing a maximum penalty when any of the aggravating circumstances are involved. Consequently, the maximum penalties for the offence of trafficking in human beings vary significantly, spanning from ten years[20] to life imprisonment.[21]

20 GRETA, *Report on Germany*, I GRETA(2015)10, 3 June 2015, para 188; GRETA, *Report on Norway*, II GRETA(2017)18, 21 June 2017, paras 150-154.

21 GRETA, *Report on Slovak Republic*, II GRETA(2015)21, 9 November 2015, para 145.

ARTICLE 25

PREVIOUS CONVICTIONS

Katerina Simonova

Each Party shall adopt such legislative and other measures providing for the possibility to take into account final sentences passed by another Party in relation to offences established in accordance with this Convention when determining the penalty.

A. INTRODUCTION

25.01 As trafficking in human beings is often a transnational crime, whereby traffickers have potentially been tried or convicted in more than one country, Article 25 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] deals with previous convictions. Taking into account previous convictions is a common sentencing practice in many legal systems around the world; however, historically, only domestic courts' convictions were considered when determining the penalty. This was for various reasons, including criminal law being a national matter of sovereign states, differences of the law itself, or a degree of suspicion of decisions by foreign courts.[2] However, such arguments are becoming less valid in times of internationalisation of criminal law standards,[3] which is also leading to the harmonisation of states' criminal laws.[4]

B. DRAFTING HISTORY

25.02 During the 1st Ad hoc Committee on action against trafficking in human beings (CAHTEH) meeting, the Committee discussed the question of recidivism.[5] The revised preliminary draft of Article 25 reads as follows:

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).
2 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 265.
3 For more see Nicolas Santiago Cordini, 'The Internationalization of Criminal Law: Transnational Criminal Law, Basis for a Regional Legal Theory of Criminal Law' (2018) 8 *Brazilian Journal of Public Policy* 262–3.
4 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 266.
5 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 43.

> Each Party shall adopt such legislative and other measures as may be necessary to take into account final sentences passed by another Party in relation to offences established in accordance with this Convention for the purpose of establishing recidivism.[6]

25.03 It was the 4th meeting when the CAHTEH discussed Article 25 in depth. Several delegations were against including this provision into the Convention. They argued that state's legislation on recidivism differ significantly, while other delegations did not have the concept of recidivism in their legal systems at all. Moreover, some delegations pointed out that only on very rare occasions were the sentences from other countries brought to the attention of the court at that moment responsible for sentencing the offender.[7] Based on these arguments, the Committee amended Article 25 accordingly and changed the term 'for the purpose of establishing recidivism' to 'when determining the penalty'.[8]

25.04 During the 6th meeting, the CAHTEH decided to delete the phrase 'as may be necessary to take into account' and replaced it with a new wording 'providing for the possibility to take into account;'[9] making it non-mandatory for the judges to take into account previous foreign convictions.

C. ARTICLE IN CONTEXT

25.05 At the level of the CoE, Article 56 of the European Convention on the International Validity of Criminal Judgements[10] encourages the State Parties to:

> enable its courts when rendering a judgement to take into consideration any previous European criminal judgement rendered for another offence after a hearing of the accused with a view to attaching to this judgement all or some of the effects which its law attaches to judgements rendered in its territory. (…).

Due to the non-mandatory nature of this provision, the national laws regarding taking into consideration previous foreign court convictions are not unified among the CoE Member States.

25.06 Although Article 25 of the Convention does not oblige the State Parties to take into account previous convictions handed down by courts of other State Parties, the European Union Member States (EU MS) are obliged to do so among each other. This is due to Article 3(1) of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union (EU) in the course of new criminal

6 CAHTEH, *Revised Preliminary Draft of the Convention*, CAHTEH(2003)9, 27 November 2003, 12.
7 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 10.
8 CAHTEH, *Revised Draft Convention of the Council of Europe on action against trafficking in human beings*, CAHTEH(2004)12, 17 May 2004, 14.
9 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting report*, CAHTEH(2004)RAP6, 11 October 2004, para 65.
10 European Convention on the International Validity of Criminal Judgments, CETS No. 70, 28 May 1970, entered into force 26 July 1974 (thereinafter Convention on the International Validity of Criminal Judgments).

proceedings.[11] This provision obliges all EU MS to take into account previous convictions handed down in other EU MS. It also ensures that such a previous conviction has the same legal effect as the domestic court conviction. In relation to the countries outside the EU, Article 56 of the Convention on the International Validity of Criminal Judgements still applies.

25.07 In terms of other international treaties focused on trafficking in human beings, there are two provisions that could be deemed relevant for Article 25 of the CoE Convention against Trafficking. The first provision, Article 22 of the United Nations Convention against Transnational Organised Crime[12] on the establishment of criminal record, states that:

> Each State Party may adopt such legislative or other measures as may be necessary to take into consideration (…) any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence covered by this Convention.

25.08 The second provision, Article 5(3)(f) of the Association of Southeast Asian Nations Convention against Trafficking in Persons, Especially Women and Children[13] adopts a different approach and obliges the State Parties to ensure that the offender is liable to a higher penalty in case one of the aggravating circumstances is present, including when the same offender 'has been previously convicted for the same or similar offences'.

D. ISSUES OF INTERPRETATION

25.09 Article 25 'only' invites the State Parties to take into account previous final convictions made by another State Party in determining a sentence.[14] It should be noted that, generally, 'only conviction by a national court counts as a previous conviction resulting in a harder penalty'.[15] As the Explanatory Report notes, in order to comply with Article 25, the State Parties may set forth in their national law that the foreign courts' convictions shall result in a harsher penalty, similarly as the domestic courts' convictions do now.[16] Another possible approach could be that the State Parties provide in their domestic law that courts should take convictions into account when exercising their general power to assess the individual's circumstances in determining the sentence.[17]

25.10 Nevertheless, Article 25 does not oblige courts or prosecution services to take any active steps in order to find out whether the person being prosecuted has received final sentences from any other court in a different State Party.[18] However, in any case, as pointed out in the

11 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ L 220/32).
12 United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003.
13 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017.
14 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 269.
15 Ibid., para 265.
16 Ibid., para 269.
17 Ibid.
18 Ibid., para 270.

Convention's Explanatory Report on Article 25, if a State Party needs the information on previous convictions, according to Article 13 of the European Convention on Mutual Assistance in Criminal Matters,[19] the State Party may request from another Party extracts from and information relating to judicial records.[20]

25.11 Many of the Group of Experts on Action against Trafficking in Human Beings (GRETA) reports indicate that the State Parties national law provides for the possibility of final sentences passed in another State Party to be taken into account.[21] In several State Parties the domestic law goes even beyond Article 25 and provides for a duty to take into account the foreign courts convictions when determining the penalty for the offence of trafficking in human beings.[22]

25.12 This was certainly the initial goal of the Convention's drafters as well. Unfortunately, as the Chair of the CAHTEH, Mr Jean-Sébastien Jamart, summarised this development at the CAHTEH's final meeting:

> Article 25 on previous convictions represented a genuine opportunity to show that states intended to unite on action against international trafficking in human beings (…). Here again, states preferred a cautious wording which does not make it compulsory to take previous international convictions into account.[23]

19 European Convention on Mutual Assistance in Criminal Matters, CETS No. 30, 20 April 1959, entered into force 12 June 1962.

20 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 270.

21 See, for instance, GRETA, *Report on Armenia*, I GRETA(2012)8, para 152; GRETA, *Report on Georgia*, I GRETA(2011)24, 7 February 2012, para 203.

22 See, for instance, GRETA, *Report on Croatia*, I GRETA(2011)20, para 121; GRETA, *Report on Germany*, I GRETA(2015)10, para 189.

23 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, 31.

ARTICLE 26

NON-PUNISHMENT PROVISION

Ryszard Piotrowicz

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

A. INTRODUCTION

26.01 The non-punishment provision requires Parties to provide for the possibility of not imposing penalties on victims of trafficking for their involvement in unlawful activities, to the extent that they have been compelled to do so. It aims to prevent victims being penalised for offences committed in the course, or as a consequence, of being trafficked. Such offences could be immigration-related (in the course of being trafficked) or they could be violations of criminal law, such as forced criminality (as a consequence of being trafficked).

26.02 The provision effectively acknowledges that trafficked persons are not free agents, and that they may not be in a position to resist being involved in these offences. As such, they should not be held accountable for them. This does not mean that trafficked people should have immunity from prosecution. Rather, where it is established that the trafficked person had no real choice but to commit the offence, because of their trafficking situation, it is not appropriate to punish them. As such, this is but one example of situations where legal systems acknowledge that persons may not be accountable for their acts (such as lack of capacity).

26.03 The provision refers to each Party 'acting in accordance with the basic principles of its legal system'. This recognises that there may be significant disparities in how states address the issue of personal accountability in their legal systems. The objective is, given the human-rights based focus of the Council of Europe (CoE) Convention on Action against Trafficking in Human

Beings,[1] to ensure that it is possible for each party to apply the non-punishment provision. A similar provision is contained in Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.[2]

B. DRAFTING HISTORY

26.04 The first meeting of the CAHTEH specifically recorded that the criminal law provisions of the Convention should include a non-punishment clause for victims of Trafficking in Human Beings 'for offences committed in the framework of the trafficking process'.[3] Concern was expressed about the need for care in the wording of the provision; it was 'not a matter of eliminating offences but of determining those cases, in which there should be no criminal liability'.[4]

26.05 The first draft of the non-punishment provision actually included examples of offences to which it might apply:

> Each Party shall provide in its internal law for victims a non-punishment clause for violation of immigration laws or for the illegal acts they are usually involved in as a direct consequence of their situation as victims, such as illegal border crossing, illegal stay in the territory, use of forged documents, destruction, falsification and alteration of documents, illegal employment.[5]

26.06 The offences included were only examples; it is clear that other offences could be covered. There was some opposition. Austria argued that the provision should not be binding; it suggested that the text should require Parties to 'make all efforts to ensure that victims are not punished'.[6] The Netherlands maintained that the provision was 'well intentioned, but goes too far', and suggested moving it to the Preamble or adding a clause to Article 3 (Non-discrimination).[7] Switzerland demanded its removal altogether.[8] However, the provision survived unaltered in the revised draft adopted soon afterwards.[9]

26.07 The situation became more complicated when a further revised draft was adopted on 17 May 2004. Draft Article 26 now contained three options:

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1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

3 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, 4 (Section III (b)).

4 Ibid., para 44.

5 CAHTEH, *Revised Preliminary Draft European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, Art 26.

6 CAHTEH, *Draft European Convention on Action against Trafficking in Human Beings: Contribution by the delegation of Austria, Netherlands and by the observer of UNICEF*, CAHTEH(2004)1, 26 January 2004, 5.

7 Ibid., 11.

8 CAHTEH, *Projet de Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains: Contribution de la délégation de la Suisse*, CAHTEH(2004)1 Addendum II, 29 January 2004, 9.

9 CAHTEH, *Revised draft Europe Convention on Action against Trafficking in Human Beings: Following the 3rd meeting of the CAHTEH (3–5 February 2004)*, CAHTEH(2004)8, 12 February 2004.

> OPTION 1: Each Party shall provide in its internal law for the possibility of not punishing victims for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as victims.
>
> OPTION 2: Each Party shall ensure in its internal law that victims are not punished for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as victims.
>
> OPTION 3: 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.[10]

The notable feature of these options is that each emphasises that any offences must have been committed as a 'direct consequence' of their situation. Option 2 clearly went further than some states wanted.

26.08 While the CAHTEH accepted in the report on its 4th meeting that the non-punishment provision should be applicable to victims irrespective of whether or not they co-operated with state authorities,[11] divisions on other aspects of the issue were noted, including with regard to the extent of Parties' obligations, which conduct should not be punished, and whether or not the provision should be obligatory.[12] It was noted that the inclusion of the provision would limit traffickers' ability to put pressure on victims – although that presupposed a significant awareness of the law on the part of victims. Some states also argued that the non-punishment clause was necessary on grounds of equity, and as an incentive for victims to denounce traffickers.[13] These divisions led to the adoption of the three options set out above. These options remained in the revised draft of the Convention published following the 5th CAHTEH meeting.[14]

26.09 Opinions remained divided about whether to have a non-punishment provision at all, and, if so, how it should be framed. The issue was discussed at the 6th CAHTEH meeting. Some countries argued that victims' individual circumstances varied too much for a compulsory

10 CAHTEH, *Revised draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Following the 4th meeting of the CAHTEH (11–14 May 2004)*, CAHTEH(2004)12, 17 May 2004, 14.

11 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 16.

12 Ibid., para 17.

13 Ibid., para 20.

14 CAHTEH, *Revised draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 5th meeting of the CAHTEH (29 June–2 July 2004)*, CAHTEH(2004)INFO4, 5 July 2004, 13. Amnesty International and Anti-Slavery International then intervened, urging states to adopt Option 3, arguing that this would be in accordance with previously adopted measures of the Council of Europe, the UN, OSCE and the EU: CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Contribution by the delegation of the Commission of the European Communities*, CAHTEH(2004)17, Addendum IV, 30 August 2004, 12. Poland also declared for Option 3, on the ground that it created 'the widest procedural warrants for the victims, which could lead to increase of number of reports concerning trafficking in human beings made by the victims and help prosecution and judicial authorities in fighting against such crimes': CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Contribution by the delegation of Poland*, CAHTEH(2004)17, Addendum VI, 2 September 2004, 3.

non-punishment clause to be acceptable, and that the decision whether to punish or not should be made on a case-by-case basis. Others argued for the removal of the provision altogether.[15]

26.10 It was further noted that, for the measure to be effective and to rule out the risk of arbitrary treatment, it should not be left to the discretion of state authorities.[16] It was also noted that adoption of an optional provision would lead to discrepancies between countries and therefore inequality of victims.

26.11 As agreement could not be reached on a single text, two options were agreed upon, and battle delayed to another day. These were variations of the first two options previously adopted. Option 3 was dropped:

> OPTION 1: Each Party shall, in accordance with the basic principles of its national legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so, as a direct consequence of their situation as victim.
>
> OPTION 2: Each Party shall, under the conditions provided by its internal law, ensure that no penalty is imposed on victims for their involvement in unlawful activities when they have been compelled to do so by their situation as victims.[17]

26.12 At this stage, those states supporting Option 1 were close to winning the argument, because that text is very close to the one which made it into the Convention. Soon afterwards, an attempt was made to break the deadlock, with a new proposal:

> 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, whatever their nature, to the extent that such involvement is a direct consequence of their situation as trafficked persons.[18]

26.13 There does not appear to have been any significant support for the text proposed above, but some states did nail their colours to the mast. Germany argued in favour of Option 1, arguing that it would need to keep open the possibility of scrutinising each case individually where the crime was serious. It specifically gave the example of a trafficked person who might have committed manslaughter in the trafficking process.[19] Latvia also argued for Option 1, noting

15 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 68.

16 But this argument pre-supposed that there should actually be a non-punishment provision. If there was no such provision in the Convention, it could not be applied arbitrarily.

17 CAHTEH, *Revised draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 6th meeting of the CAHTEH (28 September–1 October 2004)*, CAHTEH(2004)INFO 6, 11 October 2004, 12.

18 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 9.

19 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers*, CAHTEH(2004)24, 19 November 2004, 11.

that the decision to prosecute or not should be taken on a case-by-case basis.[20] Sweden, on the other hand, stated simply: 'Delete the article in its entirety.' No explanation was offered.[21] UNHCR advocated Option 2 on the ground that it offered greater protection to victims of trafficking.[22]

26.14 Amnesty International and Anti-Slavery International then proposed an amended version of Option 1, which replaced the requirement that states provide for the possibility of not prosecuting with a flat prohibition:

> Each Party shall, in accordance with the basic principles of its national legal system, prohibit the possibility of the detention, prosecution or punishment or imposing penalties on victims for the illegality of their entry or residence in a country or their involvement in unlawful activities, unless it is demonstrated that such unlawful activity was not a consequence of their situation as a victim.[23]

26.15 This was a significant change in emphasis and was clearly a bridge too far for most states, requiring, as it would, that states have the onus of demonstrating that the crime was *not* connected to the trafficking status. So, at this stage, the disagreement remained as to which option to adopt, with Sweden advocating the zero-option. But the deadlock was broken as the Christmas holidays beckoned. By mid-December, a revised draft contained only one option, and that was the text eventually adopted in the Convention.[24]

C. ARTICLE IN CONTEXT

1. Binding measures

26.16 The notion that a person should not be penalised or punished for the commission of an offence is well recognised in all legal systems. Typically, this may be because the person lacked mental capacity or was too young. As mentioned earlier, the influence of duress may restrict or even deny culpability in extreme cases,[25] as may the need to act in self-defence.

26.17 The principle is recognised in the migration context. Article 31(1) of the 1951 Convention relating to the Status of Refugees provides that the parties:

> shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or

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20 Ibid., 17.
21 Ibid., 21.
22 Ibid., 24.
23 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: amendments to preamble and articles 25, 35§1 and 36 to 46 proposed by national delegations, observers and non-governmental organisations*, CAHTEH(2004)25, 23 November 2004, 7.
24 CAHTEH, *Revised draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 7th meeting of the CAHTEH (7–10 December 2004)*, CAHTEH(2004)INFO7, 10 December 2004, 12.
25 Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998, entered into force 1 July 2002, Art 31(d).

> are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[26]

26.18 While the non-punishment principle is not specifically mentioned in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[27] Article 2(b) of that instrument specifies that one of the purposes of the Palermo Protocol is to 'protect and assist the victims of trafficking, with full respect for their human rights'. As long ago as 2009, the Working Group on Trafficking in Persons which was established to assist implementation of the protocol recommended that Parties should:

> [c]onsider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.[28]

26.19 The principle has been recognised in other regional instruments. The EU included it in Dir 2011/36/EU, Article 8 of which provides:

> Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts [i.e., offences concerning trafficking in human beings] referred to in Article 2.

26.20 In 2015, the principle was included, it would appear from the wording somewhat grudgingly, in the ASEAN Convention against Trafficking in Persons, Especially Women and Children.[29] Article 14(7) provides:

> Each Party shall, subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking.

26.21 The year before, the ILO adopted the Protocol to its Convention Concerning Forced or Compulsory Labour, (No. 29).[30] The Preamble noted the connection between trafficking in human beings and forced labour, explicitly stating that 'trafficking in persons for the purposes of forced or compulsory labour' takes place. Article 4(2) contains a provision very similar to its equivalent in the EU Directive:

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26 Convention Relating to the Status of Refugees, 189 UNTS 137, July 28, 1951, entered into force April 22, 1954 as amended by the Protocol Relating to the Status of Refugees, 606 UNTS 267, done 31 January 1967, entered into force 4 October 1967.

27 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

28 Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (14–15 April 2009), CTOC/COP/WG.4/2009/2, 21 April 2009, para 12.

29 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017 (thereinafter ASEAN Convention against Trafficking in Persons).

30 See Protocol of 2014 to the Forced Labour Convention, 1930 (ILO P029), 11 June 2014, entered into force 9 November 2016.

> Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.

2. Non-binding measures

26.22 There has been a proliferation of non-binding instruments relating to the non-punishment provision, many of which preceded the binding measures and may well have contributed to their eventual adoption.[31] Perhaps most notable are the Recommended Principles and Guidelines on Human Rights and Human Trafficking, adopted by the Office of the UN High Commissioner for Human Rights in 2002,[32] and the first significant attempt to put the non-punishment provision on the international stage as a core element of anti-trafficking efforts. Principle 7 states:

> Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

That principle is repeated no less than four times, in various contexts, in the accompanying guidelines, which were intended to clarify and elaborate on how the principle should be given effect.[33]

D. ISSUES OF INTERPRETATION

26.23 The essence of the non-punishment provision is that it aims to avoid trafficked persons being penalised for their involvement in criminal activities because in reality they had no choice, having been compelled to do so by their traffickers. Article 26 of the CoE Convention against Trafficking makes it clear that states have a duty to 'provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'. The Explanatory Report, which is rather brief on the issue, specifies that states can comply with this duty either by 'providing for a substantive criminal or procedural criminal law provision, or any other measure' which enables non-punishment.[34]

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31 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (OSCE 2013) 11–13. This document does itself contain 'Recommendations on non-punishment for legislators and prosecutors', see ibid., 28–31. Ryszard Piotrowicz and Liliana Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle' (2016) 16 *Human Rights Law Review* 669, 678–80.

32 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.

33 Ibid., Guideline 2.5 (ensuring non-prosecution for violation of immigration laws or for involvement in activities as a direct consequence of being trafficked); Guideline 4.5 (ensuring that legislation prevents prosecution, detention or punishment for the same reasons); Guideline 5.5 (ensuring that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed because of their situation); Guideline 8.3 (ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons).

34 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 274.

Thus, a significant amount of discretion is left to states as to how they give effect to this; it does not even have to be by legal means. It could be achieved, for instance, through guidelines for prosecutors, so long as in reality there is the possibility that trafficked persons are not prosecuted.

26.24 The Explanatory Report contains a particularly nebulous explanation of the scope of the provision:

> (…) the requirement that victims have been compelled to be involved in unlawful activities shall be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in Article 4, when such involvement results from compulsion.[35]

26.25 This means that states must take account of all the possible means of trafficking a person that might be used. It includes not only the use of physical coercion or emotional abuse, but also abuse of a position of vulnerability – abuse of any situation, in which the person involved has no real and acceptable alternative to submitting to the abuse.[36]

26.26 It must be acknowledged that Article 26 refers only to 'the possibility' of not imposing penalties. This might suggest a discretion on the part of states. However, this would not be a correct interpretation of the duty. Rather, the non-punishment provision must be implemented in appropriate cases, but it is for individual states to achieve this in accordance with the requirements and constraints of their own legal systems. It would arguably contradict the human rights-based ethos of the Convention if victims were punished for offences they had been forced to commit. The obligation is to avoid punishment; the discretion lies in how the state fulfils that obligation.

26.27 GRETA has addressed the issue of non-punishment both in principle and in its country reports. In 2012, it stated:

> To comply with the obligation under Article 26 (…), Parties could incorporate in their internal law a substantive criminal or procedural criminal law provision or adopt any other measure resulting in the possibility of non-punishment of victims of trafficking in human beings. Criminalisation of victims of trafficking not only contravenes the State's obligation to provide services and assistance to victims, but also discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State's obligation to investigate and prosecute those responsible for trafficking in human beings.[37]

26.28 Of course, the assertion that criminalisation of victims may discourage them from coming forward and co-operating with law enforcement agencies is another good reason not to criminalise them, but it is only a pragmatic reason (aimed at promoting prosecutions); it is not based on the principle that victims should not be punished because they are *not to blame*, which is the core justification.

35 Ibid., para 273.
36 Ibid., para 83.
37 GRETA, *2nd General Report of GRETA's Activities*, 4 October 2012, para 58.

26.29 In its 4th General Report, GRETA summarised the then-varying practice of the Parties regarding non-punishment.[38] Of the 35 countries that had been evaluated, eight had adopted specific provisions on non-punishment, either in their criminal code or in anti-trafficking legislation. In four countries, the non-punishment provision applied to any trafficking-related offences. Its application was limited in three countries. Conversely, 27 countries did not have such measures in place. They relied rather on general provisions relating to duress, or else to exonerating or mitigating circumstances that were not specific to trafficked persons. In nine countries, the prosecution service had a discretion on whether to initiate a prosecution. Several countries had adopted guidelines on the application of the provision.

26.30 GRETA noted a persistent problem of a lack of awareness amongst certain key officials (including police, prosecutors and defence lawyers) of the non-punishment provision, as well as the reasons for its existence. This was in part at least due to deficiencies in training, not only about the provision itself, but also regarding the identification of victims – if people are not identified as victims of trafficking, then they are more likely to be prosecuted for alleged offences.[39] The need for guidance for relevant officials, including police officers and prosecutors, continued to be an issue.[40]

26.31 GRETA argued that the lack of a 'specific provision on the non-punishment of victims of trafficking entails a risk of treating them differently depending on the prosecutor in charge of the case'.[41] Accordingly, GRETA recommended the adoption of specific legislation on non-punishment in 16 countries, in addition to the adoption of guidelines for prosecutors in six of these countries. The lack of a specific legal provision in non-punishment in many states continued to vex GRETA throughout the second evaluation round. While Albania was praised for having introduced such a measure since the first evaluation round,[42] some countries continued to resist the move and risked incurring the further wrath of GRETA.[43] GRETA also noted again the need for effective identification of victims of trafficking amongst irregular migrants, so that potential victims would not be punished for immigration-related offences.

1. Article 26 of the CoE Convention against Trafficking in the context of human rights

26.32 The Convention stipulates in the Preamble that 'respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives'. The penalisation of a person for acts they have been compelled to commit because they have been trafficked should be seen in this context. It treats victims as criminals, and violates states' human rights obligations towards trafficked people: these include having in place legislation 'adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking'.[44] The rights of trafficked people are rights that the state must uphold

38 GRETA, *4th General Report on GRETA's Activities*, March 2015, 52–4.
39 For instance, GRETA, *Report on Azerbaijan*, II GRETA(2018)17, para 166.
40 For instance, GRETA, *Report on Poland*, II GRETA(2017)29, para 176 and GRETA, *Report on Montenegro*, II GRETA(2016)19, para 145.
41 GRETA, *4th General Report*, March 2015, 54.
42 GRETA, *Report on Albania*, II GRETA(2016)6, para 159.
43 For instance, GRETA, *Report on Austria*, II GRETA(2015)19, para 175.
44 *Rantsev v.Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 284.

and it would amount to a serious violation of such rights to hold them accountable for offences that they have not chosen to commit.

26.33 GRETA's report on Italy, in the context of non-punishment, states: 'Public prosecutors should be encouraged to be proactive in establishing if an accused person is a potential victim of trafficking and to consider trafficking in human beings as a serious violation of human rights'.[45] This is an error, although one that admittedly repeats the error in the Preamble to the Convention, which also refers to trafficking in human beings as a 'violation of human rights'. This is a common error; trafficking in human beings is, in the absence of state involvement or complicity, a private criminal enterprise. As the ECtHR makes clear in *Rantsev v. Cyprus and Russia*, it is the failure of the state to protect people from being trafficked, or to provide them with support and protection, that violates human rights, not the trafficking. This analysis is supported by a relatively recent decision of the Court of Appeal of England and Wales, which addressed the nature and scope of states' obligations under the European Convention on Human Rights.[46] Giving the only judgment, with which his two co-judges concurred, Lord Justice Laws stated (with regard to Art 3 ECHR):

> The rights which the Convention guarantees are enjoyed against the State, and only the State. It is important to recognise that ill-treatment by a non-State agent, however grave, does not of itself constitute a breach of Article 3. This is sometimes glossed over in the language of the cases … Likewise a killing does not of itself violate Article 2, nor an act of enslavement Article 4, if it is not perpetrated by an agent of the State. But it is surely inherent in the Convention's purpose that the State is to protect persons within its jurisdiction *against such brutalities, whoever inflicts them* (…).[47]

26.34 The state may violate the non-punishment provision directly or indirectly. Where the state fails to identify a person as having been trafficked and punishes or penalises them for an offence, this could be indirect violation, where it can be shown that the state should have identified the person as a trafficking victim. Direct violation occurs where the state knows that the person has been trafficked yet fails to attribute sufficient weight to this fact in deciding whether to prosecute or punish. This means that public servants likely to come into contact with trafficked persons, such as police officers, labour inspectors, border guards and social services, need to be trained to spot them. Identification of trafficked persons is not stated to be part of the duty under Article 26, but it needs to happen to enable the state to give full effect to Article 26. Furthermore, the obligation to identify is found in Article 7(1) of the CoE Convention against Trafficking including the duty to strengthen border controls in order to detect trafficking as well as, most importantly in Article 10 of the CoE Convention against Trafficking, the duty to have personnel appropriately trained to identify trafficked victims, and to adopt measures to identify such victims.

2. Scope of Article 26 of the CoE Convention against Trafficking

26.35 The principle of non-punishment goes beyond prosecution, which may lead to criminal fines or imprisonment. The reference in Article 26 to the non-imposition of 'penalties' encompasses

45 GRETA, *Report on Italy*, II GRETA(2018)18, para 239.

46 *The Commissioner of Police of the Metropolis v. DSD and NBV*; *Alio Koraou v. The Chief Constable of Greater Manchester Police*, [2015] EWCA Civ 646. Case No: B2/2014/1643, A2/2014/2662 & A2/2014/2731

47 Ibid., para 43 (emphasis added).

other measures, such as administrative fines, detention or a prohibition on re-entry to the national territory for a period of time after the trafficked person leaves. States are entitled to detain in certain circumstances, such as prior to deportation. The point is that the detention should not be a measure of penalisation for a trafficking-related offence.[48] None of these measures amounts to a fine or a term of imprisonment, but they clearly penalise the trafficked person, and as such would amount to a violation of Article 26. Moreover, where a trafficked person is to be removed from its territory, the state must ensure that to do so does not violate its duty under Article 16(2), to ensure that 'such return shall be with due regard for the rights, safety and dignity of that person'. Additionally, the state that proposes to return a trafficked person must ensure that, in so doing, it would not violate the principle of *non-refoulement*.[49]

26.36 The non-punishment duty covers both offences committed in the course of being trafficked (causation-based offences), and those committed as a consequence of being trafficked (e.g., growing cannabis). The issue, which remains undecided, is how far the provision goes: would it include what might otherwise be very serious offences? For instance, a trafficked person might be compelled to commit an act of serious violence against another trafficked person.

26.37 There may be problems in connecting the offence to the person's trafficked status. A trafficked person might steal food from a shop because they are very hungry, yet it might be difficult to establish whether that hunger is because of the conditions the person is subjected to by the trafficker. A person who was originally trafficked may themselves go on to participate in the trafficking of others, yet questions may arise about the extent to which the perpetrator did this as a consequence of their own experience; in other words, whether their own past experience as a victim of trafficking played a role in them becoming involved in trafficking themselves.

26.38 There is no reason in principle why the obligation not to punish should not apply to most offences. If the essence of the duty is based upon the fact that the trafficked person was not a free agent and had no real choice but to commit the offence, then arguably they should not be criminally accountable, just as individuals may not be held accountable because they lacked the capacity to take full responsibility for their actions.

26.39 Should the non-punishment provision exonerate or mitigate?[50] It is difficult to imagine a court accepting that a trafficked person could avoid being punished entirely for a serious offence on the basis that they had no real alternative but to commit the offence. And yet one can readily envisage a scenario, where a trafficked person might kill a trafficker by stabbing them in a struggle to escape. But in that scenario, the trafficked person might in any case have a defence of self-defence.

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48 See OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations 2010) 133–6. GRETA has also noted with concern the detention of possible trafficking victims in administrative holding centres, for example in France, see GRETA, *Report on France*, II GRETA(2017)17, paras 247, 250. If this is because of a failure to identify the person as having been trafficked, then the breach is of the duty to identify. If they are detained for illegal entry when the authorities know that they have been trafficked, then this would probably violate the non-punishment principle.

49 CoE Convention against Trafficking, Art 40(4).

50 See the different approaches of the International Criminal Court, Art 31.1 of the Rome Statute of the International Criminal Court, which provides for complete exoneration subject to strict conditions, whereas the International Criminal Tribunal for the former Yugoslavia went for mitigation: *Prosecutor v. Erdemovic* Case No. IT-96-22-A (Appeals Chamber), (ICTY, 7 October 1997) para 19.

26.40 There are obvious risks for any criminal justice system that states, unambiguously, that a trafficked person cannot be punished for trafficking-related offences under any circumstances. It creates a kind of immunity based upon the fact that the person had absolutely no agency of their own. This is one of the remaining challenges for the non-punishment provision: first, to reach the stage, where all Parties to the Convention have measures in place that enable the effective application of the provision; but secondly, and this remains controversial, how far it should go.

26.41 Article 26 was discussed by the Court of Appeal of England and Wales in *R v. LM and Others*:[51]

> It is necessary to focus upon what Article 26 does and does not say. It does not say that no trafficked victim should be prosecuted, whatever offence has been committed. It does not say that no trafficked person should be prosecuted when the offence is in some way connected with or arises out of trafficking. It does not provide a defence which may be advanced before a jury. What it says is no more, but no less, than that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled (in the broad sense) to commit it. Article 26 does not require a blanket immunity from prosecution for trafficked victims.[52]

26.42 A later case before the same court elicited the observation that the notion of 'compulsion' in Article 26 is wider than that of duress under the law of England and Wales. This is important, because some countries do argue that the defence of duress is available to trafficked victims. If they interpret duress similarly to English law, then there is a chance that Article 26 is being construed too narrowly, to the detriment of trafficked persons. The court said that 'the possibility of not imposing penalties is related to criminal activities in which the victims of trafficking have been compelled to participate in circumstances in which the defence of duress is not available'.[53] This is a significant point, and careful scrutiny should be given to any claims that a defence of duress will meet the requirements of Article 26; the veracity of such claims will depend upon how the defence is interpreted in practice. But the courts have recognised that a clear connection between the fact of having been trafficked and having committed an offence should allow for the quashing of convictions.[54]

26.43 It has also been argued that culpability may be diminished but not extinguished by the fact that a person was trafficked.[55] This reflects the difficulty of defining the precise scope of the non-punishment provision. It does not lend itself to mechanical application; the complexities are much more nuanced than that.

51 *R v LM and Others* [2010] EWCA Crim 2327, 30 October 2010.

52 Ibid., para 13.

53 *R v. N and R v. L.E.* [2012] EWCA Crim 189, 20 February 2012 January 2016, para 13.

54 *R v. Verna Sermanfure Joseph, Alexandra Dorina Craciunescu, VCL, NTN, Dong Nguyen and AA*, [2017] EWCA Crim 326, 9 February 2017, para 136.

55 *L, HVN, THN and T v. R*, [2013] EWCA Crim 991, 21 June 2013, para 33.

E. CONCLUSIONS

26.44 The non-punishment provision has been widely recognised, not only in the CoE Convention against Trafficking, but also in other regional instruments. In many countries, it is specifically included in domestic law, but in others it does not have such status. No state claims not to apply the provision but it is sometimes difficult to find cases where it has been applied. This can be because a state asserts that, when it identifies such cases, prosecutions or proceedings are discontinued. It is impossible to verify such claims.

26.45 It is clear that Article 26, taken in the context of the CoE Convention against Trafficking as a whole, which requires a human rights-based approach, obliges states – however they achieve this – not to allow trafficked persons to be penalised or punished for offences they were compelled to commit; but there is uncertainty about the precise scope of the duty.

ARTICLE 27

EX PARTE AND *EX OFFICIO* APPLICATIONS

Katerina Simonova

1 Each Party shall ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory.

2 Each Party shall ensure that victims of an offence in the territory of a Party other than the one where they reside may make a complaint before the competent authorities of their State of residence. The competent authority to which the complaint is made, insofar as it does not itself have competence in this respect, shall transmit it without delay to the competent authority of the Party in the territory in which the offence was committed. The complaint shall be dealt with in accordance with the internal law of the Party in which the offence was committed.

3 Each Party shall ensure, by means of legislative or other measures, in accordance with the conditions provided for by its internal law, to any group, foundation, association or non-governmental organisations which aims at fighting trafficking in human beings or protection of human rights, the possibility to assist and/or support the victim with his or her consent during criminal proceedings concerning the offence established in accordance with Article 18 of this Convention.

A. INTRODUCTION

27.01 The original draft of Article 27 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] exclusively focused on the initial stages of the investigation or prosecution and combined three paragraphs, each of them referring to the initiation of proceedings. Article 27(1) forbids to limit the investigations into or prosecution of human trafficking offences by a victim's complaint. This allows the relevant authorities to prosecute trafficking offences *ex officio*, therefore, without the necessity for a victim to come forward and report the offence.

27.02 Similarly, also paragraph 2 was intended to improve the already very difficult conditions under which victims submit a complaint. It allows victims to lodge the complaint with the competent authorities of their state of residence. Furthermore, it obliges these authorities to transmit the complaint to other competent authorities if it decides it does not have a jurisdiction in this matter. As the previous paragraph, this provision also opens up a new pathway through which the competent authorities may be informed about an offence and conduct the investigation.

27.03 The last paragraph initially granted to any group, foundation, association or non-governmental organisations which aims at fighting trafficking in human beings or protection of human rights (hereinafter NGOs and other entities) significant rights. It entitled them to institute proceedings and to participate as a third party during the criminal proceedings.[2] This provision would have the potential to significantly strengthen the role of the NGOs in combating human trafficking and protecting victims. However, after several delegations expressed their concerns about this provision, paragraph 3 was replaced by a provision that limits NGOs and other entities competence to providing assistance and support during the criminal proceedings.[3]

B. DRAFTING HISTORY

1. *Ex officio* applications

27.04 At the 1st meeting of the Ad hoc Committee on action against trafficking in human beings (CAHTEH), experts discussed different options to bring applications before the courts. These options were primarily *ex parte* and *ex officio* applications or applications brought by interested third parties such as NGOs committed to the protection of or assistance to victims of human trafficking. At this point, several delegations emphasised the importance of a possibility to initiate *ex officio* proceedings regardless of whether the victim lodged a complaint.[4] Therefore, an early draft Convention in its Article 27(1) also establishes that: 'Each Party shall ensure that

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).
2 CAHTEH, *Revised Preliminary Draft of the Convention*, CAHTEH(2003)9, 27 November 2003, 12.
3 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 75.
4 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 59.

investigations into or prosecution of offences established in accordance with this Convention shall not be dependent on the report or accusation made by a victim.'[5]

Later on, the experts recalled the importance of Article 27(1) and highlighted the fact that conditioning prosecution on a victim's complaint could cause pressure and threats by perpetrators to stop victims from filing such a complaint. Since this principle was already set forth in Article 7(1) of the European Union Council Framework Decision of 19 July 2002 on combating trafficking in human beings,[6] the CAHTEH decided to bring the wording of Article 27(1) closer to the Framework Decision on human trafficking and replaced 'shall not be dependent on the report or accusation' by the clause 'shall not be exclusively subordinated to the report or accusation'.[7] However, the CAHTEH decided at a later meeting to delete 'exclusively' again.[8] **27.05**

During the 4th CAHTEH meeting, one delegation pointed out the issue of offences committed outside state's territory. Its domestic legislation conditions the proceedings by a requirement that such an offence 'had to be the subject of a complaint by the victim or an allegation by a foreign authority'.[9] During the 6th meeting, the CAHTEH addressed the issue of extra-territorial offences raised during the 4th CAHTEH meeting and decided to amend Article 27(1). It was decided to add the clause 'at least when the offence has been committed in whole or in part on its territory'.[10] This new amendment did not only bring this provisions further in line with the above mentioned Article 7(1) of the Framework Decision on human trafficking, but it also allowed State Parties to keep their legislation unchanged as well.[11] **27.06**

2. Interested third-party applications

Already during the 1st CAHTEH meeting, experts envisaged that applications could be brought *ex parte*, *ex officio*, and also by interested third parties. Consequently, an early draft of Article 27 contained paragraph 3 establishing that: **27.07**

> Each Party shall grant, in accordance with the conditions provided for by its national law, to any group, foundation, association or NGO which aims at fighting trafficking in human beings or protection of human rights, the right to institute proceeding and to participate as third party in criminal proceedings concerning offences established in accordance with this Convention.[12]

During the 4th CAHTEH meeting, the experts reiterated that the goal of paragraph 3 was to protect victims from possible threats and to ensure that the proceedings are initiated in cases when responsible state authorities remain inactive.[13] Some delegations perceived paragraph 3 as an important measure for protecting victims. Other delegations, however, were of the **27.08**

5 CAHTEH, *Revised Preliminary Draft of the Convention*, CAHTEH(2003)9, 27 November 2003, 12.
6 European Union Council Framework Decision of 19 July 2002 on combating trafficking in human beings (thereinafter Framework Decision on human trafficking).
7 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 23.
8 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, para 72.
9 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 68.
10 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, para 73.
11 Ibid.
12 CAHTEH, *Revised Preliminary Draft of the Convention*, CAHTEH(2003)9, 27 November 2003, 12.
13 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 27.

opinion that initiating criminal proceedings should remain within the exclusive competence of the public protection services. Several delegations proposed to replace this paragraph with a new provision designed to only support the involvement of NGOs or other victim support services as it is prescribed, for example, in Article 13 of the European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.[14] [15] As a result of the 4th CAHTEH meeting, three different options for Article 27(3) were decided.[16]

27.09 During the 6th CAHTEH meeting, Article 27(3) was discussed for the second time. During this meeting, one of the discussed options for the wording succeeded: instead of the possibility to institute proceedings or to participate as a third party during the proceedings, NGOs were only allowed to 'assist and/or support the victim with his or her consent during criminal proceedings'.[17] The Committee on Equal Opportunities between Women and Men disagreed with this amendment and strongly advocated for the previous provision ensuring that NGOs or other entities have the right to initiate or to request the initiation of investigation or prosecution of the offence of human trafficking and that they may participate as third parties in criminal proceedings.[18]

27.10 During its final meeting, the CAHTEH discussed a proposal of the Parliamentary Assembly advocating for the right of NGOs and other entities to initiate or commission investigation or prosecution.[19] Due to a disagreement, the CAHTEH held a vote and the majority of delegations voted against an amendment of this provision[20] and thereby against this proposal. Additionally, the CAHTEH examined a second part of the Parliamentary Assembly proposal on the right of the NGOs and other entities to participate as parties in criminal proceedings.[21] The EU Member States opposed this amendment and Article 27 remained unchanged.[22]

C. ARTICLE IN CONTEXT

1. Relations to other Articles of the Convention

27.11 As was already emphasised, Article 27(1) and (2) is especially important for the initial stages of the proceedings. Also Article 34(2) is important for early stages of proceedings, which provides that:

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14 European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (thereinafter Framework Decision on victims' standing in criminal proceedings).

15 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 31.

16 Ibid., 52.

17 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, para 75.

18 CAHTEH, *Council of Europe Draft Convention on action against trafficking in human beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 9.

19 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, para 68.

20 Six delegations were in favour of the Parliamentary Assembly amendment, 26 delegations opposed and three delegations abstained. Ibid., para 69.

21 Ibid., para 70.

22 Ibid., para 71.

> [a] Party may (…) forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention.

Thus, this provision may have an impact on the number of *ex officio* initiated investigations, similarly as Article 27(1) and (2).

27.12 Another related provision is Article 12 on assistance to victims. Paragraph 5 of this provision states that: 'Each Party shall (…) co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.' In general, Article 12 obliges State Parties to adopt 'such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery' and lists minimum assistance measures that include 'assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders' (Art 12(1)(e)). These two paragraphs (Art 12(1)(e) and Art 12(5)) can be considered a *lex specialis* to Article 27(3).

2. Relations with provisions in other standards

27.13 At the international level, the United Nations Transnational Organized Crime Convention (UNTOC)[23] and its Article 18(4) only encourages State Parties to transmit information that may lead to further investigation or prosecution. Also the ASEAN Convention against Trafficking in Persons, Especially Women and Children[24] does not contain a provision similar to Article 27.

27.14 This is however not the case at the EU level where Article 9(1) of the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[25] explicitly establishes that investigation and prosecution of the offence of trafficking in human beings and inciting, aiding, abetting or attempting to commit this offence does not depend on reporting or accusation made by a victim. The second part of Article 9(1) of the Dir 2011/36/EU moreover guarantees that criminal proceedings may continue even if the victim has withdrawn the statement. This provision otherwise mirroring the wording of Article 27(1) of the Convention introduces an additional clause explicitly ensuring that the proceedings are not dependant on a victim withdrawing his or her statement.

23 United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003.

24 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017.

25 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

27.15 Article 27(2) was modelled on Article 11(2) of the Framework Decision on victims' standing in criminal proceedings, which was later replaced by Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.[26] The corresponding provisions in this directive are Article 17(2) and (3) of Dir 2012/29/EU.

27.16 In a comparison with other major regional or international treaties focused on combating trafficking in human beings, Article 27 of the Convention improved the process of initiation of investigation or prosecution by removing a very important limitation of victim's complaint (para 1) and by guaranteeing the possibility to submit a complaint in another State Party (para 2). Similar provisions were later introduced in other CoE Conventions.[27]

D. ISSUES OF INTERPRETATION

1. *Ex officio* and *ex parte* applications

27.17 Article 27(1) of the Convention obliges State Parties to investigate and prosecute offences under the CoE Convention against Trafficking without the requirement that the victim has to first make an accusation or report the offence to trigger the investigation or prosecution (*ex officio*). The main aim of this provision is to ensure that victims do not have to face traffickers' pressure and threats intended to 'deter them from complaining to the authorities'.[28]

27.18 In general, there are two main modes of initiation of criminal prosecution. In the first mode, the offence is prosecuted on the victim's motion. The second one is a mode of an *ex officio* indictment. It is important to reiterate that Article 27(1) of the Convention forbids to condition initiation of criminal investigation or prosecution on 'the report or accusation made by a victim'. In other words, it only provides for the possibility that investigation or prosecution 'can be initiated *ex officio*'.[29] This does not however address the main issue that, in reality, the majority of law enforcement agencies initiate such proceedings only following a victim's complaint.[30] Among other things, this leads to excessive reliance of law enforcement authorities on victim-based evidence.[31]

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26 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA (OJ L 315/57) (thereinafter EU Victims' Rights Directive).

27 See for instance Art 55 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210, 11 May 2011; or Art 32 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25 October 2007, CETS No. 201 (thereinafter Lanzarote Convention).

28 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 277.

29 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 124.

30 Ibid. See also European Commission, *Study on Case-Law relating to Trafficking in Human Beings for Labour Exploitation: Final Report* (European Commission 2015) 56.

31 For more see ibid., 59–60. GRETA's report on Bulgaria confirms that 'most of the difficulties in prosecutions for the crime of THB are related to finding sufficient proof in addition to the victim's statements'. GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 221.

27.19 On the other hand, the Recommended Principles and Guidelines on Human Rights and Human Trafficking[32] highlight that '[i]n many cases, individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms'.[33] Further reasons why victims restrain from reporting trafficking is fear of deportation, increasing 'debt' to be paid back, or social pressure.[34] Therefore, as GRETA stressed on several occasions, it is crucial that State Parties conduct a proactive investigation[35] and detect potential victims of trafficking,[36] including in cases when presumed victims of trafficking in human beings do not consider themselves as victims.[37] It is however equally important that State Parties ensure that victims of trafficking in human beings are 'adequately' informed and further assisted during the pre-trial stage and during the court proceedings as well,[38] in order to support them in making the deposition and address their fears from reprisal and other threats.[39]

27.20 In the case of *Finucane v. United Kingdom*, the European Court of Human Rights (ECtHR) had already concluded that 'the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures'.[40] This obligation was reaffirmed by the landmark decision *Rantsev v. Cyprus and Russia*.[41] This judgement furthermore specified that the requirement to investigate further entails agencies inter alia asking appropriate questions, taking a statement, making enquiries into the background, other facts, or parts of the trafficking chain.[42] In addition, in the case of *Opuz v. Turkey*, the ECtHR established that state authorities should be able to prosecute the crime (in this case domestic violence) 'as a matter of public interest' even when the victim withdraws the complaint.[43]

27.21 Additionally, according to the GRETA reports, states should provide law enforcement authorities with adequate investigative powers and techniques[44] and support the development

32 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add. 1, 20 May 2002, Guideline 5.

33 See also GRETA, *4th General Report on GRETA's activities*, March 2015, 54.

34 Fiona David, 'Law enforcement responses to trafficking in persons: challenges and emerging good practice' (2007) 347 *Trends and Issues in Crime and Criminal Justice*, 2.

35 See e.g., GRETA, *Report on Austria*, I GRETA(2011)10, paras 92 and 145.

36 See for instance GRETA, *Report on the United Kingdom*, I GRETA(2012)6, para 229.

37 GRETA, *Report on Hungary*, II GRETA(2019)13, para 190.

38 GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 229.

39 Ibid., para 221.

40 *Finucane v. United Kingdom* App no 29178/95 (ECtHR, 1 October 2003) para 67.

41 *Rantsev v. Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) para 288.

42 Ibid., paras 297 and 307.

43 *Opuz v. Turkey* App no 33401/02 (ECtHR, 9 June 2009) para 145.

44 GRETA emphasises in its reports the importance of special investigation techniques as set out in Recommendation Rec(2005)10 of the Committee of Ministers to member states on 'special investigation techniques' in relation to serious crimes including acts of terrorism. See for instance GRETA, *Report on Belgium*, I GRETA(2013)14, para 225.

of proactive investigatory procedures[45] that could prevent the law enforcement authorities from relying predominantly on victim testimony.[46]

2. Submission and transmission of a complaint made in another State Party

27.22 This provision expands possibilities of victims to report an offence and requires the State Parties to ensure that victims may submit their complaint before the competent authorities of their state of residence while the offence was committed in the territory of a different State Party.[47] In case the competent authority to which the victim submitted its complaint concludes that it does not itself have jurisdiction, for example based on the passive personality principle (laid down in Art 31(1)(e)), it must further forward the victim's complaint without delay to the competent authority of the State Party in whose territory the offence was committed.[48] However, as the Explanatory Report emphasises, it is only an obligation of the state of residence to forward victim's complaint to the competent authority. Article 27(2) does not oblige the state of residence to initiate an investigation or prosecution.[49]

27.23 Inherent to trafficking in human beings is that it may occur in several states, even the exploitation itself may occur in many states. Consequently, State Parties may face difficulties when deciding to which competent authorities of which state they should forward the complaint. In relation to this question, several delegations suggested it would be better if the complaint would be referred to the competent authority of the State Party 'in whose territory the offence had begun'.[50] The CAHTEH agreed to examine this question of the competent authority further during the second reading.[51] However, at the end, the CAHTEH decided to retain Article 27(2) without amendment and did not further discuss this issue.[52] Thus, in conclusion, the State Parties are obliged to transmit the complaint to the competent authorities of all State Parties where the offence took place. It is then up to these particular State Parties to resolve a potential conflict of jurisdictions that may occur.[53]

27.24 The purpose of this provision is to ease the complaint process for victims and allow them to file a complaint with a competent authority of their state of residence while the offence was committed in the territory of a different state. However, there are specific situations that make even this complaint submission difficult, including situations when victims are in irregular

45 See for instance GRETA, *Report on Azerbaijan*, I GRETA(2014)9, paras 190 and 199 and GRETA, *Report on Switzerland*, I GRETA(2015)8, paras 195 and 200.

46 Reliance solely on a victim's testimony was among other issues also criticised by the Special Representative and Co-ordinator for Combating Trafficking in Human Beings of the OSCE, see further OSCE, *Report by the OSCE Acting Co-ordinator for Combating Trafficking in Human Beings following the official visit to Cyprus*, SEC.GAL/110/19, 5 June 2019, para 44. See also *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Guideline 5(3).

47 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 278.

48 See on this also the Commentary on Art 31.

49 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 278.

50 CAHTEH, *4th meeting (11–14 May 2004) – Meeting report*, CAHTEH(2004)RAP4, 23 June 2004, para 24.

51 Ibid., para 25.

52 Ibid., para 26.

53 Art 31(4) of the CoE Convention against Trafficking provides that:

> When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

migration situation and/or detention. According to the responses to GRETA's questionnaire, the possibility to file a complaint in these specific circumstances seems to be ensured by rather informal arrangements, such as the possibility to report their case to NGOs and other entities by using contact information[54] or during their regular visits in detention facilities[55] or to social workers and reception officers.[56] Detainees may also use confidential complaint boxes.[57]

3. Article 27(3) of the CoE Convention against Trafficking: 'assist and/or support the victim'

27.25 Article 27(3) of the CoE Convention against Trafficking creates an obligation upon the State Parties to ensure that the NGOs or other entities have the possibility to provide assistance and support to the victim 'with his or her consent during criminal proceedings concerning the offence of trafficking in human beings'.[58] Hence, as was outlined in the drafting history above, the initially very strongly formulated provision was significantly altered during the drafting process.[59] An early draft was allowing NGOs and other entities to initiate investigation or prosecution and to act as a third party during the criminal proceedings. Therefore, it had potential to significantly influence the initiation of investigation and prosecution and also to substantially strengthen the protection of victims when acting as a third party during the criminal proceedings.

27.26 The final wording of Article 27(3), as amended during the 6th CAHTEH meeting, and only provides for the possibility to assist and support the victim during the criminal proceedings.[60] This new wording was partially inspired by Article 13 of the Framework Decision on victims' standing in criminal proceedings.[61] As the Chair of the CAHTEH, Mr Jean-Sébastien Jamart, commented on this sudden development:

> Unfortunately, we did not accept the idea that an NGO could take part in proceedings on behalf of a victim. Yet victims often do not dare bring legal proceedings for fear of reprisals. Intervention by an NGO during trafficking is sometimes essential in order to get proceedings started. (…) You would think we needed an international convention to allow NGOs to practise charity.[62]

27.27 Article 12 lists minimum assistance requirements. Among others, such assistance shall include 'assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders' (Art 12(1)(e)). This provision serves as a basis for the obligation enshrined in Article 27(3). Therefore, State Parties are at minimum obliged to allow NGOs and other entities to provide such an assistance or support during the criminal proceedings that would enable victim's rights and interests to be presented and considered (Article 27(3) in conjunction with Article 12(1)(e) and (5)).

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54 GRETA, *Reply from Cyprus to GRETA's Questionnaire*, III GRETA(2018)26_CYP_rep, question 6.3.
55 GRETA, *Reply from Slovakia to GRETA's Questionnaire*, III GRETA(2018)26_SVK_rep, question 6.3.
56 GRETA, *Reply from Austria to GRETA's Questionnaire*, III GRETA(2018)26_AUT_rep, question 6.3.
57 Ibid. and GRETA, *Reply from Georgia to GRETA's Questionnaire*, III GRETA(2018)26_GEO_rep, question 6.3.
58 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 279.
59 CAHTEH, *Revised Preliminary Draft of the Convention*, CAHTEH(2003)9, 27 November 2003, 12.
60 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting report*, CAHTEH(2004)RAP6, 11 October 2004, para 75.
61 CAHTEH, *4th meeting (11–14 May 2004) – Meeting report*, CAHTEH(2004)RAP4, 23 June 2004, para 31.
62 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, 31.

27.28 Also GRETA recognised in several of its reports the importance of the role NGOs play in fulfilling the purposes of the Convention, including the provision of assistance to victims of human trafficking.[63] However, Article 27(3) does not explicitly establish any additional rights and obligations in relation to the assistance and protection provided by NGOs and other entities to the victims that would not be already guaranteed by other provisions of the Convention. As GRETA's reports demonstrate, although many State Parties provide for the right of NGOs and other entities to be present during the criminal proceedings and support the victim,[64] not many State Parties exceeded the minimum standards defined in Article 12 and Article 27(3) of the Convention. In practice, only few State Parties allow NGOs to represent victims of THB and to participate in proceedings as third parties.[65]

63 GRETA, *8th General Report on GRETA's activities*, May 2019, para 204.

64 See, for instance, GRETA, *Report on Finland*, I GRETA(2015)9, para 219.

65 See for instance GRETA, *Report on Georgia*, I GRETA(2011)24, para 215; GRETA, *Report on the United Kingdom*, I GRETA(2012)6, para 344. See further GRETA, *Report on France*, I GRETA(2012)16, para 224. GRETA encouraged France not to limit these guarantees (launching a civil action on behalf of victims or intervene to assist them) only to NGOs and other entities combating trafficking for the purpose of sexual exploitation, but all NGOs and other entities combating human trafficking.

ARTICLE 28

PROTECTION OF VICTIMS, WITNESSES AND COLLABORATORS WITH THE JUDICIAL AUTHORITIES

Conny Rijken

1 Each Party shall adopt such legislative or other measures as may be necessary to provide effective and appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators, for:
- **a Victims;**
- **b As appropriate, those who report the criminal offences established in accordance with Article 18 of this Convention or otherwise co-operate with the investigating or prosecuting authorities;**
- **c witnesses who give testimony concerning criminal offences established in accordance with Article 18 of this Convention;**
- **d when necessary, members of the family of persons referred to in subparagraphs a and c.**

2 Each Party shall adopt such legislative or other measures as may be necessary to ensure and to offer various kinds of protection. This may include physical protection, relocation, identity change and assistance in obtaining jobs.

3 A child victim shall be afforded special protection measures taking into account the best interests of the child.

4 Each Party shall adopt such legislative or other measures as may be necessary to provide, when necessary, appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators, for members of groups, foundations, associations or non-governmental organisations which carry out the activities set out in Article 27, paragraph 3.

5 Each Party shall consider entering into agreements or arrangements with other States for the implementation of this article.

A. INTRODUCTION

28.01 Article 28 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] is the second article of Chapter V on Investigation, Prosecution and Procedural law. This chapter aims to facilitate the prosecution of traffickers on the one hand and the protection of victims, especially during criminal proceedings, on the other hand. Article 28 specifically addresses adaptive measures in criminal procedural law to protect victims, witnesses and collaborators. Their protection was deemed necessary especially when reporting cases of trafficking, giving a statement or acting as a witness, because such co-operation might generate a real risk of reprisals and threats by the accused or their networks.

B. DRAFTING HISTORY

28.02 During the drafting of Article 28, the need for a separate article on protection of victims, witnesses and collaborators as well as the need for a separate chapter on Investigation, Prosecution and Procedural Law was considered superfluous by some delegates as this was already dealt with in other CoE conventions as well as the United Nations (UN) Convention Against Transnational Organized Crime and its supplementary Protocols[2] and thus implied a risk to undermine those instruments.

1. Subjects of protection

28.03 The subjects of protection are listed in Article 28(1) of the CoE Convention against Trafficking. Contrary to the title of the article, there is no mention of collaborators separately but they are included in Article 28(1)(b). The term 'collaborators' is not defined but did receive considerable attention in the drafting history.

28.04 The initial proposal after the 1st Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting, included the protection of 'members of association or organisations who assisted the victims during civil or penal proceedings'.[3] During the 4th CAHTEH meeting, the Committee thought that including members of associations or

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (CoE Convention against Trafficking or Convention).
2 UN Convention against Transnational Organised Crime, 2225 UNTS 209, entered into force 29 September 2003.
3 CAHTEH, *Revised Preliminary Draft of the Convention*, CAHTEH(2003)9, 27 November 2003, 13.

organisations that assist victims during civil or criminal proceedings would give Article 28 too wide a scope and was therefore deleted.[4] However, during the 8th CAHTEH meeting, it was decided that protection be granted to members of groups, foundations, associations or non-governmental organisations (NGOs) should be included as a separate new paragraph. It was decided to adopt such protection in a separate paragraph (finally Art 28(4)) because the type of measures to protect these entities were considered to be different from the measures for victims, witnesses and collaborators.[5]

28.05 Article 28(1)(b), on protection of collaborators was also thoroughly discussed during the drafting process. During the 4th CAHTEH meeting it was explained that the text was based on the Criminal Law Convention on Corruption[6] as well as Recommendation No. R(97)13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence.[7] According to the recommendation a:

> 'collaborator of justice' means any person who faces criminal charges, or was convicted, of having taken part in an association of criminals or other criminal organisation of any kind, or in organised crime offences but agrees to co-operate with criminal justice authorities, particularly by giving information about the criminal association or organisation or any criminal offence connected with organised crime.[8]

28.06 It is clarified in the Convention's Explanatory Report that this provision refers to those 'who face criminal charges or have been convicted of having taken part in offences established under the Convention but who agree to co-operate with criminal justice authorities'.[9] This explanation was finally included in the Explanatory Report.[10] As agreed during the 6th CAHTEH meeting, protection to collaborators is given only 'as appropriate',[11] because collaborators can be involved in the trafficking themselves which makes them inappropriate subjects for protection.

28.07 During the 4th CAHTEH meeting reference to Article 18 (Criminalisation of trafficking in human beings) was included in the article, limiting the scope of protection of collaborators to those who cooperated or gave testimony in cases of trafficking in human beings and not for any other criminal offence defined by the CoE Convention against Trafficking.[12]

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4 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 36.
5 CAHTEH, *8th Meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, paras 73–75.
6 Criminal Law Convention on Corruption, ETS No. 173, 27 January 1999, entered into force 1 July 2002, Art 22.
7 Committee of Ministers, Recommendation No. R(97)13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence, 10 September 1997 (thereinafter Recommendation (97)13).
8 Ibid., I. Definitions. This definition was almost literally repeated in Recommendation Rec(2005)9 with one important change, namely, the replacement of 'giving information' by 'giving testimony'. Furthermore, 'any criminal offence connected with organised crime' was extended to 'organised crime or other serious crimes'. See Committee of Ministers, Recommendation Rec(2005)9 of the Committee of Ministers to Member States on the protection of witnesses and collaborators of justice, 20 April 2005, 1. Definitions (thereinafter Recommendation (2005)9).
9 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 35.
10 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 283.
11 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 80.
12 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 38.

28.08 In line with the Explanatory Report, the term 'witnesses' refers to 'persons who possess information relevant to criminal proceedings concerning human-trafficking offences under Article 18 (…)' including whistle blowers and informers.[13]

28.09 As family members of victims and witnesses could be involved in the trafficking, they could receive protection only 'as appropriate'.[14] Later, this was changed to 'when necessary'.[15] Family members of collaborators are excluded from protection under Article 28.

2. Before, during and after investigation and prosecution

28.10 During the 4th CAHTEH meeting it was decided that protection should also be granted after and not only during criminal proceedings.[16] Amnesty International and Anti-Slavery International suggested to extend protection to include before criminal proceedings and in the absence of a prosecution.[17] During the 6th CAHTEH meeting it was decided to include 'in particular' during and after investigation and prosecution of perpetrators, not to exclude protection before such investigation and prosecution and thus being non-exhaustive.[18]

3. Types of protection

28.11 An early draft of the CoE Convention against Trafficking listed various methods of protection in Article 28(2), namely identity change, relocation, assistance in obtaining new jobs and physical protection.[19] During the 4th CAHTEH meeting it was decided to formulate the list in a non-exhaustive way.[20]

28.12 Apart from the measures listed in Article 28(2), the Explanatory Report refers to Recommendation (97)13 which offers a list of measures to protect both the interests of witnesses and the criminal justice system while guaranteeing the rights of the suspect.[21] Which and how long protection measures are offered depends on the level and type of threats and is based on an assessment of the risks as mentioned in the Explanatory Report.[22]

28.13 Amnesty International and Anti-Slavery International pleaded that protection should be provided on a fully informed and consensual basis, that legal aid and assistance should be available and that protection measures should be based on an individual assessment done by a trained person.[23] In principle the protection is provided on a consensual basis unless emergency

13 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 284.
14 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 37.
15 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, 51.
16 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 39.
17 CAHTEH, *Draft Convention of the Council of Europe on action against trafficking in human beings: Contribution by Non-Governmental Organisations*, CAHTEH(2004)17, Addendum IV, 30 August 2004 , 12–13.
18 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, para 79.
19 CAHTEH, *Revised Preliminary Draft of the Convention*, CAHTEH(2003)9, 27 November 2003, 13.
20 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 41.
21 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 282.
22 Ibid., para 288.
23 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by Non-Governmental Organisations*, CAHTEH(2004)17, Addendum IV, 30 August 2004 , 3.

situations prevent the aquirement of consent. During the 6th CAHTEH meeting, it was decided that the Explanatory Report should explain the consensual basis of the protection measures.[24]

4. International co-operation

28.14 The Committee, after the 4th CAHTEH meeting, introduced a paragraph encouraging State Parties to enter into agreements with other states for the implementation of Article 28 due to the international scope of the crime of human trafficking and the limited territory of some states.[25]

5. Reference to the rights of the child

28.15 UNICEF proposed to add 'including special protection measures for child victims' to Article 28(1) (a) and (c). During the 6th CAHTEH meeting it was decided that in case of a child victim, reference should be made in Article 28 to protection measures taking into account the child's best interests.[26] Therefore, Article 28(3) was included.

C. ARTICLE IN CONTEXT

1. Article 28 of the CoE Convention against Trafficking and Council of Europe Recommendations

28.16 As mentioned above, the Explanatory Report refers to Recommendation (97)13 for protective measures. This non-binding document provides alternative methods of giving evidence to prevent direct face-to-face confrontation with the suspect. Types of measures listed in Recommendation (97)13 are: recording by audio visual, meaning statements made by witnesses during pre-trial examination; using pre-trial statements given before a judicial authority as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the life and security of witnesses, their relatives or other persons close to them; revealing the identity of witnesses at the latest possible stage of the proceedings and/or releasing only selected details; excluding the media and/or the public from all or part of the trial. Furthermore, it provides for conditions under which anonymity can be granted to witnesses, including the right of the defence to challenge the granting of anonymity and the prohibition to base a conviction primarily on a testimony that is given by a witness who is granted anonymity.[27]

24 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, para 82.

25 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 42; For further explanation of this provision see, Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 291.

26 CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegations of Austria, Netherlands and by the observer of UNICEF*, CAHTEH (2004) 1, 26 January 2004, 14 and CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, para 81.

27 Recommendation (97)13, III. Measures to be taken in relation to organised crime.

28.17 Special provisions are foreseen in Recommendation (97)13 for vulnerable witnesses, especially those who testify against family members. These provisions may take the form of protection available immediately after the reporting, prohibition of repeated hearings and video recording testimony in pre-trial stages to prevent face to face confrontation at trial stage.[28]

28.18 Although protection before the trial is not explicitly mentioned in Article 28, the wording 'in particular' implies a non-exhaustive listing of when protection should be provided. In Recommendation (2005)9, it is explicated as a general principle that protection should be provided before, during and after the trial, where necessary.[29]

28.19 Recommendation (97)13 provides for some examples of co-operation with third countries as included in Article 28(5) of the CoE Convention against Trafficking. Measures that could be considered are, for example, use of modern means of telecommunication, such as video-links, to facilitate simultaneous examination of protected witnesses or witnesses whose appearance in court in the requesting state is otherwise impossible, difficult or costly, while safeguarding the rights of the defence; assistance in relocating protected witnesses abroad and ensuring their protection or exchange of information between authorities responsible for witness protection programmes.[30] Recommendation (85)11 on the position of the victim in the framework of criminal law and procedure, only briefly and in general wording, addresses victim protection in relation to protection of privacy and special protection of the victim.[31]

2. Article 28 of the CoE Convention against Trafficking in relation to Article 6 ECHR

28.20 Protection of victims, witnesses and collaborators should be balanced with the rights of the defendant and the principles of fair trial as adopted in Article 6 of the European Convention on Human Rights (ECHR).[32] Hence, the court must give reasons why it refuses to call a witness to testify which may not lead to a disproportionate restriction of the defendant's ability to present arguments that favours their case.[33] Non-disclosure of evidence can be allowed when the defence was given an opportunity to comment on a supplementary police report.[34]

28.21 To facilitate the balance between the parties in a criminal procedure, the accused must have the opportunity to challenge protective measures, the credibility of the protected person and the origin of their knowledge. Recommendation (2005)9 states that anonymity of persons (including victims, witnesses and collaborators) should be an exceptional measure and criminal procedural law should provide for a verification procedure to provide for a fair balance between

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28 Ibid., IV. Measures to be taken in relation to vulnerable witnesses, especially in cases of crime within the family.

29 Recommendation (2005)9, para 2.

30 Recommendation (97)13, V. International co-operation.

31 Council of Europe, Recommendation 85(11) on the position of the victim in the framework of criminal law and procedure, adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies, paras 15 and 16.

32 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 4 November 1950, entered into force 3 September 1953.

33 *Wierzbicki v. Poland* App no. 24541/94 (ECtHR, 18 June 2002) para 45, *Ankerl v. Switzerland* App no. 17748/91 (ECtHR, 23 October 1996) para 38, *Dombo Beheer B.V. v. the Netherlands* App No. 14448/88 (ECtHR, 9 September 1992) para 35.

34 ECtHR, *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb)* (CoE/European Court of Human Rights 2020), para 156. See on this also the Commentary on Art 30.

the different parties. Furthermore, if convicted, the conviction should not be based solely or primarily on the evidence provided by the anonymised person.[35]

3. Article 28 of the CoE Convention against Trafficking in relation to Article 30 of the CoE Convention against Trafficking

28.22 Article 30 of the CoE Convention against Trafficking overlaps with Article 28. Article 28 refers to extra-judicial protection, whereas Article 30 of the CoE Convention against Trafficking explicitly refers to Article 6 ECHR and requires the implementation of procedural measures to provide privacy and security.

4. Article 28 of the CoE Convention against Trafficking in relation to UNTOC and the Palermo Protocol

28.23 Article 24 of the United Nations Convention against Transnational Organized Crime (UNTOC)[36] specifically addresses protection of witnesses and Article 25 UNTOC is on assistance to and protection of victims. Article 24(1) UNTOC provides that such protection should also be provided to relatives and other persons close to the witness. A non-exhaustive list is included in Article 24(2) UNTOC which lists physical protection including relocation, non-disclosure of identity and testimony given using communications technology.[37] For relocation of protected witnesses, states should enter into agreements with other states. Article 24(4) UNTOC provides this article is equally applicable to victims 'insofar as they are witnesses'. Article 25 UNTOC obliges states to provide protection to victims 'in particular in cases of threat of retaliation or intimidation'. Article 25(3) UNTOC provides for a general obligation for states to take into account victims' views and concerns during any stage of the criminal proceedings 'in a manner not prejudicial to the rights of the defence'. Article 26 UNTOC concerns measures to enhance co-operation with law enforcement authorities, and is directed at collaborators defined as those 'who participate or who have participated in organized criminal groups'.[38] Article 24 on witness protection is equally applicable to collaborators.[39]

28.24 Article 6 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[40] provides for the protection of a victim's privacy and identity. Article 6(2) of the Palermo Protocol contains the general provision on bringing forward the views and concerns during criminal proceedings; physical safety is provided for in Article 6(5).

35 Recommendation (2005)9, paras 18–21.
36 UN Convention against Transnational Organised Crime, 2225 UNTS 209, entered into force 29 September 2003.
37 See also UNTOC, Art 18(18).
38 Ibid., Art 26(1).
39 Ibid., Art 26(4).
40 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

5. Article 28 of the CoE Convention against Trafficking in relation to European Union law

28.25 The most relevant document for victim protection in trafficking cases in the European Union (EU) is Directive 2011/36/EU.[41] Article 12 of Dir 2011/36/EU provides for the protection of victims in criminal investigations and proceedings. Article 12(1) of Dir 2011/36/EU refers to the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings which was replaced in 2012 with Directive 2012/29/EU.[42] Neither of these documents refer to collaborators but only apply to victims and some provisions also to witnesses. Article 12(3) of Dir 2011/36/EU provides for protection of victims on the basis of an individual risk assessment and guarantees access to, inter alia, 'witness protection programmes or other similar measures'. Further protection, including to prevent secondary victimisation, is guaranteed in Article 12(4) of Dir 2011/36/EU and seeks to avoid: unnecessary repetition of interviews, visual contact with the suspect, giving of evidence in open court and unnecessary questioning about victim's private life. Similar provisions are guaranteed in Article 20 and Article 23 of the EU Victims' Rights Directive with regard to all victims of crime and those with specific protection needs.[43]

28.26 As mentioned above, the EU Victims' Rights Directive provides for protection of victims as well. Article 18 is the greneral provision on the right to protection including against intimidation and retaliation and 'to protect the dignity of victims during questioning and when testifying.' The avoidance of contact between the victim and offender within premises of criminal proceedings, is provided for in Article 19 of the EU Victims' Rights Directive. Article 6 of the EU Victims' Rights Directive provides guarantees for victims to be duly informed about the steps in the criminal proceedings including decisions not to proceed and more importantly the release or escape from custody of the offender and any measures issued for their protection in such cases (Art 6(5) of the EU Victims' Rights Directive). In case of danger or risk of harm, information on the release or escape should be given at all times (Art 6(6) of the EU Victims' Rights Directive). Article 9(3)(a) of the EU Victims' Rights Directive provides for safe accommodation in situations of risk of intimidaton and retaliation.

28.27 Article 22 of the EU Victims' Rights Directive prescribes that protection should be based on an individual assessment of victims to identify specific protection needs, with special attention for vicitms who have suffered considerable harm due to the severity of the crime and victims whose relationship to and dependence on the offender make them particularly vulnerable. Furthermore, it states that wishes of victims should be taken into account and their consent to protective measures taken.[44] Articles 23 and 24 of the EU Victims' Rights Directive further specify that the protection during criminal proceedings should be based on the individual needs assessment. Article 23(1) of the EU Victims' Rights Directive implies an important limitation to the protection granted and states that:

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41 Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15 April 2011 (OJ L 101/1) (thereinafter Dir 2011/36/EU).

42 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (thereinafter EU Victims' Rights Directive) (OJ L 315/57).

43 See on extra protective provisions for children: EU Victims' Rights Directive, Art 24.

44 Ibid., Art 22(6).

> a special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is a an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.

Article 23(2) of the EU Victims' Rights Directive lists the measures that can be taken during investigations, namely, interviews in separate premises, and/or carried out by trained professionals, interviews conducted by the same person, and, under certain circumstances, a person of the same sex. Lastly, states should cooperate with other EU Member States to minimise the impact of intimidation and retaliation.[45]

28.28 Thus, Dir 2012/29/EU and to a lesser extent Dir 2011/36/EU provide for more detailed protective measures for victims, including trafficking victims, when compared to Article 28 of the CoE Convention against Trafficking. As such, for the non-EU MS among the State Parties of the Convention, these directives could be a source of inspiration when implementing and reporting on Article 28 of the CoE Convention against Trafficking. Apart from these instruments, the EU does not have a legally binding instrument for witness protection.[46]

28.29 Of further importance for the protection of victims in general are the European Protection Orders,[47] providing for mutual recognition of protection orders issued in one of the EU MS to protect the victim against intimidation and retaliation from the suspect or convicted person. The EU Convention on Mutual Legal Assistance[48] provides for the hearing by videoconference including at the request of a witness (Article 10(3)) and in order to protect the person to be heard (Article 10(5)b and 10(6)).

D. ISSUES OF INTERPRETATION

1. General aim of Article 28 of the CoE Convention against Trafficking

28.30 Based on the rational choice theory, victims and witnesses in the same vane as perpetrators make a decision to co-operate or not based on an analysis of possible costs and benefits.[49] Witness protection programs can influence this decision-making process. Based on his literature review Demir argues that victim assistance and protection measures increase people's willingness to testify and cooperate with officials.[50] [51] Despite this understanding, there is a

45 Ibid., Art 26(2).

46 Yorik van Lent, 'Legal regulation of witness protection in the EU' (2018) 21 *Public Security and Public Order*, 139–49.

47 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (OJ L 338/4); Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (OJ L 181/4).

48 Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, 12 July 2000, (OJ C 197/3).

49 Mustafa Demir, 'The perceived effect of a witness security program on willingness to testify' (2018) 28(1) *International Criminal Justice Review*.

50 Ibid., 64–70.

51 Additionally, witnesses are more likely to cooperate if they know that they will receive appropriate and adequate care and support, ibid.

lack of victimological research into procedural justice in general and victim/witness protection in criminal justice proceedings more specifically.[52]

2. Subjects of protection

28.31 Article 28(4) of the CoE Convention against Trafficking did not receive so much attention during the drafting process, nor is it explained in the Explanatory Report. It concerns the 'appropriate' protection 'when necessary' for members of groups, foundations, associations or NGOs which carry out the activities set out in Article 27(3) of the CoE Convention against Trafficking. These activities are 'fighting trafficking in human beings or protection of human rights, the possibility to assist and/or support the victim with his or her consent during criminal proceedings concerning the offence established in accordance with Article 18 of this Convention'[53] and thus include the victim's lawyer. Furthermore, it provides protection to NGOs and organisations that assist trafficking victims.

28.32 As seen below, the reports of the Group of Experts on Action against Trafficking in Human Beings (GRETA) focus on the protection of witnesses and victims and do not seem to include the protection of collaborators.

3. Types of protection

28.33 Article 28(2) of the CoE Convention against Trafficking lists four types of protection: physical protection; relocation; identity change; and assistance in obtaining jobs. As mentioned above this is a non-exhaustive list and further defined in CoE recommendations, national laws and practice. Many states have victim protection and witness protection programmes in place. However, formal witness protection programmes are often available to victims of trafficking only on paper while in practice, they are often not used or not appropriate.[54]

28.34 Recommendation R(97)13 and Recommendation (2005)9 provide concrete suggestions for the prevention of the identification of witnesses, namely: audiovisual recording of statements during preliminary phase; using statements given during the preliminary phase which should be regarded as valid evidence if parties have (had) the chance to question the witness and discuss the content of the statement; non-disclosure of details; excluding or restricting media or the public; using devices preventing physical identification; and using video-conferencing.

28.35 Below several types of protection are discussed and illustrated by reference to the evaluations of GRETA. In the following, non-disclosure of identity and anonymous testimony, change of identity, avoiding direct contact between victims and the accused, changing place of residency, protection orders and surveillance measures will be discussed. Some of these matters are also discussed under Article 30.[55]

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52 Emanuela Biffi et al., *IVOR-Report. Implementing Victim-Oriented Reform of the criminal justice system in the European Union* (2016) 52–3.

53 CoE Convention against Trafficking, Art 27(3).

54 UNODC, *Anti-human trafficking manual for criminal justice practitioners – Protection and assistance to victim-witnesses in trafficking in persons cases (module 12)* (United Nations 2009) 7.

55 See on this also the Commentary on Art 30.

(a) Non disclosure of identity and anonymous testimony

28.36 One of the most frequently mentioned measures in the GRETA reports concerns non-disclosure of the identity of victims/witnesses.[56] One country report explicitly mentions that anonymous statements are not an option at all.[57] The conditions for the applicability of anonymity differ from country to country. At one end of the spectrum there are examples where anonymity is the preferred approach to begin with and is guaranteed to alleged victims of trafficking unless it is explicitly waived in the interest of justice.[58] Under Portuguese law, the disclosure by the media of the identity of victims without their consent is prohibited.[59]

28.37 At the other end of the spectrum, the anonymity is guaranteed only upon fulfilment of strict criteria. For example, under Lithuanian law, anonymity of the victim/witness is ensured only if three cumulative criterions are observed. In noting this provision, GRETA underlined that, such triple threshold is unjustifiably high and does not contribute to the effective protection of victims and witnesses of trafficking offences.[60]

28.38 In other states the conditions to grant anonymity to victims/witnesses are more vague, for example, when it 'concerns a particularly sensitive aspect of his or her private life',[61] if the disclosure of the identity would 'cause damage to the injured party or someone close to him'[62] or, referring more precisely to the aspect of danger to the life of the victim, some countries emphasise 'serious danger'[63] or 'grave danger'[64] to the life or physical integrity of the victim/witness or those of his/her family. In Spain anonymity of victim/witness is guaranteed during the investigations up until the trial hearing, however during trial their identities have to be disclosed in case such request is made.[65]

(b) Change of identity

28.39 Many country reports mention a change of identity among the available protection measures.[66] Of these, many also mention the possibility to create a new physical appearance although, none of the reports spell out the conditions on which the changes of physical appearance would be

56 See among others GRETA, *Report on Denmark* II GRETA(2016)7, para 179; GRETA, *Report on Estonia*, I GRETA(2018)6, para 207; GRETA, *Report on Iceland*, I GRETA(2014)17, para 182; GRETA, *Report on Slovenia*, I GRETA(2013)20, para 174; GRETA, *Report on Serbia*, I GRETA(2013)19, para 227.

57 GRETA, *Report on Luxembourg*, I GRETA(2013)18, para 160.

58 GRETA, *Report on Ireland*, II GRETA(2017)28, para 230.

59 GRETA, *Report on Portugal*, I GRETA(2012)17, para 184.

60 GRETA, *Report on Lithuania*, I GRETA(2015)12, para 169.

61 GRETA, *Report on Finland*, I GRETA(2015)9, para 223.

62 GRETA, *Report on Sweden*, II GRETA(2018)8, para 200.

63 GRETA, *Report on Slovenia*, I GRETA(2013)20, para 172.

64 GRETA, *Report on France*, I GRETA(2012)16, para 229.

65 GRETA, *Report on Spain*, I GRETA(2013)16, para 271.

66 GRETA, *Report on Albania*, I GRETA(2011)22, para 176; GRETA, *Report on Armenia*, I GRETA(2012)8, para 164; GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 204; GRETA, *Report on Belarus*, I GRETA(2017)16, para 196; GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 217; GRETA, *Report on Georgia*, II GRETA(2016)8, para 186; GRETA, *Report on Germany*, I GRETA(2015)10, para 216; GRETA, *Report on Greece*, I GRETA(2017)27, para 224; GRETA, *Report on Iceland*, I GRETA(2014)17, para 182; GRETA, *Report on Latvia*, I GRETA(2012)15, para 186; GRETA, *Report on Slovenia*, I GRETA(2013)20, para 174.

ensured, therefore it is not clear how easily available this protection measure is.[67] Generally, a change of identity, which is more often used by collaborators, is considered to be hard and only available after in-depth scrutiny.[68] Change of identity as well as change of residency are drastic protection measures having serious consequences for a person's private life. Therefore they should only be applied as a last resort, thus if other protection measures are not sufficient.[69]

(c) Avoiding direct contact between victim and witness and the accused and cross-examination

28.40 In the GRETA reports, State Parties reported measures to avoid contact such as using audio-visual means when questioning the victim and witness; removing the accused from the room during the questioning of the victim and witness to protect the identity and avoid direct contact. For this reason, frequently the courtrooms are equipped so as to hide the victim and witness from the view of the accused with, for example, a mobile partition to be installed between the participants of the proceedings.[70] This is also in line with especially Article 12(4)(b) of Dir 2011/36/EU and Article 19 of the EU Victims' Rights Directive.

28.41 Taking evidence using modern techniques, such as video-conferencing, is broadly used in the EU and seen as a measure protecting the interest of the parties in criminal proceedings.[71] To prevent recognition of the victim and witness in case of video hearings, images are blurred[72] or voices are distorted.[73] Another measure taken to avoid direct contact is the recording of the testimony beforehand.[74]

28.42 In general, to avoid direct contact between the suspect and the victim or witness GRETA advises to 'take all necessary steps to provide effective and appropriate protection'[75] so as to minimise the risk of the victims and witnesses being intimidated by the accused and thus affecting their willingness and ability to tell their story.

28.43 GRETA condemns the practice of cross-examinations and recommends relevant authorities to discontinue and replace this procedure with alternative ones, as listed in Recommendation No.

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67 For instance GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 204; GRETA, *Report on Georgia*, I GRETA(2011)24, para 220; GRETA, *Report on Iceland*, I GRETA(2014)17, para 182; GRETA, *Report on Portugal*, I GRETA(2012)17, para 182.

68 Saša Atanasov; Mirjana Đukić, and Božidar Otašević 'Witness Protection Programmes for Justice Collaborators – Comparative Overview, Positive Legal Solutions in the Republic of Serbia, the Republic of North Macedonia, USA, England and Italy', (2019) 1 Proceedings of the International Scientific Conference "Social Changes in the Global World".

69 Recommendation (2005)9, para 23.

70 GRETA, *Report on Andorra*, I GRETA(2014)16, para 110. See on this also Art 30 in this commentary, section 4.4.

71 Regulation (EC) No 1206/2001 of the Council of 28 May 2001 on EU Judicial Co-operation, (OJ L 174/1); Miguel Torres, 'Cross-Border Litigation: Videotaking of Evidence within EU Member States' (2018) 12 Dispute Resolution International Law 71.

72 For instance GRETA, *Report on Belgium*, I GRETA(2013)14, para 229.

73 GRETA, *Report on Estonia*, I GRETA(2018)6, para 207; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 161; GRETA, *Report on Romania*, II GRETA(2016)20, para 191; GRETA, *Report on Switzerland*, I GRETA(2015)18, para 202.

74 See on this also Art 30 in this commentary, section 4.5.

75 See for instance GRETA, *Report on Andorra*, I GRETA(2014)16, para 112. See on this also the Commentary on Art 30.

R(97)13. Although cross-examinations in court are not widely practiced in cases of human trafficking, witness protection in the pre-trial stage including during questioning by the defence is equally important. A recent study commissioned by the European Commission looked into the psychological consequences of interventions of judicial authorities during criminal proceedings and confirmed the devastating impact on victims of questioning by defence lawyers in pre-trial stage.[76]

(d) Changing place of residency

28.44 Changing of the place of residence is a further protective measure discussed in GRETA reports. Some countries ensure that as part of this measure the victim/witness may be resettled to another country if security reasons demand so.[77] As such, this ties in with the provision of Article 28(5) of the CoE Convention against Trafficking, namely on international co-operation. No information is provided as to how often this measure is used.

(e) Protection orders

28.45 Protection orders have been subject of research, especially in the context of the EU. Civil and criminal protection orders (orders that prevent the accused or convicted person from entering certain areas, to contact victims and their family for instance) can serve as protective measure before, during and after criminal proceedings, although such orders in some EU Member States lack pre- and post-trial application.[78] According to van der Aa, especially victims of course-of-conduct crimes show an additional need for protection against recidivism and these include victims of stalking, domestic violence and human trafficking. Although their effectiveness is challenged, positive effects are reported for course-of-conduct crimes.[79]

28.46 Despite the European Protection Order Directive 2011/99/EU, there is a huge variety between EU countries on protection orders. All EU Member States have some form of protection order schemes (both criminal and civil) to counter repeat victimisation by physical, mental or sexual violence and stalking.[80] Furthermore, all EU Member States have criminal protection orders. Some EU Member States have opened the criminal protection order to certain categories of victims and protection orders are generally available both in pre- and post-trial stages. The three measures that are most often included in protection orders are prohibition: from entering certain area; to contact the protected person; and to approach the protected person.[81] Research shows that protection orders are not always effective in practice and violations of the protection order are often not followed up.[82] Given the fact that especially

76 Carly Bollen, Conny Rijken and Leyla Khadaroui, 'Psychological Health Impact of THB for sexual exploitation on female victims. File study of Trafficking Cases in The Netherlands', in Markus González Beilfuss (ed.), *Psychological Health Impact of THB for sexual exploitation on female victims* (Thomson Reuters 2020), 279–307.

77 GRETA, *Report on Malta*, II GRETA(2017)3, para 157; GRETA, *Report on Portugal*, I GRETA(2012)17, para 182; GRETA, *Report on Georgia*, II GRETA(2016)8, para 186; GRETA, *Report on Greece*, I GRETA(2017)27, para 224; GRETA, *Report on Iceland*, I GRETA(2014)17, para 183; GRETA, *Report on Latvia*, I GRETA(2012)15, para 186.

78 Suzan van der Aa, 'Protection orders in the European Member States: Where do we stand and where do we go from here? (2012) 18 *European Journal on Criminal Policy and Research*, 183–4.

79 Ibid., 184.

80 Suzan van der Aa et al., *Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States* (Wolf Legal Publishers 2015) 7.

81 Ibid., 9.

82 Ibid., 12.

post-trial protection is often lacking, protection orders could be a useful instrument which should be in place at least in the EU Member States among the State Parties of the CoE Convention against Trafficking.[83]

28.47 Although protection orders can be part of the protective measures, GRETA points out that such a measure might prove ineffective, since oftentimes it is a network of individuals rather than one specific person that may be behind the acts of intimidation and reprisals.[84]

(f) Surveillance measures

28.48 Linked to protection orders, a couple of reports mention the possibility of organising surveillance of the place of residence of the witnesses.[85] Similarly, the option of surveillance of telephone conversations and other transmissions is sometimes noted.[86] Furthermore, few states have explicitly underlined the possibility of ensuring a guard for the witnesses' physical safety.[87]

4. In particular during and after criminal proceedings

28.49 At EU level, there are no guarantees for vicitm protection post-trial in Dir 2012/29/EU.[88] According to van der Aa, most rights in Dir 2012/29/EU are still linked to the position of victims 'in criminal proceedings',[89] which excludes the post-trial stage, unless it is explicitly mentioned in the Directive.[90] Dir 2011/36/EU is more generous in that regard as it states in its Article 11(1) that victims should receive assistance and support before, during and for an appropriate period of time after the conclusion of criminal proceedings.

28.50 Article 28 of the CoE Convention against Trafficking is clear on this matter as protection after criminal proceedings is equally important as the protection during criminal proceedings. In line with the wording and aims of the Article 28, GRETA, in its evaluations, emphasised that the protection lasts beyond the duration of the criminal proceedings,[91] and is particularly important when the perpetrator is released from detention.[92]

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83 Suzan van der Aa, 'Post-trial victims' rights in the EU: do law enforcement motives still reign supreme?' (2015) 21 *European Law Journal*, 239–56.

84 GRETA, *Report on Andorra*, I GRETA(2014)16, para 109.

85 GRETA, *Report on Moldova*, II GRETA(2016)9, para 178; GRETA, *Report on Romania*, II GRETA(2016)20, para 191.

86 For instance GRETA, *Report on Armenia*, II GRETA(2017)1, para 170; GRETA, *Report on Ukraine*, I GRETA(2014)20, para 208.

87 For instance GRETA, *Report on Ukraine*, II GRETA(2018)20, para 214; GRETA, *Report on Georgia*, II GRETA(2016)8, para 186; GRETA, *Report on Latvia*, I GRETA(2012)15, para 186.

88 Van der Aa 'Post-trial victims' rights in the EU: do law enforcement motives still reign supreme?', 239.

89 Ibid., 248.

90 See for instance EU Victims' Rights Directive, Art 6(5) on the release or escape of the offender and Recital 37.

91 For instance GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 207; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 209; GRETA, *Report on Germany* I GRETA(2015)10, para 222; GRETA, *Report on Iceland*, I GRETA(2014)17, para 184; GRETA, *Report on Italy*, II GRETA(2018)28, para 266; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 163.

92 GRETA, *Report on Austria*, I GRETA(2011)10, para 125.

5. Measures to protect child victims and witnesses

28.51 In this context, GRETA regularly refers to the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.[93] This recommendation is sometimes followed by a reminder that 'the police officers, prosecutors, judges, social service staff and persons acting as legal guardians of children are made aware of the particular vulnerability of child victims of trafficking'.[94]

28.52 Recurrent criticism by GRETA concerns disparities in the application of the relevant protection measures depending on the age of the children involved. In quite a few countries the legislation foresees increased measures of protection reserved for children younger than for instance 14 or 16.[95] In this context, GRETA is unambiguous in calling for a consistent application of protection measures addressed to all children below 18 years of age.[96]

28.53 According to the reports, in many countries recordings of the interviews with children can be used during court proceedings instead of having the children to repeat their testimony once more in the court.[97] GRETA notes with satisfaction this practice and recommends to apply it systematically so as to avoid repeated questioning of children.[98]

6. Individual assessment

28.54 The text of Article 28 itself does not mention the need for an individual needs assessment as the basis for protective measures, but conducting a risk assessment is briefly addressed in the Explanatory Report.[99] As mentioned above, this is an important provision in Dir 2012/29/EU. Article 22 of Dir 2012/29/EU aims to identify vulnerable victims and victims with special protection needs based on an individual assessment and to determine whether a victim is particularly vulnerable to secondary and repeat victimisation, to intimidation and to retaliation during criminal proceedings. An evaluation of the Dir 2012/29/EU in 2016 showed that six EU Member States had adopted provisions for an individual needs assessment in their

93 Committee of Ministers, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) (thereinafter CoE Guidelines on child-friendly justice). See GRETA, *Report on Austria*, II GRETA(2015)19, para 190; GRETA, *Report on Belarus* I GRETA(2017)16, para 201; GRETA, *Report on Croatia*, II GRETA(2015)33, para 170; GRETA, *Report on Poland*, II GRETA(2017)29, para 194. See also Art 30 in this commentary, section 4.6.

94 See for instance GRETA, *Report on Latvia*, II GRETA(2017)2, para 187.

95 GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 184; GRETA, *Report on Estonia*, I GRETA(2018)6, para 209; GRETA, *Report on Hungary*, I GRETA(2015)11, para 207; GRETA, *Report on Moldova*, II GRETA(2016)9, para 181; GRETA, *Report on Norway*, II GRETA(2017)18, para 185; GRETA, *Report on Poland*, I GRETA(2013)6, para 226; GRETA, *Report on Slovak Republic*, I GRETA(2011)9, para 146; GRETA, *Report on Slovenia*, I GRETA(2013)20, para 175.

96 GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 187; GRETA, *Report on Poland*, I GRETA(2013)6, para 227; GRETA, *Report on Hungary*, I GRETA(2015)11, para 207; GRETA, *Report on Slovak Republic*, I GRETA(2011)9, para 146; GRETA, *Report on Slovenia*, II GRETA(2017)38, para 178.

97 For instance GRETA, *Report on France*, II GRETA(2017)17, para 278; GRETA, *Report on Latvia*, I GRETA(2012)15, para 189; GRETA, *Report on the Netherlands*, I GRETA(2014)10, para 236; GRETA, *Report on Slovak Republic*, II GRETA(2015)21, para 168; GRETA, *Report on Spain*, II GRETA(2018)7, para 262.

98 GRETA, *Report on Belarus*, I GRETA(2017)16, para 201; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 208.

99 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 286.

legislation. However, this does not necessarily guarantee that such an assessment is made in practice.[100] Questions relevant in relation to the needs assessment are: who conducts the assessment (law enforcement, NGOs), who must be considered as vulnerable victims entitled to specific needs, who monitors the needs before, during and after criminal proceedings? The study shows that practices vary between the EU MS.[101]

28.55 Furthermore, Recommendation (2005)9 provides for criteria to be taken into consideration when providing protective measures. In short, the information/testimony of the victim, witness or collaborator should be essential for the criminal case, the seriousness of the intimidation and the willingness and suitability of the person being subjected to protection measures. Furthermore, any protection measure will need to take into account the individual needs of the person to be protected.[102] Although it seems to be established as a general principle that protection of victims and witnesses and collaborators should be based on an individual needs assessment, such an assessment is not explicitly provided for in Article 28 and therefore not specifically evaluated by GRETA.

7. International co-operation

28.56 Recommendation R(2005)9 provides for some concrete measures of international co-operation in cases of cross-border protection of victims, witnesses and collaborators. States should consider to provide assistance in relocating abroad, to facilitate and improve the use of modern means of telecommunication, to co-operate and exchange best practices and to contribute to the protection measures within the context of co-operation with international criminal courts.[103]

E. CONCLUSION

28.57 Article 28 of the CoE Convention against Trafficking is an important provision for the protection of victims and witnesses in particular during and after criminal proceedings. The fact that the protection after criminal proceedings is explicitly included in this article is an advantage as such protection is often lacking.

28.58 It is, however, remarkable that the protection of collaborators is equally addressed in this article. Furthermore, Article 28(4) extends the scope of the article to also include NGOs, groups, foundations and associations that support victims during criminal proceedings. In the GRETA evaluations, these two categories, however, do not receive much attention which gives the impression they are of lesser importance.

28.59 The types of protection are very diverse and it is up to the State Parties what measures they take. This is to be advocated because in this way states can chose those measures that fit best

100 Biffi et al, 151–63.

101 Ibid.

102 Recommendation (2005)9, paras 12–15.

103 Ibid., para 32. See further Article 33 of the CoE Convention against Trafficking, which requires a State Party to warn another State Party when there is information that a victim or witness is in immediate danger in the territory of the other State Party. See on this also the Commentary on Article 33.

with their own criminal justice system. The consequence is that the protection differs considerably among State Parties. Furthermore, GRETA does not seem to recognise the added value of protection orders.

28.60 In conclusion, the primary focus in evaluating Article 28 is on legal provisions on the protective measures used during criminal proceedings. This however, does not say whether they are used in practice and whether or not protection is provided after criminal proceedings. And last, but not least, an individual needs assessment based on which protective measures are provided is lacking in Article 28 but seems an essential part of effective protection measures.

ARTICLE 29

SPECIALISED AUTHORITIES AND CO-ORDINATING BODIES

Katerina Simonova

1 Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against trafficking and the protection of victims. Such persons or entities shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. Such persons or the staffs of such entities shall have adequate training and financial resources for their tasks.

2 Each Party shall adopt such measures as may be necessary to ensure co-ordination of the policies and actions of their governments' departments and other public agencies against trafficking in human beings, where appropriate, through setting up co-ordinating bodies.

3 Each Party shall provide or strengthen training for relevant officials in the prevention of and fight against trafficking in human beings, including Human Rights training. The training may be agency-specific and shall, as appropriate, focus on: methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers.

4 Each Party shall consider appointing National Rapporteurs or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements.

A. INTRODUCTION

29.01 The specialisation of personnel and co-ordination of activities among particular state bodies and agencies has become indispensable for combating human trafficking.[1] It was therefore very clear to the drafters of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[2] that a specific provision on specialisation (Art 29(1)) and co-ordination (Art 29(2)) had to be included in the draft CoE Convention against Trafficking. However, neither specialisation nor co-ordination is truly effective if the relevant officials are not properly trained (Art 29(3)) and have their activities monitored (Art 29(4)).

B. DRAFTING HISTORY

1. Specialised authorities and co-ordinating bodies

29.02 During its 1st meeting, the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) held a discussion on the necessity of specialised authorities and their training, plus the issue of co-ordinating authorities at both, the national and international level.[3] This was reflected in the preliminary draft of Article 30, which later became Article 29. The article contained two paragraphs on specialisation and co-ordination,[4] which remained, to a large extent, unchanged throughout the entire drafting process.

29.03 Later, the CAHTEH agreed that Article 30(1) does not create an obligation to establish new entities, it only implies that State Parties should have specialised units responsible for applying the law and adequately trained personnel. Moreover, such specialisation should be linked not only to the fight against human trafficking, but also to the protection of victims.[5] Consequently, the duty to specialise also in victim's protection was added to the provision of Article 30(1).[6] With this emphasis added to Article 30 later during the drafting process, experts kept the nature of the Convention as a document strengthening protection of victims.[7] With regard to Article 30(2), the experts stressed that human trafficking is often committed internationally and by organised mobile networks who are able to quickly adapt to change. Therefore, action taken against such organisations has to be co-ordinated.[8]

1 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 67.
2 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).
3 CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, para 67.
4 CAHTEH, *Revised Preliminary Draft Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 13.
5 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 48.
6 CAHTEH, *Revised draft Europe Convention on Action against Trafficking in Human Beings: Following the 4th meeting of the CAHTEH (11–14 May 2004)*, CAHTEH(2004)12, 17 May 2004, 15–16.
7 CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, para 11.
8 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 50.

2. Training for relevant officials

29.04 During the 4th meeting, the CAHTEH decided to add a provision initially contained in Article 31(2) (later changed to Art 30), concerning training, as a new paragraph 3 of Article 30.[9] The CAHTEH members agreed that training should focus not only on the prevention of and fight against human trafficking but also on human rights and amended paragraph 3 accordingly.[10] Originally, the training should have been designed for law enforcement officials, immigration, social services and other officials working to prevent and combat trafficking in human beings. Some delegations proposed to explicitly include judicial authorities in this list.[11]

29.05 At the 6th CAHTEH meeting, the experts concluded that training should be for all officials participating in preventing and combating human trafficking. Hence the list of entities in Article 30(3) was replaced by simply referring to 'relevant officials'.[12] The United Nations Office on Drugs and Crime (UNODC) proposed that the CAHTEH also requests State Parties to include gender and child-sensitive issues in their training activities, an approach similar to the Palermo Protocol,[13] however this suggestion was not adopted.[14]

3. National rapporteurs and other mechanisms for monitoring

29.06 In the middle of the drafting process, the CAHTEH discussed the possibility to include a new paragraph establishing a National Rapporteur.[15] Experts decided to introduce two different options for this new paragraph, which was to become Article 30(4). The first proposal established that State Parties should consider appointing national rapporteurs or other mechanisms for monitoring the anti-trafficking activities of state institutions and the implementation of national legislation requirements. The second proposal envisaged that the national rapporteurs or other mechanisms would have a co-ordinating function.[16]

29.07 The Organisation for Security and Co-operation in Europe (OSCE) proposed a different wording that would include the appointment of both entities envisaged by the CAHTEH, 'National Co-ordinators or other mechanisms for co-ordinating, and National Rapporteurs or other mechanisms for monitoring'.[17] Several delegations, including Azerbaijan,[18] Hungary,[19]

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9 The text of the new Art 30 can be found in CAHTEH(2004)12, Appendix IV.

10 CAHTEH(2004)12, 17 May 2004, 15–16.

11 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 51.

12 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 85.

13 CAHTEH, *Council of Europe Draft Convention on action against trafficking in human beings: Comments by the delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers*, CAHTEH(2004)24, 19 November 2004, 30.

14 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, 56.

15 CAHTEH, *4th meeting Meeting Report*, CAHTEH(2004)RAP4, para 52.

16 Ibid., para 53.

17 CAHTEH, *Draft Convention of the Council of Europe on action against trafficking in human beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004, 44.

18 CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Contribution by the delegations of Azerbaijan, Germany, Hungary, Norway, Spain, Sweden, United Kingdom, and by the observer of European Women's Lobby*, CAHTEH(2004)17, 30 August 2004, 5.

Poland[20] and Norway[21] supported the latter option of establishing a co-ordinating mechanism. Also, a discussion on the binding nature of this provision took place. Non-Governmental Organisations (NGOs), also in support of the second option, proposed to strengthen this provision by replacing 'considers appointing' with 'shall appoint'.[22] Contrary to that, Spain and Germany supported the first option of monitoring function and proposed to make this provision non-mandatory. Germany advocated against diverting funds from their effective field activities by creating a new centralised office at the federal level.[23] Following these discussions, the CAHTEH adopted the first option – monitoring function – and added it to Article 30(4).[24]

C. ARTICLE IN CONTEXT

1. Relationship between Article 29 and Article 5(1) of the CoE Convention against Trafficking

29.08 Given its content, Article 29 is naturally linked to and, in some cases, even overlaps with several other provisions in the Convention, one being Article 5 (Prevention of trafficking in human beings) paragraph 1, which establishes that 'Each Party shall take measures to establish or strengthen national co-ordination between the various bodies responsible for preventing and combating trafficking in human beings.' The Convention's Explanatory Report further clarifies that the co-ordination requirement applies to 'all the sectors whose action is essential in preventing and combating trafficking'.[25] Further, it extends the co-ordination duty of Article 29(2) from 'governments' departments and other public agencies' to inter alia 'agencies with social, police, migration, customs, judicial or administrative responsibilities, non-governmental organisations, other organisations with relevant responsibilities and other elements of civil society'.[26] However, how such a co-ordination should be achieved is left to the discretion of State Parties.

2. Relationship between Article 29 and Article 36(1) of the CoE Convention against Trafficking

29.09 In a parallel to the non-mandatory domestic monitoring mechanism set forth by Article 29(4), Chapter VII (Monitoring mechanism) of the Convention establishes one of its kind monitoring mechanism for all State Parties which has a mandate to monitor the implementation of

19 Ibid., 8.

20 CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Contribution by the delegation of Poland*, CAHTEH(2004)17, Addendum VI, 2 September 2004, 3.

21 Ibid., 12.

22 CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Contribution by the Coalition Against Trafficking in Women (CATW) and the Gender Equality Grouping of the international NGOs enjoying participatory status with the Council of Europe*, CAHTEH(2004)17, Addendum IX, 24 September 2004, 6.

23 CAHTEH, CAHTEH(2004)17, 13.

24 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, para 86.

25 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 102.

26 Ibid.

the Convention as such (Art 36(1)). Although, it may seem like the mandates of these two mechanisms may overlap, the CoE monitoring mechanism focuses exclusively on the implementation of the Convention, while the national rapporteur or other monitoring mechanisms oversee the implementation of state's domestic law and its anti-trafficking activities. Moreover, their competencies differ significantly as well. While the competencies of the Group of Experts on Action against Trafficking in Human Beings (GRETA) and Committee of the Parties are strictly prescribed by the Convention, Article 29(4) leaves it entirely to the State Parties discretion.

3. Relations with provisions in other standards

29.10 The United Nations Transnational Organized Crime Convention (UNTOC)[27] in its Article 29 (Training and technical assistance) paragraph 1 requires State Parties to initiate 'specific training programmes for its law enforcement personnel'. According to sub-paragraph (i) of this provision, such training programmes shall focus inter alia on 'methods used in the protection of victims and witnesses'.

29.11 Regarding the Palermo Protocol,[28] its Article 10 (Information exchange and training) to a wide extent mirrors the wording of Article 29(3) of the Convention and provides that training should be focused on methods used in 'preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims' with explicit emphasis on 'protecting the victims from the traffickers'. However, in comparison with the Convention, it does not emphasise human rights training. On the other hand, in its second part, Article 10 of the Palermo Protocol includes reference to human rights and child and gender-sensitive issues, the exact reference that was omitted from Article 29(3) during the drafting process.[29]

29.12 Concerning co-ordination, Article 27(1)(d) of the UNTOC obliges State Parties to 'facilitate effective coordination between their competent authorities, agencies and services'. The UNODC's Model Law against Trafficking in Persons goes further and recommends establishing a national anti-trafficking coordinating body, similar to Article 29(2),[30] and a national rapporteur, similarly as Article 29(4).[31]

29.13 In its Preamble, the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[32] refers extensively to co-ordination at the EU level[33] or between international organisations.[34] Especially then Article 20 of the Dir 2011/36/EU requires that European Union Member States facilitate the tasks of an anti-trafficking coordinator.

27 UN Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003.

28 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000, entered into force 25 December 2003 (thereinafter Palermo Protocol).

29 CAHTEH(2004)24, 30.

30 UNODC, *Model Law against Trafficking in Persons* (UNDOC 2009) 67–9.

31 Ibid., 70.

32 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2004/36/EU).

33 Dir 2004/36/EU, Recital 5.

34 Ibid., Recital 9.

Furthermore, Article 19 sets forth an obligation to establish national rapporteurs or equivalent mechanisms with particular focus on data collection and on monitoring of anti-trafficking actions rather than monitoring of the implementation of the Directive itself.[35]

D. ISSUES OF INTERPRETATION

1. Specialisation

29.14 The emergence of specialised units and personnel at the domestic level is a 'relatively recent phenomenon'.[36] The focus of these units range from terrorism, crimes against children, or public health offences to organised crime.[37] The failure to implement anti-trafficking legislation effectively could be, in many cases, attributed to the lack of capacity rather than the absence of a political will.[38] It is the specialisation of law enforcement that significantly contributes to more efficient investigation and prosecution.[39] Therefore, also given the complexity and gravity of human trafficking, it is a logical step that the Convention obliges State Parties to 'promote specialisation of persons or units in anti-human-trafficking action and victim protection' (Art 29(1)). This duty does not only include the requirement to have a sufficient amount of anti-trafficking specialists, but also to provide them with appropriate resources.[40] This, however, does not imply that each entity, for example, each police station or prosecution service, has to have a person or even a unit specialising in human trafficking. It only means that 'where necessary (…) there must be units with responsibility for implementing the measures, and staff with adequate training'.[41]

29.15 Equally, Article 29(1) does not prescribe a specific form for implementing this obligation. In other words, State Parties may choose between various approaches, including having a number of specialised staff members, agencies, or units.[42] Such a specialised unit has to have 'the capability and the legal and material resources to at least receive and centralise all the information necessary for preventing trafficking and unmasking it'.[43] In this connection, GRETA has, on several occasions, recommended to provide adequate human and financial resources to the police and the prosecution.[44] In addition, these specialised persons or units

35 The first informal network at EU level of 'National Rapporteurs or equivalent mechanisms' was established in 2009. Council of the EU, Council Conclusions on establishing an informal EU Network of National Rapporteurs, 2946th Justice and Home Affairs Council meeting, 4 June 2009.

36 Olympia Bekou, 'Special Mechanism to Investigate and Prosecute International Sex Crimes: Pro and Contra Arguments', in Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 234.

37 Ibid.

38 Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 489.

39 Anne Gallagher and Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line' (2008) 18(3) *International Criminal Justice Review*, 323.

40 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 292.

41 Ibid.

42 Ibid., para 293.

43 Ibid.

44 For example, see GRETA, *Report on Germany*, II GRETA(2019)07, para 260.

shall have a certain level of independence. However, this independence should not be absolute and is limited to the degree that is essential to perform their functions successfully.[45]

29.16 Generally, specialisation may take place at several different levels.[46] The Convention does not explicitly specify the persons or entities that should be specialised. From the text of the Convention's Explanatory Report, it is clear that investigators, prosecutors, judges, and administrative officers should be specialised. GRETA recommends to further develop the knowledge and specialisation in human trafficking among investigators, prosecutors and judges.[47] This automatically translates into the obligation to train these persons (Art 29(1)) but also all other 'relevant officials' (Art 29(3)).[48]

2. Co-ordination and co-ordinating bodies

29.17 Human trafficking is a crime commonly committed by highly organised and transnational criminal networks. The fight against these networks and human trafficking, in general, requires involving a wide range of actors, which can cause incoherence of interventions, duplication of efforts or waste of scarce resources. Due to all these reasons, a co-ordinated multidisciplinary approach is crucial.[49] In this context, Article 29(2) obliges State Parties to 'co-ordinate policies and actions of public agencies responsible for combating trafficking in human beings'[50] and recommends 'where appropriate' to establish co-ordination bodies.

29.18 GRETA recommends that State Parties set up a separate post of National Co-ordinator.[51] Moreover, GRETA recommends that Parties not only have the national co-ordination framework supported by a separate or dedicated office, but it should have sufficient human resources and have 'the mandate and the authority to bring together the anti-trafficking work of relevant ministries and agencies, as well as by further involving NGOs, trade unions and other members of civil society in the development, implementation and evaluation of anti-trafficking policy'.[52] GRETA's reports do not further specify the entities and persons that should be included in the co-ordination framework.[53] However, GRETA in the past criticised the exclusion of prosecutors[54] or labour inspectors[55] and conversely welcomed the inclusion of

45 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 294.

46 Specialisation may occur already before the investigation phase, e.g., at the level of immigration authorities. See Bekou, 235.

47 See, e.g., GRETA, *Report on Luxembourg*, II GRETA(2018)18, para 179.

48 Also, the ECtHR in its case-law takes into account the fact that applicants (the potential victims of human trafficking) were interviewed by 'specially trained police officers'. *J. and Others v. Austria* App no 58216/12 (ECtHR, 17 January 2017) paras 99 and 110.

49 Katharine Bryant, Jacqueline Joudo Larsen and Elise Gordon, 'Combating human trafficking: Challenges to the criminal justice system and what practitioners need to know', in Rochelle L Dalla and Donna Sabella (eds), *Routledge International Handbook of Human Trafficking: A Multi-Disciplinary and Applied Approach* (Routledge 2019).

50 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 295.

51 GRETA, *Report on Belarus*, I GRETA(2017)16, para 58, GRETA, *Report on North Macedonia*, I GRETA(2014)12, para 73.

52 GRETA, *Report on Italy*, II GRETA(2018)28, para 33.

53 See example of relevant entities recommended by the Working Group on Trafficking in Persons. Conference of the Parties to the UNTOC, *Report on the meeting of the Working Group on Trafficking in Persons (14–15 April 2009)*, CTOC/COP/WG.4/2009/2, 21 April 2009, para 17.

54 GRETA, *Report on Austria*, II GRETA(2015)19, para 23.

55 GRETA, *Report on Croatia*, II GRETA(2015)33, para 24.

NGOs.[56] In this connection, GRETA stressed the importance of formalising the co-ordination structures and practices 'in order to clarify roles and increase transparency and legal certainty'.[57] Article 29(2) requires the adoption of a national action plan 'and/or strategy against THB, in which priorities, objectives, concrete activities and stakeholders responsible for their implementation are clearly defined and budgetary resources allocated'.[58]

29.19 With regards to victim assistance, an example of a best practice of such a co-ordination structure is the National Referral Mechanism (NRM). The NRM is a co-operative framework through which state authorities co-ordinate their efforts with civil society in order to fulfil their obligation to protect and promote the human rights of victims of human trafficking.[59]

3. National rapporteurs or other mechanism for monitoring

29.20 Article 29(4) obliges State Parties to consider appointing national rapporteurs or other mechanisms for monitoring the anti-trafficking activities of state institutions and the implementation of national legislation. The Convention's Explanatory Report recalls that the institution of a national rapporteur was originally established in the Netherlands where it was an independent institution having its own personnel.[60] Its main function is the monitoring of anti-trafficking activities and, similar to National Human Rights Institutions (NHRIs),[61] it has not only the competence to investigate, but it may also exercise its quasi-judicial function (issue legally non-binding recommendations) and compile an annual report submitted to the parliament.[62] Although the Explanatory Report and drafting history make this explicit reference to the example of the Netherlands' National Rapporteur,[63] the Convention leaves it to the discretion of State Parties to decide what kind of competence will be delegated to the National Rapporteur or other mechanisms.[64]

29.21 As noted in the drafting history, Article 29(4) aims to provide a monitoring body, and not a co-ordinating body as covered by Article 29(2). However, in several State Parties, the functions of national rapporteur are carried out by the National Co-ordinator or vice versa;[65] this approach experienced extensive critique. In this context, GRETA emphasised that the main

56 GRETA, *Report on Estonia*, I GRETA(2018)6, para 58. See on this also the Commentary on Art 35.
57 GRETA, *Report on Norway*, I GRETA(2013)5, para 55.
58 GRETA, *Report on Greece*, I GRETA(2017)27, para 71. See also for instance GRETA, *Report on Germany*, I GRETA(2015)10, para 70
59 Theda Kröger, Jasna Malkoc and Baerbel Heide Uhl, *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook* (OSCE/ODIHR 2004) 15. See on this also the Commentary on Art 35.
60 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 298.
61 In some states, the institution of the national rapporteur is integrated in NHRIs. UNGA, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/29/38/Add.2, 2 April 2015, para 23. For more on NHRIs see the chapter on 'National Human Rights Institutions', in Emilie M Hafner-Burton, *Making Human Rights a Reality* (Princeton University Press 2013) 164.
62 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 298.
63 For more see Alexis A Aronowitz and Suze E Hageman, 'National rapporteur on trafficking in human beings and sexual violence against children, the Netherlands,' in Winterdyk J, Jones J (eds) *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan 2019) 1–22.
64 For more see Mohamed Y Mattar, 'Comparative models of reporting mechanisms on the status of trafficking in human beings' (2008) 41(5) *Vanderbilt Journal of Transnational Law*, 1404–13.
65 See for instance GRETA, *Report on Estonia*, I GRETA(2018)6, para 21; GRETA, *Report on Malta*, II GRETA(2017)3, para 17.

feature of the institution of national rapporteur 'should be the ability to critically monitor the efforts and effectiveness of all state institutions, including national coordinators'.[66] A structural division between monitoring and executive functions is therefore crucial since it 'enables an objective evaluation of the implementation of anti-human trafficking legislation, policy and activities, identification of lacunae and shortcomings, and the formulation of comprehensive legal and policy recommendations'.[67] Following these arguments, GRETA recommended to several State Parties to 'establish an independent national rapporteur or the possibility of designating as a national rapporteur a separate organisational entity or another independent mechanism (…)'.[68]

66 GRETA, *Report on Poland*, II GRETA(2017)29, para 22; GRETA, *Report on Denmark*, II GRETA(2016)7, para 27.
67 Ibid.
68 See, for instance, GRETA, *Report on Slovenia*, II GRETA(2017)38, para 23.

ARTICLE 30

COURT PROCEEDINGS

Vahnessa Espig and Julia Planitzer

In accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 6, each Party shall adopt such legislative or other measures as may be necessary to ensure in the course of judicial proceedings:

a the protection of victims' private life and, where appropriate, identity;
b victims' safety and protection from intimidation,

in accordance with the conditions under its internal law and, in the case of child victims, by taking special care of children's needs and ensuring their right to special protection measures.

A. INTRODUCTION

Article 30 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] obliges State Parties to adapt, within their judicial procedure, measures to protect victims' privacy and ensure their safety.[2] The measures under Article 30 cover only measures of protection for victims' during court proceedings, whereas Article 28 deals with measures of extra-judicial protection. The provision of procedural measures is compulsory; **30.01**

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 300.

State Parties must guarantee victim safety and protection from intimidation. However, due to the fact that some methods of victim protection are compatible, whereas others are incompatible with different procedural systems in State Parties, the Convention's drafters decided to give State Parties the liberty to determine how to attain the objectives.[3]

30.02 Victims play a key role in the criminal prosecution of traffickers, and while it is important to have victims' information and testimony in order to secure convictions against traffickers, a victim can be at risk of retaliation and intimidation for providing evidence and participating in court proceedings.[4] Further, with any serious form of crime, such as trafficking in human beings, court proceedings, especially for child victims, can be a (re-)traumatising experience. Thus, the State Parties, in general, should provide 'ways to assist victims of trafficking to participate safely and meaningfully, in court processes'.[5] Therefore, the protection of victims must extend to the trial process itself.[6] When dealing with child victims, Parties must apply special measures.

30.03 Article 30 lays out that all measures must comply with Article 6 of the European Convention on Human Rights (ECHR).[7] This part of the provision's text draws attention to Article 30's main challenge – the tension between the fair trial guarantees for the defence and the measures of victim protection in the framework of trafficking in human beings.[8] Balancing victims' rights with defence rights in court proceedings is complex. Therefore, the Convention's Explanatory Report provides State Parties with various procedural measures as part of the criminal proceedings in the context of victim protection, which can be used, 'in accordance with the ECHR and the Court's case-law'.[9] From the Explanatory Report, five means are listed in order to achieve the obligations deriving from Article 30: (1) the possibility of non-public hearings; (2) anonymous testimony; (3) use of audiovisual technology; (4) recordings of testimony; and (5) special consideration for child victims of trafficking in human beings.

B. DRAFTING HISTORY

30.04 The text of Article 30 of the CoE Convention against Trafficking was much more extensive during the early stages of the Convention's drafting process compared to its final text. At the beginning of the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) discussions, various concerns were raised, particularly regarding questions on

3 Ibid., para 301 and 303.
4 Anne Gallagher and Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line' (2008) 18 *International Criminal Justice Review*, 333.
5 Ibid.
6 Ibid.
7 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 4 November 1950, entered into force 3 September 1953.
8 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 301.
9 Ibid., para 307.

anonymous testimony and the right to a fair trial.[10] Regarding special protection measures of child victims, UNICEF, unsuccessfully, proposed more specific measures.[11]

30.05 During the 4th CAHTEH meeting, Article 30 was examined, and the Committee noted the differences between the provision on court proceedings and Article 28 (Protection of victims, witnesses and collaborators with the judicial authorities) concerning extra-judicial protection. Compared to Article 28 of the CoE Convention against Trafficking, which was to be applied during and after investigation and prosecution, the application of Article 30 was limited to the period of court proceedings.[12] The CAHTEH decided to include 'in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 6' in the provision's text.

30.06 Regarding the procedural measures within Article 30, the Committee became divided. For instance, some delegations emphasised that their legal systems did not allow the use of anonymous testimony.[13] Whereas, some delegations' legal system could only allow the use of anonymous testimony 'if it was given directly before the court, so that pre-trial statements could not be considered admissible evidence'.[14] In the end, the Committee decided to replace Article 30's text, resulting in a much shorter provision.[15] Under the new Article 30, parties were obliged to take necessary measures to guarantee the security of victims and protection from intimidation, as well as to take special care for children's needs.[16]

30.07 Still, with the new text of Article 30, there were many suggestions for amendments.[17] For example, Germany proposed combining Articles 28 and 30 'to a single article to make clear, that victim protection measures have to be in place before, during and after the trial, in the courtroom and outside the courtroom'.[18] At the 6th CAHTEH meeting, there was a discussion on combining Articles 28 and 30; however, the Committee decided against it since the measures contained in Article 30 were different compared to those in Article 28.[19]

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10 See CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegations of Sweden and by the observer of the International Labour Office (ILO)*, CAHTEH(2003)8 rev.2 Addendum I, 28 November 2003, 6.

11 See CAHTEH, *Preliminary draft of European Convention on Action against Trafficking in Human Beings: Contributions by the delegations of Austria, the Netherlands and by the observer of UNICEF*, CAHTEH(2004)1, 15.

12 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 57.

13 Ibid., para 60.

14 Ibid.

15 See CAHTEH, *Revised draft Convention on Action against Trafficking in Human Beings: Following the 4th meeting of CAHTEH (11–14 May 2004)*, CAHTEH(2004)12, 17 May 2004, Art 32.

16 CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 62.

17 For example, see comments from OSCE and UNICEF in CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contributions by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, UNICEF*, CAHTEH(2004)13, 9 June 2004; see comments from Spain and Sweden in CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contributions by the delegations of Azerbaijan, Germany, Hungary, Norway, Spain, Sweden, United Kingdom and by the observer of European Women's Lobby*, CAHTEH(2004)17, 30 August 2004, 137–15.

18 CAHTEH, CAHTEH(2004)17, 30 August 2004, 6.

19 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 90.

C. ARTICLE IN CONTEXT

1. Article 30 of the CoE Convention against Trafficking in relation to Article 6 and Article 8 of the ECHR

30.08 Measures under Article 30 must be in accordance with Article 6 of the ECHR (right to a fair trial). The objective of Article 6 of the ECHR is to guarantee the right to a fair trial – a fundamental principle of a democratic society.[20] Protecting the identity of trafficked persons, while at the same time complying with Article 6, must be weighed. For instance, in the context of anonymous testimony, tensions between Article 6 and Article 8 of the ECHR (right to respect for private and family life) may arise between privacy rights of victims and witnesses and defence rights. Although Article 6 of the ECHR does not explicitly require that the interests of witnesses have to be taken into consideration, criminal proceedings should not unjustifiably impair interests of witnesses protected by Article 8 of the ECHR.[21] The principles of a fair trial also require 'that the interests of the defence are balanced against those of the witnesses or victims called upon to testify'.[22] Competing interests such as the need to protect witnesses at risk of reprisals 'must be weighed against the rights of the accused'.[23]

2. Relationship between Article 30 and Article 28 of the CoE Convention against Trafficking

30.09 As noted in the drafting history, the CAHTEH decided that the differences between Article 28 and 30 outweighed the similarities and that the provisions should be left as separate provisions.[24] Article 28 applies to extrajudicial protection, meaning State Parties have an obligation to protect victims, witnesses and collaborators with authorities before, during and beyond the courtroom. The text of Article 30 is much narrower, and its measures and protection only apply to court proceedings.

3. Relationship with provisions in other standards

30.10 A number of texts on witness protection standards have been drafted on the international and regional level. The United Nations Declaration of Basic Principles for Victims of Crime and Abuse of Power is an instrument that created a foundation for principles and treatment of crime victims in the criminal justice process.[25] Furthermore, international guidelines concerning child victims of crime have been created on this matter as for instance the United Nations Economic and Social Council (ECOSOC) Guidelines on justice for child victims and

20 See for instance, *Pretto and Others v. Italy* App no 7984/77 (ECtHR, 8 December 1983) para 21.

21 ECtHR, *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb)* (CoE/European Court of Human Rights 2020), para 490.

22 *Doorson v. the Netherlands* App no 20524/92 (ECtHR, 26 March 1996) para 70. See also *Van Mechelen and Others v. the Netherlands* App nos 21363/93, 21364/93, 21427/93 and 22056/93 (ECtHR, 23 April 1997) para 53.

23 *Fitt v. the United Kingdom* App no 28777/96 (ECtHR, 16 February 2000) para 45.

24 For further analysis of the relationship between Arts 28 and 30, see on this also the Commentary on Art 28.

25 UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/40/34, 29 November 1985. See further Irvin Waller, *Crime Victims: Doing Justice to Their Support and Protection*, The European Institute for Crime Prevention and Control (HEUNI 2003), 9 cited after European Parliament, *The Victims' Rights Directive 2012/29/EU – European Implementation Assessment* (European Parliamentary Research Service 2017), 36.

witnesses of crime, which state that children should be protected from cross-examination by the perpetrator.[26] The UNICEF's Guidelines on the Protection of Child Victims of Trafficking expresses that 'child-friendly practices' should be applied in criminal proceedings; for instance, interview rooms should accordingly be designed for children.[27]

30.11 On the European level, the CoE's Recommendation 85 (11) on the position of the victim in the framework of criminal law and procedure[28] also laid out principles such as protecting the privacy of the victim by considering holding trials *in camera*.[29] Furthermore, Recommendation No. R(97)13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence[30] established principles such as recording of statements at the pre-trial stage in order to avoid face-to-face confrontation. Recommendation (2005)9 of the Committee of Ministers to Member States on the protection of witnesses and collaborators of justice further developed these principles, with a focus on witnesses in terrorist cases and organised crime.[31]

30.12 The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice,[32] which were inspired by the principles of the UN Guidelines on Justice in matters involving Child Victims and Witnesses of Crime[33] and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse,[34] 'deal with the issue of the place and role, and the views, rights and needs of the child in judicial proceedings and in alternatives to such proceedings'.[35] These guidelines play a central role and, as shown below, GRETA regularly refers to the standards set in the guidelines in order to implement Article 30 in the context of trafficked children.

30.13 In the EU legal framework, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime[36] plays a central role and establishes key procedural provisions. In comparison to the replaced Framework Decision on the status of

26 ECOSOC Resolution 2005/20, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, Annex, 22 July 2005, para (31)(b).

27 UNICEF, *Guidelines on the Protection of Child Victims of Trafficking* (UNICEF 2006) 32.

28 Council of Europe, Recommendation 85 (11) on the position of the victim in the framework of criminal law and procedure, adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies.

29 European Parliament, *The Victims' Rights Directive 2012/29/EU – European Implementation Assessment* (European Parliamentary Research Service 2017), 36.

30 Committee of Ministers, Recommendation No. R(97)13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence, 10 September 1997 (thereinafter Recommendation (97)13).

31 Committee of Ministers, Recommendation Rec(2005)9 of the Committee of Ministers to Member States on the protection of witnesses and collaborators of justice, 20 April 2005.

32 Committee of Ministers, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) (thereinafter CoE Guidelines on child-friendly justice).

33 ECOSOC Resolution 2005/20, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, Annex, 22 July 2005.

34 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 25 October 2007, entered into force 1 July 2010.

35 CoE Guidelines on child-friendly justice, para I(1).

36 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315/57) (thereinafter EU Victims' Rights Directive).

victims of crime,[37] the EU Victims' Rights Directive expanded the rule on protection of victims during criminal investigations and further elaborated the right to privacy of victims.[38] In parallel, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims[39] provides for protection measures for victims of trafficking in human beings.[40] According to the EU Victims' Rights Directive, new court premises should have separate waiting areas for victims.[41] Member States have to conduct individual assessments of victims in order to identify specific protection needs.[42] The special measures for victims with specific protection needs as outlined in the EU Victims' Rights Directive are also listed in Dir 2011/36/EU for victims of trafficking in human beings. These special measures during court proceedings include, for instance, avoiding visual contact between victims and offenders, including while giving evidence by appropriate means.[43] Furthermore, unnecessary questioning concerning the victim's private life that is not related to the criminal offence have to be avoided.[44] Additionally, hearings should be possible without the presence of the public.[45] The EU Victims' Rights Directive obliges to make sure that victims may be heard in the courtroom without being present,[46] which Dir 2011/36/EU states only in the context of children.[47]

D. ISSUES OF INTERPRETATION

30.14 During criminal proceedings, victims of trafficking in human beings can be exposed to several risks, including the risk of secondary victimisation by re-traumatising the victim through examinations or the risk of retaliation and intimidation by the offender.[48] Therefore, various measures are discussed in Article 30 of the CoE Convention against Trafficking that State Parties should employ, 'in accordance with the conditions defined by its internal law' in order to achieve the Convention's objectives including guaranteeing victim safety and protection from intimidation.

37 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ L 82/1).

38 EU Victims' Rights Directive, Arts 20 and 21, see Steve Peers, *EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law* (Oxford University Press 2016) 158.

39 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (thereinafter Dir 2011/36/EU) (OJ L 101/1).

40 See in particular Art 12(4) of Dir 2011/36/EU on the protection of trafficked persons and measures to avoid secondary victimisation and Art 15 of Dir 2011/36/EU on the protection of child victims of trafficking in human beings.

41 EU Victims' Rights Directive, Art 19(2).

42 Ibid., Art 22.

43 EU Victims' Rights Directive, Art 23(3)(a) and Directive 2011/36/EU, Art 12(4)(b).

44 EU Victims' Rights Directive, Art 23(3)(c) and Directive 2011/36/EU, Art 12(4)(d).

45 EU Victims' Rights Directive, Art 23(3)(d) and Directive 2011/36/EU, Art 12(4)(c).

46 EU Victims' Rights Directive, Art 23(3)(b).

47 Directive 2011/36/EU, Art 15(5)(b).

48 Nusha Yonkova et al, *Protecting Victims: An Analysis of the Anti-trafficking Directive from the Perspective of a Victim of Gender-based Violence* (European Institute for Gender Equality 2017) 60; EU Agency for Fundamental Rights, *Victims' rights as standards of criminal justice – Justice for victims of violent crime (Part I)* (FRA 2019) 16.

1. Non-public hearings

30.15 The public character of court proceedings is a fundamental principle in Article 6(1) of the ECHR;[49] however, it is not an absolute principle. Article 6(1) of the ECHR states that 'the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the private life of the parties so require'. According to the CoE Guidelines on child-friendly justice, when children are being heard or giving evidence in proceedings, this should 'preferably take place in camera'.[50] In relation to organised crime, Recommendation No. R(97)13 asks states to consider excluding the media and/or the public from all or part of the trial.[51] The EU Victims' Rights Directive and Dir 2011/36/EU explicitly refer to the possibility to have hearings without the presence of the public.[52]

30.16 Many of the GRETA country reports confirm that State Parties allow for the possibility of hearings to be held *in camera*.[53] Generally, the measure is used to ensure the protection and safety of the victims and witnesses[54] or their anonymity.[55] However, it is also observed that there are gaps in applying these measures in practice.[56]

2. Avoiding cross-examination of victims of trafficking

30.17 Cross-examinations of victims of trafficking, especially of child victims, can be a (re)traumatising and difficult experience.[57] This concern needs to be balanced with Article 6(3)(d) of the ECHR, which guarantees the right 'to examine witnesses or to have them examined'. However, in the context of proceedings concerning sexual offences, 'this provision cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means'.[58] Since direct confrontation between the defendant and the victim can lead to the further traumatisation of the victim, 'personal cross-examination by defendants should be subject to most careful assessment by the national courts, the more so the more intimate the questions are'.[59] Factors such as the victim's age or the intimate nature of the subject matter require a correspondingly sensitive approach of the authorities to conduct the criminal proceedings. Therefore, as shown by the ECtHR in *Y. v. Slovenia*, several factors, including having four hearings over four months including being

49 *Axen v. Germany* App no 8273/78 (ECtHR, 8 December 1983).
50 CoE Guidelines on child-friendly justice, Guideline 9.
51 Recommendation (97)13, para 9.
52 EU Victims' Rights Directive, Art 23(3)(d) and Directive 2011/36/EU, Art 12(4)(c).
53 See, for instance, GRETA, *Report on Albania*, II GRETA(2016)6, para 173; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 205; GRETA, Report on Ukraine, II GRETA(2018)20, para 214; GRETA, *Report on Austria*, II GRETA(2015)19, para 187.
54 See, for instance, GRETA, *Report on Denmark*, II GRETA(2016)7, para 179; GRETA, *Report on Ireland*, II GRETA(2017)28, para 230.
55 See, for instance, GRETA, *Report on Austria*, II GRETA(2015)19, para 187.
56 GRETA, *Report on Denmark*, II GRETA(2016)7, para 179, GRETA, *Report on Bosnia and Herzegovina*, I GRETA(2013)7, para 163.
57 Tony Ward and Shahrzad Fouladvand, 'Human Trafficking, Victims' Rights and Fair Trials' (2018) 82 *The Journal of Criminal Law*.
58 *S.N. v. Sweden* App no 34209/96 (ECtHR, 2 July 2002) para 52.
59 *Y. v. Slovenia* App no 41107/10 (ECtHR, 28 May 2015) para 106.

directly confronted with the defendant 'substantially exceeded the level of discomfort inherent in giving evidence as a victim of alleged sexual assaults' and 'cannot be justified by the requirements of a fair trial'.[60]

30.18 GRETA refers in this context to Recommendation No. R(97)13, which in general states that witnesses should be provided with alternative methods of giving evidence which protect them from intimidation resulting from face to face confrontation with the accused.[61] It recommends avoiding face-to-face confrontation and in case of cross-examination, 'the judge should consider taking appropriate measures to control the manner of questioning'.[62] In relation to children, the CoE Guidelines on child-friendly justice advise avoiding any contact between a child victim or witness and the alleged perpetrator. Furthermore, children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator.[63]

30.19 GRETA has expressed its serious concern regarding the practice of cross-examination of victims of trafficking.[64] GRETA advises State Parties to use technologies or 'other suitable means to avoid face-to-face cross-examination ('direct confrontation') of victims and alleged perpetrators'.[65] In the context of Belgium, GRETA urged 'to discontinue the practice of face-to-face examination of victims and suspected traffickers in court and to adopt alternative procedures which avoid direct contact'.[66] Hence, GRETA interprets measures to be taken under Article 30 as encompassing measures that avoid any face-to-face examination. Generally, direct contact between the victim and the accused should be avoided by for instance providing separate facilities and waiting areas for victims and witnesses and the accused.[67]

3. Audiovisual technologies

30.20 The ECtHR requires to allow for the questioning of victims in order to safeguard the rights of the defence sufficiently.[68] Audio and video technology can contribute to a less traumatic experience for victims of trafficking within court proceedings. Victims, for instance, can give evidence by video-link and sit in a different room, not the courtroom. According to GRETA country reports, many State Parties allow for the possibility of audiovisual means to be used for the questioning of the victim and witness during the court proceedings.[69] For example, in the

60 Ibid., para 114.
61 Recommendation (97)13, para 6.
62 Ibid., paras 27–29.
63 CoE Guidelines on child-friendly justice, Guidelines 68 and 69.
64 See, e.g., GRETA, *Report on Slovak Republic*, II GRETA(2015)21, para 167.
65 GRETA, *Report on Serbia*, II GRETA(2017)37, para 199.
66 GRETA, *Report on Belgium*, II GRETA(2017)26, para 200 thereby referring to the Committee of Ministers, Recommendation CM/Rec (97)13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence, 10 September 1997.
67 GRETA, *Report on Serbia*, II GRETA(2017)37, paras 195 and 199. See also GRETA, *Report on Andorra*, I GRETA(2014)16, paras 110 and 112.
68 *D. v. Finland* App no 30542/04 (ECtHR, 7 July 2009) para 50, *A.L. v. Finland* App no 23220/04 (ECtHR, 27 January 2009) para 41.
69 See, for instance, GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 203; GRETA, *Report on Estonia*, I GRETA(2018)6, para 207.

Netherlands, victims of trafficking in human beings are 'as a rule not heard in open court hearings, but instead video links are used'.[70]

4. Protection of identity and anonymous testimony

30.21 Protecting the identity of victims of trafficking in human beings during legal proceedings needs to be reconciled with the rights of the defence. Preserving the victims or witness's identity may be conflicting with Article 6 of the ECHR.[71] At the investigation stage, anonymous informants may be permissible to a certain extent. In *Kostovski v. the Netherlands*, the ECtHR noted that 'the right to a fair administration of justice holds so prominent a place in a democratic society […] that it cannot be sacrificed to expediency'.[72] Thereby, witness anonymity is permissible at the investigation stage 'for reasons of expediency in so far as the information obtained in this way is to be used not as evidence but to enable evidence to be found'.[73]

30.22 Regarding the use of statements made by anonymous witnesses for convictions, the ECtHR stated that 'such use is not under all circumstances incompatible with the Convention'.[74] However, in order to balance interests of witnesses with those of the defence, granting anonymity to a witness whose statements are used in the trial, must be sufficiently counterbalanced with appropriate procedures followed by the judicial authorities.[75]

30.23 Several GRETA country reports highlight the possibility of avoiding disclosure of the identity of the victim and collecting testimony by technical means.[76] Furthermore, examples of means are listed in various GRETA reports such as blocking the victim from the accused, for instance, through the installation of a mobile partition, a protective wall or a one-sided

70 GRETA, *Report on the Netherlands*, II GRETA(2018)19, para 233.

71 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 318. See also Gert Vermeulen, *EU Standards in Witness Protection and Collaboration with Justice* (Maklu Publishers 2005), 37. See Art 6(3)(d) ECHR: 'Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

72 *Kostovski v. the Netherlands* App no 11454/85 (ECtHR, 20 November 1989) para 44.

73 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 319.

74 *Doorson v. the Netherlands* App no 20524/92 (ECtHR, 26 March 1996) para 69.

75 See Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 *Human Rights Quarterly* 294, 317. See further for instance *Al-Khawaja and Tahery v. the United Kingdom* App nos 26766/05 and 22228/06 (ECtHR, 15 December 2011) paras 127 and 139. The approach in the situation of absent witnesses is also applied in the context of anonymous witnesses, see *Ellis, Simms and Martin v. the United Kingdom*, App nos 46099/06 and 46699/06 (ECtHR, 10 April 2012) para 75. For a list of possible counterbalancing factors that may be considered as permitting a fair trial and appropriate assessment of the reliability of the evidence and thereby ensuring the overall fairness of the proceedings when the witness is absent see *Schatschaschwili v. Germany* App no 9154/10 (ECtHR, 15 December 2015) paras 125–131.

76 GRETA, *Report on Slovenia*, II GRETA(2017)38, para 176. See also, GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 205; GRETA, *Report on Ireland*, II GRETA(2017)28, para 230; GRETA, *Report on Poland*, II GRETA(2017)29, para 190.

mirror.[77] GRETA notes that several State Parties' legislation foresees the possibility of removing the accused from the room during the testimony of the victim or witness.[78]

5. Recordings of testimony

30.24 The use of recordings of testimony is also highlighted in the CoE's Explanatory Report as one of the procedural measures to be considered in the context of Article 30.[79] In general, viewing of video recordings of the witness needs to be balanced with the rights of the defence. In the context of a case of sexual abuse of a child, the ECtHR stated that showing the videotape of the first police interview and reading out the record of the second interview was considered as not infringing the rights of the defence.[80] In *Khawaja and Tahery v. United Kingdom*, the ECtHR held that:

> [w]hen a witness's fear is attributable to the defendant or those acting on his behalf, it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives – even if such evidence was the sole or decisive evidence against the defendant.[81]

30.25 According to GRETA reports, some State Parties accept written testimonies or demonstrating recorded testimonies instead of testifying in the court proceedings.[82]

6. Special care of the needs of child victims

30.26 The Convention accentuates that Parties must take special care of children's needs and ensure special protection.[83] As stated in the CoE Guidelines on child-friendly justice, a child-friendly justice system 'does not inflict additional pain and hardship and it does not violate children's rights'.[84] Several State Parties point out that recorded testimonies of children are possible in order to avoid children having to attend the court proceedings in person.[85] However, safeguards for trafficked children such as recording their testimony need to protect all trafficked children, regardless of the resulting type of exploitation.[86] Furthermore, even when there is a legal provision providing for special protection of children, including using recorded

77 For instance, see GRETA, *Report on Cyprus*, II GRETA(2015)20, para 153; GRETA, *Report on Montenegro*, II GRETA(2016)19, para 161.

78 GRETA, *Report on Sweden*, II GRETA(2018)8, para 201 stating that the defendant is placed in a room nearby, where he or she can listen to the hearing or view it on screen. See also GRETA, *Report on Denmark*, II GRETA(2016)7, para 179; GRETA, *Report on Norway*, II GRETA(2017)18, para 183.

79 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, paras 312–317.

80 *S.N. v. Sweden*, para 52.

81 *Khawaja and Tahery v. the United Kingdom*, para 123.

82 See, e.g., GRETA, *Report on Sweden*, I GRETA(2014)11, para 211; GRETA, *Report on Bosnia Herzegovina*, GRETA(2013)7, para 161; GRETA, Report on the Netherlands, I GRETA(2014)10, para 235.

83 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 303.

84 CoE Guidelines on child-friendly justice, 8.

85 See for instance GRETA, *Report on Denmark*, II GRETA(2016)7, para 179; *Report on Norway*, II GRETA(2017)18, para 185; GRETA, *Report on Belgium*, II GRETA(2017)26, para 201.

86 See, for instance, GRETA, *Report on France*, I GRETA(2012)16, para 234 and GRETA, *Report on France*, II GRETA(2017)17, paras 282–284.

interviews, gaps in the application in practice are shown.[87] Specially designed child-friendly interview rooms should be used, which is pointed out by several State Parties.[88] These facilities and recorded testimonies should be used systematically in order to avoid repeated questioning of children.[89] The number of times of questioning of child victims should be kept to a minimum,[90] as foreseen in the CoE Guidelines on child-friendly justice.[91]

87 See, for instance, GRETA, *Report on Slovakia*, II GRETA(2015)21, para 168.

88 See, for instance, GRETA, *Report on Bulgaria*, II GRETA(2015)32, paras 208 and 209; GRETA, *Report on Belarus*, I GRETA(2017)16, para 199.

89 GRETA, *Report on Bulgaria*, II GRETA(2015)32, paras 208; GRETA, *Report on Belarus*, I GRETA(2017)16, para 201.

90 See, for instance, GRETA, *Report on Poland*, II GRETA(2017)29, paras 192 and 194.

91 CoE Guidelines on child-friendly justice, Guideline 67.

ARTICLE 31

JURISDICTION

Katerina Simonova

1 Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

a in its territory; or

b on board a ship flying the flag of that Party; or

c on board an aircraft registered under the laws of that Party; or

d by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State; or

e against one of its nationals.

2 Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1 (d) and (e) of this article or any part thereof.

3 Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in this Convention, in cases where an alleged offender is present in its territory and it does not extradite him/her to another Party, solely on the basis of his/her nationality, after a request for extradition.

4 When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

5 Without prejudice to the general norms of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with internal law.

A. INTRODUCTION

31.01 In line with other international treaties focused on transnational organised crime, Article 31 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] contains a specific provision on jurisdiction, which lists several types of jurisdictional grounds. In general, the State Parties to the Convention are obliged to establish jurisdiction when the offence of trafficking in human beings was committed in their territory, territorial jurisdiction (Art 31(1)(a)), or on board vessels flying the flag of the State Party or aircrafts registered under its laws, quasi-territorial jurisdiction (Art 31(1)(b)). The State Parties are also obliged to establish jurisdiction in cases where they cannot extradite an alleged offender who is present in its territory on the grounds of nationality. In such a scenario, the principle of *aut dedere aut judicare* (extradite or prosecute) would apply (Art 31(3)).

31.02 According to Article 31(1)(d), the State Parties shall establish a jurisdiction when the offence was committed by their nationals or by stateless persons with a habitual residence in its territory (active personality principle). Similarly, the State Parties shall also establish jurisdiction over offences committed against their nationals (passive personality principle). However, the two latter mentioned types of extraterritorial jurisdiction are not mandatory. This is because, during the drafting process, paragraph 2 was added to Article 31, allowing the State Parties to the CoE Convention against Trafficking reserve itself from this obligation.

31.03 In addition, under Article 31(5), states are also encouraged to establish any other types of criminal jurisdiction in accordance with their domestic law. This provision opens up additional channels for the more effective prosecution of traffickers, including universal jurisdiction or jurisdiction based on the protective principle.

B. DRAFTING HISTORY

1. Extra-territorial jurisdiction

31.04 In Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, the CoE Committee of Ministers recommended Member States to include new legal norms into their domestic legal regimes, which would govern extra-territorial jurisdiction. Such a reform would allow 'the prosecution and conviction of persons who have committed offences connected with trafficking, regardless of the country the offences were committed in'.[2] The CoE Committee of Ministers further highlighted that extra-territorial jurisdiction is an essential legal instrument, especially important in combating cross-border crimes, including trafficking for the purpose of sexual exploitation.[3] Similarly, the Parliamentary Assembly, in its Recommendation 1545 (2002) on a campaign against trafficking in women, emphasised that the use of extra-territorial jurisdiction for trafficking in human

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 Committee of Ministers, Recommendation No. R(2000)11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation, 19 May 2000, para 48.

3 Ibid., para 48.

beings is one of the main requirements to prevent further increase in trafficking in women in Europe.[4] Hence, Recommendation 1545 (2002) suggested establishing new rules governing extra-territorial jurisdiction, which would enable CoE Member States to punish traffickers more effectively.[5]

31.05 Already during the 1st Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting, several experts recommended that the draft Convention needed to include a provision on court jurisdiction, primarily to 'enable an extra-territorial court to try trafficking cases'.[6] This proposal was partially implemented in the preliminary draft of the Convention, introducing a mandatory extra-territorial jurisdiction based on the nationality principle. By the third draft of the Convention, Article 31, which at the time was Article 33, stated that the State Party is obliged to establish jurisdiction when the offence is committed:

> by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.[7]

31.06 In the 4th meeting, the CAHTEH examined Article 33 (later changed to Art 31). Many State Parties, especially within the Common Law System, did not recognise in their legal systems the newly added jurisdiction based on the nationality principle specified in paragraph (1)(d). Due to these concerns and inspired by Article 22(2) of the Convention on Cybercrime,[8] the CAHTEH decided to add a new paragraph 2 to Article 33 of the draft Convention.[9] This paragraph allowed the State Parties to 'reserve the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in Paragraph 1 (d)'.[10]

31.07 During the 6th CAHTEH meeting, the Committee re-examined Article 33. Several delegations proposed to include another type of extra-territorial jurisdiction based on the nationality of the victim (passive personality principle). The CAHTEH decided to amend Article 33 accordingly and inserted a new sub-paragraph (e) to Article 33(1). This amendment reflects the wording of Article 15(2) of the United Nations Convention against Transnational Organised Crime (UNTOC),[11] which includes the same principle. However, in order to keep Article 33 in line with Article 15(2) UNTOC, the Committee decided to include this principle in the non-mandatory grounds for jurisdiction in Article 33(2).[12]

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4 Parliamentary Assembly, Recommendation 1545 (2002) Campaign against trafficking in women, 21 January 2002, 1 (thereinafter Recommendation 1545 (2002)).

5 Ibid., para 10.

6 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, para 68.

7 CAHTEH, *Revised draft Europe Convention on action against trafficking in human beings: Following the 3rd meeting of the CAHTEH (3–5 February 2004)*, CAHTEH(2004)8, 12 February 2004, Art 33(1)(d).

8 Council of Europe Convention on Cybercrime, CETS No.185, 23 November 2001 (thereinafter Budapest Convention).

9 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 66.

10 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Following the 4th meeting of the CAHTEH (11–14 May 2004)*, CAHTEH(2004)INFO1, 9 June 2004, 15.

11 United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003.

12 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 94.

31.08 During the final meeting, the CAHTEH examined the last effort of the Parliamentary Assembly to withdraw the possibility of entering a reservation as laid down in Article 31(2) and therefore, to make all types of jurisdictions listed in subparagraphs (a), (b), (c), (d), and (e) obligatory. The European Union (EU) Member States rejected this proposal and thus, the CAHTEH adopted a decision not to amend Article 31.[13] Following the adoption of the Convention, several states, especially the EU Member States, submitted their reservations from Article 31(1)(d) and/or (e).[14] This approach, adopted by a significant number of State Parties, creates a need for strict enforcement of mandatory jurisdictions enshrined in Article 31(1)(a), (b), (c) and Article 31(3). Otherwise, such a list of reservations from extra-territorial jurisdiction can limit the potential of the CoE Convention against Trafficking to improve prosecution of offenders and might allow them to escape to safe havens of impunity.

2. Effective control concept

31.09 Amnesty International and Anti-Slavery International proposed that the Convention includes the possibility to establish jurisdiction over persons and territory within the effective control of the State Party. The main argument for this proposal was based on past experience when human trafficking has flourished in the context of internal or international armed conflict and post-conflict situations. Such a scenario reiterates the fact that it is a responsibility of a state to respect, protect, and fulfil human rights of people present not only on its own territory but also to ensure respect for human rights of individuals on territories within the effective control of the state.[15]

31.10 During the 6th meeting, the CAHTEH revisited draft Article 33. Several delegations expressed their support to include a reference to 'persons and territories otherwise within the Party's power or effective control' (referring in particular to international peacekeeping operations). However, the majority of delegations opposed this more extensive amendment to the list of jurisdictional grounds.[16] Following this meeting and in light of the comments previously submitted by Amnesty International and Anti-Slavery International, also the Committee on Equal Opportunities between Women and Men suggested to add a new subparagraph 1(f), which stated: 'by anyone placed under its authority or effective control, situated within a territory over which it exercises authority or effective control'.[17]

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13 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, para 84.

14 Reservations were submitted by the Czech Republic, Denmark, Estonia, Finland, France, Germany, Latvia, Malta, Monaco, North Macedonia, Poland, Portugal, Slovenia, Sweden, Switzerland, and United Kingdom. See Council of Europe, Reservations and Declarations for Treaty No. 197 – Council of Europe Convention on Action against Trafficking in Human Beings, status as of 9 September 2019, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/declarations?p_auth=88CXo7zH.

15 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Contribution by non-governmental organizations: Additional Comments by Amnesty International and Anti-Slavery International*, CAHTEH(2004)17, Addendum IV, 30 August 2004, 13.

16 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, para 93.

17 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 10.

31.11 Subsequently, the Parliamentary Assembly urged the Committee of Ministers to incorporate the concept of authority and effective control to Article 31.[18] During the final CAHTEH meeting, due to a dispute between delegations over the Parliamentary Assembly proposal,[19] the Committee held a vote.[20] The majority of delegations were against the amendment, and thus, the Committee of Ministers decided not to amend Article 31.[21]

C. ARTICLE IN CONTEXT

1. Article 31 of the CoE Convention against Trafficking and Article 15 UNTOC

31.12 Although the wording and structure of Article 31 was inspired by Article 22(2) of the Budapest Convention, it is clear that the drafters took Article 15 UNTOC into consideration during the drafting process.[22] Article 15 UNTOC requires that the State Parties establish a mandatory jurisdiction based on the territorial and quasi-territorial principle (Art 15(1)). The State Parties are also obliged to establish jurisdiction over an offender who committed an offence outside of state's territory but according to its domestic law, it cannot extradite its nationals (Art 15(3)).[23] Similarly to Article 31(1)(d) and (e) of the CoE Convention against Trafficking, it only encourages ('may also establish') the State Parties to establish non-mandatory jurisdiction in instances where the offence was committed against its nationals or by a national or a stateless person with a habitual residence in its territory (Art 15(2)). Finally, Article 31(5) mirrors the wording of Article 15(6) UNTOC. This clause ensures that the list of the jurisdictional grounds is not exhaustive and opens other possibilities for the State Parties to establish jurisdiction 'without prejudice to norms of general international law'[24] and 'in accordance with its domestic law'.

31.13 The *travaux préparatoires* of the UNTOC indicate that initial drafts of this provision contained additional jurisdictional ground (originally set forth in Art 9(2)(c)). The draft of this provision reads as follows: '2. A State Party may also establish its jurisdiction over any such offence when: (…) [(c) The offence has substantial effects in that State]'.[25] Later, this sub-paragraph was deleted from the draft article.

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18 Parliamentary Assembly, Recommendation 1695 (2005) Draft Council of Europe Convention on action against trafficking in human beings, 18 March 2005, para 8.

19 Ibid.

20 Four delegations were in favour of the Parliamentary Assembly proposal to amend Art 31 and add a new sub-paragraph (f). But the majority of delegations (22 delegations) opposed the proposal, and eight delegations abstained. See CAHTEH, *8th meeting – Meeting Report*, CAHTEH(2005)RAP8, para 83.

21 CAHTEH, *8th meeting – Meeting Report*, ibid.

22 See, e.g., CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 69.

23 UNODC, *Legislative Guides for the Implementation of the United National Convention against Transnational Organized Crime thereto* (United Nations 2004), 78, para 256.

24 During the drafting process of Art 31, the CAHTEH added the term 'without prejudice to the general norms of international law' to para 5 in order to bring it closer to the wording of Art 15(5) UNTOC. CAHTEH, *4th meeting – Meeting Report*, CAHTEH(2004)RAP4, para 69.

25 UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN 2006) 130.

2. Relations with provisions in other standards

31.14 Apart from the CoE Convention against Trafficking, other instruments on combating trafficking in human beings also impose obligations on the State Parties to establish criminal jurisdiction over trafficking offences.

31.15 The preceding instrument, the UNTOC and its Article 15, sets forth the same mandatory and non-mandatory grounds as the CoE Convention against Trafficking. At the regional level, Article 10 of the Association of Southeast Asian Nations (ASEAN) Convention against Trafficking in Persons, Especially Women and Children[26] adopted the exact wording of Article 15 UNTOC.

31.16 At the EU level, Article 10(1) of the European Union (EU) Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[27] establishes mandatory jurisdiction not only for offences committed within a state's territory (Art 10(1)(a)) but also in cases where the offender is its national (Art 10(1)(b)). Moreover, Article 10(2) of Dir 2011/36/EU lists other possibilities to establish extra-territorial jurisdiction in cases where '(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory; (b) the offence is committed for the benefit of a legal person established in its territory; or (c) the offender is an habitual resident in its territory'. This, although only optional, provision explicitly encompasses much broader grounds for jurisdiction than the CoE Convention against Trafficking or the UNTOC.

31.17 Another significant difference is that Dir 2011/36/EU explicitly obliges, in cases referred to in Article 10(1)(b), and allows, in cases referred to in Article 10(2), Member States to ensure that their jurisdiction is not limited by a dual criminality standard (Art 10(3)(a)) or by a requirement of a victim's report submitted in the state where the offence was committed or a denunciation from such a state (Art 10(3)(b)). This additional clause encourages a less restrictive approach than Article 31 of the CoE Convention against Trafficking, which expressly limits the extra-territorial jurisdiction based on the nationality principle by a dual criminality standard.

31.18 The comparative analysis of the above instruments reveals that although the CoE Convention against Trafficking in relation to several different aspects strengthens the current legal regime on trafficking in human beings, as regards the obligations to establish jurisdiction over trafficking offences, it remains rather conservative.

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26 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017 (thereinafter ASEAN Convention against Trafficking in Persons).

27 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1) (thereinafter Dir 2011/36/EU).

D. ISSUES OF INTERPRETATION

1. Nationality principle

31.19 Apart from the mandatory jurisdictions, the Convention sets forth also additional non-mandatory basis for jurisdiction, nationality and passive personality principle. As laid down in Article 31(1)(d), the nationality principle (active personality principle) allows the State Parties to establish jurisdiction when the offence was committed by its nationals outside its territory or outside any territorial jurisdiction.

31.20 The nationality principle is not unique to the CoE Convention against Trafficking as several other conventions contain this principle as well.[28] The principle is also a common rule in many civil law states.[29] The main rationale behind this principle is that nationals are responsible for their behaviour to the state regardless of the territory because they owe allegiance to the state. The 'allegiance' theory is justified by two state's concerns: (1) protection of the state's reputation; and (2) interest of the entire international community to prosecute serious crimes.[30] Another relevant factor is a reluctance of civil law countries to extradite their own nationals.[31] However, non-civil law countries also started applying the nationality principle to fight against the most 'egregious' transnational crimes, such as sex tourism[32] or a range of extra-territorial transnational crimes.[33]

31.21 As the Convention's Explanatory Report points out, state's nationals are obliged to comply with its law even when they are outside state's territory and the 'State party is obliged to be able to prosecute' its own national who committed an offence outside its territory.[34] Such a prosecution is limited by the dual criminality standard. This standard, which may constitute a significant barrier in prosecution, represents another strong reason for states to criminalise trafficking in human beings.[35] The monitoring reports of the Group of Experts on Action against Trafficking in Human Beings (GRETA) show that several State Parties did not implement the dual criminality standard into their Criminal Codes.[36]

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28 See, e.g., Art 15(2)(b) of the United Nations Transnational Organized Crime Convention, 2225 UNTS 209, 8 January 2001, entered into force 29 September 2003 or Art 42(2)(b) of the United Nations Convention against Corruption, 2349 UNTS 41, 31 October 2003, entered into force 14 December 2005.

29 Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press 2018) 258.

30 Geoffrey R Watson, 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction' (1992) 17 *Yale Journal of International Law*, 68.

31 Boister, 258.

32 Melissa Curley and Elizabeth Stanley, 'Extraterritorial Jurisdiction, Criminal Law and Transnational Crime: Insights from the Application of Australia's Child Sex Tourism Offences' (2016) 28 *Bond Law Review*, 171–2.

33 Boister, 258.

34 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 330.

35 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations 2010) 205.

36 See for instance GRETA, *Report on Austria*, II GRETA(2015)19, para 191; GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 210; GRETA, *Report on Finland*, II GRETA(2019)06, 5 June 2019, paras 222–223; GRETA, *Report on France*, II GRETA(2017)17, 6 July 2017, para 285; GRETA, *Report on Iceland*, II GRETA(2019)02, 15 March 2019, para 178; GRETA, *Report on Sweden*, II GRETA(2018)08, 8 June 2018, para 206.

Apart from nationals, Article 31(1)(d) also applies to stateless persons with habitual residence in the state's territory.[37] This more expansive approach to the nationality principle is in line with Article 15(2)(b) UNTOC. However, there are also examples of even broader concepts of the nationality principle that include all habitual residents.[38] Some State Parties, for instance, Poland, also limit the use of the nationality principle by additional conditions such as the presence of the alleged offender on its territory or a certain level of gravity.[39] **31.22**

2. Passive personality principle

The second type of extraterritorial jurisdiction is in Article 31(1)(e) of the CoE Convention against Trafficking and is based on the passive personality principle. According to this principle, the State Party 'has to have the possibility' to establish jurisdiction in cases when one of their nationals is the victim of an offence that was committed abroad.[40] This principle comes from the interest of a state in the well-being of its nationals.[41] Such a jurisdiction applies irrespective of the place where such a crime was committed or the existence of other victims with different nationalities. Further, the existence of an intent of the offender to target a specific nationality is irrelevant.[42] **31.23**

Unlike Article 31(1)(d), the narrow wording of the sub-paragraph (e) does not provide similar protection to stateless victims with habitual residence in the respective territory. Although the use of the passive personality principle raises issues of legality, particularly if the conduct is an offence in the victim's state but not in the state where it occurs, sub-paragraph (e) does not include the dual criminality limitation. **31.24**

Similarly, as in the case of the nationality principle, some states limit the use of passive personality principle to offences that reach a certain level of gravity or based on a condition that an alleged offender is present in the state's territory.[43] For example, Finland allows application of the passive personality principle 'only if the offence is punishable under Finnish criminal law by imprisonment for more than six months and if the offence is also punishable under criminal law where it was committed and it could have been punished also by a court of law in the foreign State'.[44] On the other hand, France requires that 'the offences are the subject either of **31.25**

37 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 329.

38 See, e.g., Dir 2011/36/EU, Art 10 (2)(c) or Art 4(2)(b) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1582 UNTS 95, 19 December 1988, entered into force 11 November 1990 (1988 Drug Trafficking Convention).

39 Reservations submitted by Poland on 17 November 2008. Council of Europe, Reservations and Declarations for Treaty No.197 – Council of Europe Convention on Action against Trafficking in Human Beings, status as of 9 September 2019, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/declarations?p_auth=88CXo7zH.

40 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 330.

41 Boister, 260.

42 Ibid.

43 Ibid., 261. See also Regula Echle, 'The Passive Personality Principle and the General Principle of Ne Bis In Idem' (2013) 9 *Utrecht Law Review*, 60–61.

44 Reservations submitted by Finland on 30 May 2012, Council of Europe, Reservations and Declarations for Treaty No. 197 – Council of Europe Convention on Action against Trafficking in Human Beings, status as of 9 September 2019, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/declarations?p_auth=88CXo7zH.

a complaint from the victim or of an official denunciation by the authorities of the country where they have been committed'.[45]

3. Concurrent jurisdiction

31.26 The wide variety of jurisdictional principles set forth in the CoE Convention against Trafficking may result in overlapping jurisdictions. Together with the transnational nature and complexity of the trafficking in human beings' phenomenon, it is not a rare situation that several State Parties may establish jurisdiction. However, neither the Convention nor international law, in general, provides a hierarchy of jurisdictional principles in order to choose between parallel prosecutions.[46] According to Article 31(4), in order to determine which State Party has 'the most appropriate jurisdiction for prosecution', the State Parties should consult with one another to 'determine the proper venue for prosecution'.[47] However, as the Convention's Explanatory Report highlights, such a consultation is not an obligatory prerequisite to establishing jurisdiction; it applies only 'where appropriate'.[48] Thus, a State Party may postpone or even decline any consultation, if there is a possibility that such consultation could disrupt the investigation or prosecution of the offence.[49]

31.27 The CoE Convention against Trafficking and also other international treaties[50] determine the requirement of consultations as 'the only key'[51] to resolve the possible positive conflict of jurisdictions, including Article 15(5) UNTOC, which requires the State Parties to 'as appropriate, consult one another with a view to coordinating their actions'.[52] Given the mandatory nature of the territorial jurisdiction, it may be argued that the State Party, where the offence was committed, should be given a priority. However, since trafficking is typically committed in various states, prioritising the territoriality principle does not provide a clear answer. Neither do the two most relevant instruments of the CoE, the Convention on the International Validity of Judgements[53] and the Convention on the Transfer of Proceedings.[54]

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45 Reservations submitted by France on 9 January 2008, Council of Europe, Reservations and Declarations for Treaty No.197 – Council of Europe Convention on Action against Trafficking in Human Beings, status as of 9 September 2019, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/declarations?p_auth=88CXo7zH.

46 Boister, 270.

47 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 333.

48 Ibid.

49 Ibid.

50 See, e.g., Art 4(3) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, entered into force 15 February 1999 (OECD Anti-Bribery Convention). At the EU level, see, e.g., Framework Decision 2008/919/JHA on combating terrorism and Framework Decision 2005/222/JHA on attacks against information systems, propose to the Member States to coordinate their efforts and decide which one of them will prosecute.

51 Boister, 271.

52 During the drafting process, several delegations proposed that the UNTOC should include a specific provision for the settlement of conflicts over jurisdictions; however, this proposal was never accepted. Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft United Nations Convention against Transnational Organized Crime: Following Fourth session (28 June–9 July 1999)*, A/AC.254/4/Rev.2, 19 May 1999, footnote 78.

53 European Convention on the International Validity of Criminal Judgments, ETS No. 070, 28 May 1970, entered into force 26 July 1974.

54 European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 073, 15 May 1972, entered into force 30 March 1978.

31.28 Additionally, for decades, EU law did not provide any specific criteria to resolve the conflict of jurisdictions in criminal proceedings. However, in 2003, Eurojust issued guidelines[55] according to which 'a prosecution should take place in the jurisdiction in which the majority – or the most important part – of the criminality occurred or in which the majority – or the most important part – of the loss was sustained' (the centre of gravity approach).[56] Nevertheless, other factors should be considered as well, including the location of the alleged offender, availability and admissibility of evidence, protection of witnesses, interests of victims, stage of proceedings, and several other aspects.[57]

31.29 In 2005, the European Commission also published a non-binding document, 'Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings'.[58] Unfortunately, the Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, which was the final result of these efforts, only broadly refers to the Eurojust Guidelines in its Recital No. 9.[59]

4. Universal jurisdiction (absolute universality)

31.30 Article 31(5) reads 'this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with internal law'. This provision opens up other channels for prosecution by allowing the State Parties to also establish different kinds of jurisdiction than the ones set out in the previous paragraphs.[60] As the Convention's Explanatory Report highlights, Article 31(5) allows the State Parties to establish criminal jurisdiction regardless of the *locus* of the offence or nationality of the offender.[61] Since Article 31(1) enshrines almost all types of jurisdiction,[62] it is primarily the universal jurisdiction and jurisdiction based on the protective principle that is implicitly allowed by this paragraph. This interpretation is further supported by a parallel provision of the UNTOC, Article 15(6). The Legislative Guide to the UNTOC provides that the aim of this provision is to broaden the State Parties jurisdiction to prevent that 'serious transnational crimes' do not remain unpunished due to gaps in jurisdiction.[63]

31.31 Based on the universal jurisdiction, all states can prosecute foreign offenders for certain crimes regardless of the locus of the offence or nationality of the victim.[64] Universal jurisdiction was initially created to suppress piracy;[65] however, later on, the doctrine was *per analogiam*

55 Eurojust, *Guidelines for Deciding 'Which Jurisdiction Should Prosecute?'* (2016).
56 Ibid., 3.
57 Ibid., 3–4.
58 European Commission, Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings, 23 December 2005, COM(2005) 696 final.
59 Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.
60 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 334.
61 Ibid., para 334.
62 See Ian Brownlie, *Principles of Public International Law* (Oxford University Press 2003) 301–5.
63 See on Art 15(6) UNODC, *Legislative Guides for the Implementation of the United National Convention against Transnational Organized Crime thereto* (United Nations 2004), 75, para 244.
64 Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction (Princeton 2001) 28.
65 See Kenneth C Randall, 'Universal Jurisdiction Under International Law' (1988) 66 *Texas Law Review*, 791–5.

expanded to other crimes such as genocide, war crimes, and crimes against humanity.[66] The arguments supporting the application of absolute universality to human trafficking suggest that trafficking in human beings fulfils both, the gravity of crime rationale[67] since it is a 'heinous crime'[68] and the international impact rationale[69] since it 'affects or threatens all States'.[70]

31.32 Despite these arguments, the universal jurisdiction doctrine has not yet been generally expanded to trafficking in human beings based on the analogy to the core international crimes.[71] Nevertheless, some states, for example, Switzerland, apply universal jurisdiction to a variety of offences, including human trafficking of a minor.[72] Also, Germany enshrined in its Criminal Code a possibility to establish jurisdiction over offences committed abroad that are against internationally protected legal interests, regardless of the law of the location where the offence was committed, including trafficking in human beings.[73] Although the application of universal jurisdiction to prosecute trafficking in human beings is still rare, Article 31(5) creates a space for new developments in this doctrine.

66 See M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law*, 105–34.

67 Ibid., 153; Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 *Harvard International Law Journal*, 184–5.

68 Miriam Cohen, 'The Analogy between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction' (2010) 16 *Buffalo Human Rights Law Review*, 206. See, among others, Anne Gallagher, 'Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibition on Slavery, Servitude, Forced Labour and Debt Bondage', in Leilya N Sadt and Michael P Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni*, 397 *passim* (Brill Nijhoff 2008).

69 See Eugene Kontorovich, 'Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute' (2004) 80 *Notre Dame Law Review*, 152–4.

70 Cohen, 231.

71 Boister, 269.

72 Art 5, Swiss Criminal Code, 21 December 1937 as amended.

73 Section 6(4), German Criminal Code, 13 November 1998, Federal Law Gazette I p. 3322 as last amended on 19 June 2019. Germany also remains the only State Party that applied the principle of universal jurisdictions to prosecute human trafficking (Decision No. 1 StR 599/17 of the German Federal Supreme Court, delivered on 4 July 2018; and Decision No. 1 AK 34/16 of the Higher Regional Court Karlsruhe, delivered on 7 September 2016). GRETA, *Report on Germany*, II GRETA(2019)07, 20 June 2019, para 270.

ARTICLE 32

GENERAL PRINCIPLES AND MEASURES FOR INTERNATIONAL CO-OPERATION

Nora Katona

The Parties shall co-operate with each other, in accordance with the provisions of this Convention, and through application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:

- **preventing and combating trafficking in human beings;**
- **protecting and providing assistance to victims;**
- **investigations or proceedings concerning criminal offences established in accordance with this Convention.**

A. INTRODUCTION

32.01 In most cases, trafficking in human beings takes place in cross-border settings, making trafficking in human beings a complex offence as alleged perpetrators, victims and evidence can be, and frequently are located in more than one country. Thus, for State Parties to meet their obligations under the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings cross-border co-operation is often essential.[1] In general, Chapter VI of the CoE Convention against Trafficking regulates 'international co-operation and co-operation with civil society'. In specific, Article 32 sets the general principles and measures for

1 CAHTEH, *1st meeting (15–17 September 2003) – Meeting report*, CAHTEH(2003)RAP1, 29 September 2003, 5; Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 404.

international co-operation under the CoE Convention against Trafficking. It states that Parties must co-operate 'to the widest extent possible'. The aim is to take joint actions and ensure smooth and rapid flow of information and evidence internationally.[2]

32.02 The purpose of the co-operation areas are the prevention and combat of trafficking in human beings; the protection of and assistance to victims; and co-operation in investigations or proceedings concerning criminal offences (e.g., extradition and mutual legal assistance). By including these three indents, the 'paramount objectives' of the CoE Convention against Trafficking as mentioned in the Preamble are reflected and it is stressed that co-operation is also required apart from strictly criminal matters.

32.03 According to Article 32 of the CoE Convention against Trafficking, State Parties' co-operation should be based on 'applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws'. During the drafting process, the necessity of specific international co-operation mechanisms under this Convention (e.g., extradition, mutual legal assistance, victim protection) were discussed. An agreement was reached that the regulations under Chapter VI should contain provisions to improve co-operation, but not create new mechanisms or replace or prejudice any relevant law or provision.[3] Thus, the Convention itself does not regulate how the co-operation in these areas should be organised in concrete but rather stresses the importance of co-operation and refers to existing and future instruments and arrangements.[4]

B. DRAFTING HISTORY

32.04 Article 32 (formerly numbered as 34 and 31 of the draft Convention) was subject to changes over the drafting period. The initial draft was divided into three paragraphs: the first regulating co-operation for the purposes of investigations or proceedings concerning criminal offences; the second for the purposes of protecting and assisting victims; while the third included a provision for the purpose of the relocation of victims and/or their family members either within the territory of the respective or one of another State Party.[5] Concerning the latter, the Swiss delegation stressed in its contribution that the provision for the purpose of relocation could only be temporary in nature and should be preferably rephrased. An adaptation should be done in a way that co-operation should be understood to find a new residence for the victims and/or their family members without specifying in which territory.[6] In the 4th Ad hoc Committee on Action against Traficking in Human Beings (CAHTEH) meeting, it was

2 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, paras 338–339.
3 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 337; Gallagher, 411.
4 Ibid., paras 341–345.
5 CAHTEH, *Revised Preliminary Draft – European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 15.
6 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Contribution by the delegation of Switzerland*, CAHTEH(2004)1 Addendum II, 29 January 2004, 11.

decided that the provision on the relocation of victims should be transferred to Article 28 (formerly Art 38 of the draft Convention).[7]

32.05 In the same meeting, it was debated if the CoE Convention against Trafficking should entail specific regulations on co-operation similar to cross-sectoral conventions that apply to various offences and not specifically to one type of crime.[8] Some delegations emphasised that other existing instruments might evolve and provide improved co-operation rendering provisions in the CoE Convention against Trafficking impractical.[9] The drafters opted not to reproduce in the present Convention provisions identical to those in cross-sector instruments. It was agreed that Chapter VI on International Co-operation should contain provisions to strengthen co-operation but there was no wish to set up a separate system, which would take the place of other relevant instruments or arrangements. Thereby the Convention enables a continuous use of existing instruments and prevents challenges resulting from competing systems of co-operation.[10]

32.06 In the 4th CAHTEH meeting, the initial draft was reworded and restructured. The revised 1st paragraph focused on co-operation in preventing and combating trafficking in human beings as well as protecting and assisting victims. Paragraph 2 dealt with co-operation for the purposes of investigation or proceedings concerning criminal offences.[11] The delegation from the United Kingdom (UK) suggested removing repetition in the paragraphs, proposing the structure found in the final version; dividing the Article into three indents, namely 'preventing and combating trafficking in human beings; protecting and providing assistance to victims; investigations or proceedings concerning criminal offences'.[12] At the 6th CAHTEH meeting, it was decided to restructure the Article.[13]

C. ARTICLE IN CONTEXT

1. Article 32 and other related provisions of the CoE Convention against Trafficking

32.07 According to Article 32 of the CoE Convention against Trafficking State Parties should co-operate for the purpose of 'protecting and providing assistance to victims'. In this regard,

7 CAHTEH, *4th meeting (11–14 May 2004) – Meeting report*, CAHTEH(2004)RAP4, 23 June 2004, paras 74–79. See on this also Art 28(2) in this Commentary.

8 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 336. See for instance cross-sectoral conventions like the European Convention on Extradition, ETS No. 24, 13 December 1957, entered into force 18 April 1960 and the European Convention in Mutual Assistance in Criminal Matters, ETS No. 30, 20 April 1959, entered into force 12 June 1962.

9 CAHTEH, *4th meeting – Meeting report*, CAHTEH(2004)RAP4, paras 71-73.

10 Ibid.; Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 337.

11 CAHTEH, *4th meeting – Meeting report*, CAHTEH(2004)RAP4, paras 74–79.

12 CAHTEH, *Draft Convention of the Council of Europe on action against trafficking in human beings: Contribution by the delegations of Azerbaijan, Germany, Hungary, Norway, Spain, Sweden, United Kingdom and by the observer of European Women's Lobby*, CAHTEH(2004)17, 30 August 2004, 17. See also CAHTEH, *Draft Convention of the Council of Europe on action against trafficking in human beings: Contribution by the delegation of Poland*, CAHTEH(2004)17 Addendum VI, 2 September 2004, 3.

13 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting report*, CAHTEH(2004)RAP6, 11 October 2004, 15 and 52.

special measures are provided in Article 33 (Measures relating to endangered or missing persons). Further, Article 34(4) of the CoE Convention against Trafficking provides concrete regulations of co-operation for the purpose of protecting and providing assistance to victims through, for example, information exchange. It refers to the transmission of information to ensure the rights of victims regulated under Articles 13 (Recovery and reflection period), 14 (Residence permit) and 16 (Repatriation and return of victims). Moreover, Article 34(2) and (3) regulates spontanious exchange of information if it benefits initiating or conducting proceedings concerning criminal offences under the CoE Convention against Trafficking. This exchange of information is a less formal way of co-operation than extradition or mutual legal assistance in criminal proceedings.

32.08 In addition, Article 32 states that co-operation has to take place for the purpose of investigations or proceedings concerning criminal offences established in accordance with the CoE Convention against Trafficking. This includes offences that are regulated by Article 18 (Criminalisation of trafficking in human beings), Article 20 (Criminalisation of acts relating to travel or identity documents) and Article 21 (Attempt and aiding or abetting). Due to the principle of the dual criminality, co-operation for the purpose of investigations and proceedings in relation to Article 19 (Criminalisation of the use of services of a victim) is limited to those cases where the State Parties involved have criminalised the acts under Article 19 in their domestic law.[14]

32.09 Although not having included any specific instruments or mechanisms for co-operation, Article 32 requires State Parties to co-operate to the widest extent possible. To ensure the compliance with their duties under this Convention and in concrete Article 32, the use of co-operation instruments and mechanisms should be monitored accordingly.[15]

2. Article 32 and other related international and regional standards

32.10 During the drafting process, it was concluded that the reference to other instruments in Article 32 is not only confined to instruments and mechanisms in force at the time of the CoE Convention against Trafficking entering into force, but also applies to instruments adopted afterwards.[16]

32.11 Despite the contribution of the International Labour Office (ILO) that 'a wider range of international instruments as relevant to anti-trafficking activities'[17] should be included, in particular the Worst Forms of Child Labour Convention[18] to enhance international co-operation for action against child trafficking, reference to very few instruments were

14 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 340. See also, UN Convention against Transnational Organized Crime, 2225 UNTS 209, entered into force 29 September 2003, Art 16(1); European Convention on Extradition, Art 2; Gallagher, 405.

15 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 337.

16 Ibid., para 341.

17 CAHTEH, *Preliminary draft of the European Convention on Action against Trafficking in Human Beings: Contributions by the delegation of Sweden and by the observer of International Labour Organization*, CAHTEH(2003)8 rev. 2 Addendum I, 28 November 2003, 10.

18 Worst Forms of Child Labour Convention (ILO No 182), 2133 UNTS 161, 17 June 1999, entered into force 19 November 2000, Art 8.

introduced and only in the context of investigations or proceedings concerning criminal offences. These concern reference to mutual legal assistance and extradition such as the European Convention on Extradition and the European Convention in Mutual Assistance in Criminal Matters and their protocols.[19] On a European Union (EU) level, the European arrest warrant is relevant for cases of extradition.[20] Not explicitly mentioned but of relevance might be also the European Investigation Order,[21] a directive that came into force after the adoption of the CoE Convention against Trafficking. It focuses on investigative measures, including the obtaining of evidence in cross-border settings.[22] The Explanatory Report names in addition the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[23] Not explicitly mentioned but related are also, amongst others, the United Nations Convention against Transnational Organized Crime (UNTOC) and United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children.[24]

32.12 Co-operation can be based on bilateral or multilateral treaties, but also on uniform (i.e., Scandinavian countries) or reciprocal (i.e., Ireland and the UK) legislation and internal laws. In the case of uniform legislation, national laws of different states are so alike that they lead to comperable consequences, for instance in the handling of extradition cases. This approach is for example possible among the Scandinavian countries, as their national criminal laws are very similar. Reciprocal legislation ensure that State Parties extend equivalent privileges and obligations to each other based on domestic laws, as for instance in relation to extradition between Ireland and the UK.[25] This sequence was introduced to the treaty because these countries rely in matters related to extradition on uniform, reciprocal or national legislation and not on international agreements. A similar provision can be found in other CoE Conventions, for example the European Convention on Extradition.[26]

19 European Convention on Extradition; European Convention in Mutual Assistance in Criminal Matters and their protocols ETS Nos. 86, 98, 99 and 182.

20 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190/1).

21 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 131/1).

22 Ibid., Recitals 7 and 10.

23 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No 141, 8 November 1990, entered into force 1 September 1993.

24 UNTOC, Art 13 and Arts 16 to 19; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol), Art 10.

25 Council of Europe, *Explanatory Report to the European Convention on Extradition*, ETS No. 24, para 13; Bassiouni, *International Extradition and World Public Order* (Sijthoff 1974), 13–14; Gjermund Mathisen, 'Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond' (2010) 79 *Nordic Journal of International Law*, 5; August Reinisch (eds) *Österreichisches Handbuch des Völkerrechts* (Manz 2013), paras 58 and 232.

26 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 345.

D. ISSUES OF INTERPRETATION

1. Measures for international co-operation

32.13 In most cases, trafficking in human beings has a cross-border element, which requires close co-operation between States.[27] The co-operation under the CoE Convention against Trafficking should not be limited to criminal matters and the exchange between national authorities but should also include other relevant stakeholders such as NGOs, if the purpose so requires.[28]

32.14 In practice, international co-operation in criminal matters is often challenging in trafficking in human beings cases due to high evidentiary requirements, difficulties in the identification of victims and cases as well as multilateral dimensions including different jurisdictions.[29] Some co-operation mechanisms have been proven effective in the fight against trafficking, such as informal police-to-police co-operation, which has been key to identifying and rescuing victims of trafficking as well as mutual legal assistance and extradition.[30] At the same time, State Parties are required to put a focus on co-operation that should ensure that victims of trafficking are protected and assisted also apart from ongoing criminal investigations or proceedings.[31] Moreover, according to Article 32, co-operation should also entail measures to prevent and combat trafficking in human beings. However, there are no concrete instruments or mechanisms forseen under the Convention for co-operation leaving a wide margin of discretion to the State Parties.

2. Mechanisms and instruments of co-operation for non-criminal matters

32.15 The established initiatives are based on multilateral[32] or bilateral co-operation and involve different stakeholders, including NGOs. According to Article 32, the purpose of co-operation should amongst others be of a preventive nature. As in most of the cases, trafficking in human beings is a cross-border offence with different states involved, different approaches in the individual states might be necessary to prevent and combat trafficking. An exchange and co-operation between the states enable to address different aspects, from awareness-raising measures and trainings sessions (e.g., for law enforcement agencies, lawyers, judges, civil society, etc.)[33] to the implementation of cross-border task forces for combating human

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27 Gallagher, 404.

28 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 335. See on this also the Commentary on Art 35.

29 See for instance EUROJUST, *Implementation of the Eurojust Action Plan against THB 2012–2016, Final evaluation report* (2017), 47–48; UNODC, *Evidential Issues in Trafficking in Persons Cases* (UNODC 2017) 125.

30 Gallagher, 404 et seq.

31 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 335, 340.

32 See for instance GRETA, *Report on Portugal*, II GRETA(2017)4, paras 191, 192; The Ministries of Interior of the Western Mediterranean adopted the 'Lisbon Declaration' and 'Lisbon Conclusions' aiming at reinforcing co-operation including in the fight against trafficking in human beings. In addition, the 'Lisbon Action Plan for Establishing Common Measures to Prevent and Combat Trafficking in Human Beings' was adopted by the Community of Portugese-speaking Countries.

33 See for instance GRETA, *Report on Austria*, I GRETA(2011)10, para 55; GRETA, *Report on Denmark*, II GRETA(2016)7, para 190; GRETA, *Report on Hungary*, I GRETA(2015)11, para 96; GRETA, *Report on Latvia*, I GRETA(2012)15, para 84; GRETA, *Report on Belgium*, I GRETA(2013)14, para 98 (Belgium and Brazil); GRETA,

trafficking.[34] Many of these co-operations aim at targeting the root causes of trafficking in human beings (e.g. social and economic co-operation,[35] access to education and vocational training[36]) and preventing persons in vulnerable situations from being exploited (e.g. unaccompanied children,[37] children without parental protection[38]).

32.16 The second indent of Article 32 foresees the co-operation for the purpose of protecting and providing assistance to victims. In this regard there is no further specification either in the Convention text or in the Explanatory Report, how co-operation should be established. Article 34(4) of the Convention refers to the transmission of information between State Parties that is necessary to ensure that rights of trafficked persons are protected. Again, the GRETA reports give some examples about the practical implementation. These include from strategies for promoting and protecting the rights of trafficked persons[39] to assistance and safe return;[40] as well as reintegration and victim-protection initiatives.[41]

3. Mechanisms and instruments of co-operation for investigations or proceedings concerning criminal offences

32.17 Under the third indent of Article 32, co-operation for the purpose of investigations or proceedings concerning criminal offences is regulated. Overall, in the context of criminal offences under the CoE Convention against Trafficking, State Parties have the obligation to establish co-operations if it is in line with the purpose of the Convention to correspond to their obligation of due diligence.[42] The question of co-operation, especially in the framework of criminal matters, is linked to the question of jurisdiction and state sovereignty as an important principle according to which State Parties cannot undertake investigative acts in the territory of another state without prior consent.[43] However, for an effective criminal investigation and the

Report on Denmark, I GRETA(2011)21 , para 83; GRETA, *Report on France*, II GRETA(2017)17, para 287; GRETA, *Report on Norway*, II GRETA(2017)18, para 190; GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 329.

34 See for instance GRETA, *Report on Bosnia and Herzegovina*, I GRETA(2013)7, para 72 referring to the Southeast European Law Enforcement Centre (SELEC); GRETA, *Report on Denmark*, I GRETA(2011)21, para 87 referring to the Council of the Baltic States (CBSS).

35 See for instance GRETA, *Report on Hungary*, I GRETA(2015)11, para 96 referring to the European Neighbourhood and Partnership Instrument (ENPI); GRETA, *Report on the United Kingdom*, II GRETA(2016)21, paras 327, 332.

36 See for instance GRETA, *Report on Albania*, I GRETA(2011)22, para 77.

37 See for instance GRETA, *Report on France*, II GRETA(2017)17, para 292 referring to the project 'Analysis of reception, protection and integration policies for unaccompanied minors in the EU' carried out under the auspice of the European Council on Refugees and Exiles (ECRE).

38 See for instance GRETA, *Report on Andorra*, I GRETA(2014)16, para 46.

39 See for instance GRETA, *Report on Spain*, I GRETA(2013)16, para 115; GRETA, *Report on Denmark*, I GRETA(2011)21, para 83.

40 See for instance GRETA, *Report on the Netherlands*, II GRETA(2018)19, paras 242, 243; GRETA, *Report on Albania*, II GRETA(2016)6, paras 178, 179; GRETA, *Report on Denmark*, I GRETA(2011)21, para 84; GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 329.

41 See for instance GRETA, *Report on Austria*, I GRETA(2011)10, para 55; GRETA, *Report on Luxembourg*, II GRETA(2018)18, para 197; GRETA, *Report on the United Kingdom*, II GRETA(2016)21, para 329.

42 See UNTOC, Art 18(6); *Rantsev v Cyprus and Russia*, App no 25965/04 (ECtHR, 7 January 2010) para 241; David McClean, *Transnational Organized Crime. A Commentary on the UN Convention and its Protocols* (Oxford University Press 2007) 214; Gallagher, 410 et seq.

43 Gallagher, 404 et seq.; UNTOC, Art 4; UN Convention against Corruption, 2349 UNTS 41, 31 October 2003, entered into force 14 December 2005, Article 4. See on this also the Commentary on Art 31.

prosecution of alleged perpetrators close co-operation in many cases is essential. The forms of co-operation vary broadly and may contain informal practices (such as police-to-police co-operation) as well as formal co-operation (for instance mutual legal assistance and extradition).[44] In many cases, the practices are interlinked.

32.18 Informal co-operation is less rulebound, in which co-operation enables law enforcement and regulatory agencies to exchange information and intelligence on an informal way if coercion measures are not necessary. Thus, informal co-operation is often applied prior to an investigation becoming official and before court proceedings. According to the UNTOC and the Palermo Protocol, informal co-operation seeks to aid in the early identification of offences and exchange of information and intelligence, victim and perpetrator identification, document verification and proactive intelligence gathering.[45] Article 34(2) of the CoE Convention against Trafficking equally foresees the spontaneous information exchange in cases when the disclosure of such information might initiate or ease the investigation or proceeding.[46]

32.19 Further to informal co-operation, the UNTOC encourages joint investigations in trafficking cases, either based on bilateral or multilateral agreements or arrangements. In the absence of such, joint investigations may be undertaken by agreement on a case-by-case basis.[47] Similarly, the EU Framework Decision on Joint Investigations provides for joint investigations teams (JITs) between the EU Member States.[48] According to the Framework Decision, JITs may be set up by mutual agreement for a specific purpose and a limited period of time to carry out investigations in one or more EU Member States. It names in particular two scenarios, in which joint action may be undertaken.[49] Firstly, if one of the EU Member States is conducting investigation in a complex and demanding case, which has links to other EU Member States.[50] Secondly, if more EU Member States are investigating a case that require a 'coordinated and

44 Gallagher, 404 et seq.

45 UNTOC, Art 27(2); Palermo Protocol, Art 10(1); UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Guideline 11 para 6 and Guideline 11 para 7; OSCE, Decision No. 557: OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 24 July 2003, Recommendation 2.5 and Recommendation 3 (Law enforcement co-operation and information exchange between participating States); Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS No. 182, 8 November 2001, Art 11.

46 See CoE Convention against Trafficking, Art 34. See also Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (OJ L 386/89).

47 UNTOC, Art 19. See also Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Art 11.

48 Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197/3) Article 13 and Council Framework Decision 2002/465/JHA of 13 June 2020 on joint investigation teams, Art 1(1), (OJ L 162/1) (thereinafter FD 2002/465/JHA). On the evaluation of JITs see EUROJUST, *Strategic Project on Eurojust's action against trafficking in human beings* (2012) and EUROJUST, *Implementation of the Eurojust Action Plan against THB 2012–2016, Final evaluation report* (2017), 24 et seq.

49 FD 2002/465/JHA, Art 1(1).

50 Ibid., Art 1(1)(a).

concerted' action by the actors involved.[51] The JITs can also involve non-EU Member States in accordance with relevant instruments, co-operation agreements or other arrangements.[52]

32.20 In contrast to informal co-operation, mutual legal assistance and extradition include coercion and evidence gathering that can be used in court proceedings and thus, require much stricter rules. Mutual legal assistance is used to request other states to provide information and evidence for the purpose of an investigation or prosecution.[53] It is mainly used for taking evidence or statements, locating and identifying witnesses and suspects, effecting service of judicial documents, executing searches and seizures of property, providing information, evidentiary items and expert evaluations or transfer prisoners to give evidence.[54] Extradition is the process where a State Party requests another State Party to return an individual to participate in the criminal proceeding or to serve the sentence.[55] Due to the cross-border nature of trafficking, extradition may sometimes be a relevant tool for prosecuting trafficking cases.[56] In this context, the general principle is that states should extradite or prosecute (*aut dedere aut judicare*). For example, states that do not extradite their nationals for trafficking related offences or that refuse extradition on other grounds should prosecute alleged offenders.[57]

32.21 Extradition requires dual criminality meaning that the act that is subject to the criminal proceedings must be an offence under the national laws of the State Parties involved. In addition, sufficiency of evidence must be given. The request can be denied if the request relates to a case that has already been tried and the persons involved have already been acquitted or punished for the act (*ne bis in idem*).[58] Additional refusal grounds may be linked to political offences, national or public interest or bank secrecy and fiscal offences.[59] In addition, human rights considerations have to be taken into account.[60] Most of the exceptions are also valid for mutual legal assistance such us *ne bis in idem*, dual criminality and human rights aspects.[61]

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51 Ibid., Art 1(1)(b).

52 Ibid., Art 1(8); e.g., Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Art 20. According to Eurojust, in the period of 2012–2016, 50 JITs were set up in cases of trafficking in human beings, see EUROJUST, Implementation of the Eurojust Action Plan against THB 2012–2016, Final evaluation report (2017), 24–25. See for examples among the State Parties of the Convention: GRETA, *Report on Belgium*, I GRETA(2013)14, para 96; *Report on Bulgaria*, II GRETA(2015)32, para 213; *Report on Denmark*, II GRETA(2016)7, para 195; *Report on Finland*, I GRETA(2015)9, para 96; *Report on France*, II GRETA(2017)17, para 291; *Report on Germany*, I GRETA(2015)10, para 93; *Report on Hungary*, I GRETA(2015)11, para 93; *Report on the Netherlands*, II GRETA(2018)19, para 238; *Report on Norway*, II GRETA(2017)18, para 188; *Report on North Macedonia*, I GRETA(2014)12, para 97.

53 UNTOC, Art 4 and UNCAC, Art 4; Gallagher, 410 et seq.

54 Gallagher, 410 et seq.

55 See Clive Nicholls QC, Clare Montgomery QC and Julian B Knowles, *The Law of Extradition and Mutual Assistance* (2nd edn, Oxford University Press 2007).

56 Gallagher, 404.

57 UNTOC, Arts 15(3) and 16(10); CoE Convention against Trafficking, Art 31(3). See on this also the Commentary on Art 31.

58 Gallagher, 404 et seq.

59 Ibid.; see e.g., UNTOC, Art 16, European Convention on Extradition, Arts 2–6 and 9; FD on the European arrest warrant and the surrender procedures between Member States, Arts 2–4.

60 Gallagher, 411 et seq.

61 Ibid.

32.22 Co-operation in criminal matters is often linked to coercive measures. Thus, human rights considerations also concerning alleged perpetrators are an important aspect. Especially relevant are the rights of liberty and security of the person, the right to life, the right not to be subjected to torture or other forms of ill-treatment; the right to a fair trial (including access to a lawyer, presumption of innocence, right to interpretation, and others).[62] These human rights have to be respected in the context of co-operation in criminal matters to ensure the rights of alleged perpetrators and to render the investigations and proceedings fair.

62 See for instance International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, entered into force 3 March 1976, Arts 7, 9, 13, 14; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984, entered into force 26 June 1987, Art 3; Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 5, 4 November 1950, Arts 2, 3, 5, 6. See further on this matter: Gallagher, 411 et seq.; Martin Böse, 'Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant' in Stefano Ruggeri (ed), *Human Rights in European Criminal Law* (Springer 2014); Stefano Ruggeri, 'Transnational Prosecutions, Methods of Obtaining Overseas Evidence, Human Rights Protection in Europe', in Stefano Ruggeri (ed), ibid.; André Klip, *European Criminal Law* (3rd edn, Intersentia 2016) 467–79.

ARTICLE 33

MEASURES RELATING TO ENDANGERED OR MISSING PERSONS

Helmut Sax

1 When a Party, on the basis of the information at its disposal has reasonable grounds to believe that the life, the freedom or the physical integrity of a person referred to in Article 28, paragraph 1, is in immediate danger on the territory of another Party, the Party that has the information shall, in such a case of emergency, transmit it without delay to the latter so as to take the appropriate protection measures.

2 The Parties to this Convention may consider reinforcing their co-operation in the search for missing people, in particular for missing children, if the information available leads them to believe that she/he is a victim of trafficking in human beings. To this end, the Parties may conclude bilateral or multilateral treaties with each other.

A. INTRODUCTION

While Article 32 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings sets out general standards for co-operation between State Parties, Article 33 recognises, more specifically, the importance of cross-border information exchange in particularly serious and urgent situations. Article 33(1) addresses individual cases, where an 'immediate danger' to 'the life, the freedom or the physical integrity' of a victim of trafficking, witness or other persons involved in such criminal proceedings[1] has become known and this information must be shared 'without delay' between Parties in order to enable them to take effective emergency protection measures for that person. Typical examples would include situations of threats and reprisals by traffickers against family members of victims or witnesses involved in court cases, who live in a country different from the one where the proceedings take place. **33.01**

1 In reference to Art 28 of the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

33.02 The second situation, covered by Article 33(2), relates to another group at risk of (continued) trafficking, namely missing persons, in particular, missing children. Under this provision, on a more abstract level, Parties 'may consider' to reinforce their co-operation, including through bilateral and multilateral treaties in this field. Moreover, early warning and alert mechanisms, especially in relation to missing children, have been set up in Europe with support from civil society organisations, in order to provide assistance to authorities, children and families in such cases.

B. DRAFTING HISTORY

33.03 In relation to obligations concerning international co-operation, an early proposal drew specific attention to 'information relating to endangered family members and other persons'.[2] In essence, this proposal contained the substance of current Article 33(1) of the CoE Convention against Trafficking, without reference to missing persons.

33.04 At the 4th meeting of the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH), a general concern of drafters was voiced not to interfere with existing instruments in the field of mutual assistance in criminal matters and on extradition. However, in relation to victim protection, the CAHTEH considered it important to introduce a specific second paragraph on the need for co-operation for the purpose of physical relocation of endangered persons, 'either within their territory or the one of another Party'.[3] It was also decided to create an additional provision[4] which refers to the importance of the protection of private life and personal data of the victim when transmitting information on issues such as proceedings to return the victim to his/her country of origin. At the 6th meeting of the CAHTEH, however, drafters realised some overlap concerning the relocation measure, as it was already included in Article 28(2) of the Convention, and deleted it from the endangered persons section.[5] At the same time, privacy and data protection concerns were moved to the general provision on information sharing between Parties (now Art 34 of the Convention on 'information').[6] Moreover, there was discussion about the scope of emergency situations, leading to a more detailed description of conditions including immediate danger to life, freedom and physical integrity. Despite some opposition, the strict, mandatory nature of co-operation ('shall … transmit it without delay') was kept.[7]

33.05 At the 7th meeting of the CAHTEH, it was proposed to include 'a provision to strengthen international co-operation in the search for missing persons',[8] leading to a second paragraph of

2 CAHTEH, *Revised Preliminary Draft of the European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, (then) Art 38.
3 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 84 and Appendix IV Revised Draft, Art 38.
4 Ibid., para 85 and Appendix IV, Art 38bis.
5 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 102.
6 Ibid., para 105.
7 Ibid., para 101.
8 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 61.

Article 33. The explicit mention of missing children was inserted at the 8th and final CAHTEH meeting.[9]

C. ARTICLE IN CONTEXT

33.06 Article 33 forms part of chapter VI of the CoE Convention against Trafficking, setting standards for international co-operation between State Parties. Article 32 of the CoE Convention against Trafficking provides for a wide scope of such co-operation between State Parties, going beyond the more established fields of co-operation in police investigations and criminal justice, and explicitly mandating joint efforts in prevention of trafficking in human beings and protection and assistance to trafficked persons. Building on this, Article 33 is concerned with priority situations from a victim protection perspective, requiring immediate attention, information sharing and effective protection, while Article 34 (Information) outlines the procedure for the transmission of any other information. Sharing of information may give rise to concerns about confidentiality and protection of privacy and personal data, addressed by Article 11 (Protection of private life) of the Convention. Particular attention needs to be given to the respective rights of children and careful balancing of rights and interests is required particularly in relation to missing children, public search efforts and the child's right to privacy. Moreover, standards set by Article 33 of the Convention play an essential role in the context of risk assessments prior to the eventual return of victims of trafficking to their country of origin.[10] This includes the prohibition of returning child victims of trafficking to a State, 'if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child'.[11]

33.07 Several standards have been developed to protect the rights and safety of victims and witnesses of crime, including through international co-operation.[12] As far as children are concerned, the 2007 CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[13] obliges State Parties to take specific measures of protection for child victims of abuse and sexual exploitation 'at all stages of investigations and criminal proceedings', including by 'providing for their safety, as well as that of their families and witnesses on their behalf, from intimidation, retaliation and repeat victimisation'.[14] This may require international co-operation between Parties.[15] As far as cross-border victim protection of women and victims of domestic violence is concerned, the CoE Convention on preventing and combating violence

9 Parliamentary Assembly, Opinion 253(2005)1 – Draft Council of Europe Convention on action against trafficking in human beings, para 14.xxii. See further CAHTEH, *8th meeting (22–25 February 2005) – Final Activity Report*, CAHTEH(2005)RAP8, 6 January 2005, paras 85–86.

10 CoE Convention against Trafficking, Art 16.

11 Ibid., Art 16(7).

12 See, UN GA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/40/34, 29 November 1985 and ECOSOC Resolution 2005/20, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, Annex, 22 July 2005; see, in particular, para 44.

13 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 25 October 2007 entered into force 1 July 2010 (thereinafter Lanzarote Convention).

14 Lanzarote Convention, Art 31(1)(f). In this respect, see also Committee of Ministers, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) (thereinafter CoE Guidelines on child-friendly justice).

15 Lanzarote Convention, Art 38(1).

against women and domestic violence[16] sets out obligations for co-operation of State Parties similar to the CoE Convention against Trafficking.[17]

33.08 In the context of EU legislation, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime[18] requires EU Member States (EU MS) to 'take appropriate action to facilitate co-operation' between EU MS in order to improve access of victims of crime to their rights. This includes 'consultation in individual cases', but also support to relevant European networks, best practice exchange as well as awareness-raising activities on victims' rights.[19]

33.09 There are many different situations in which children might go missing – as 'runaways' from families or institutional care, often escaping from dysfunctional, abusive settings, as children 'abducted' by parents in partner disputes, as migrants disappearing *en route* to destination countries, and in trafficking-related situations for child-exploitative purposes.[20] The EU has introduced legislation for the setting up of national hotlines for missing children, with a dedicated telephone number reserved for that purpose.[21] According to data collected by Missing Children Europe,[22] child hotlines across Europe received 91 655 calls related to missing children in 2018. A total of 889 cross-border cases were opened, of which 26 per cent accounted for missing children in migration. However, there is insufficient data from the hotlines on how many children might have become victim of trafficking in this context.[23] Furthermore, AMBER Alert Europe has created a network of partner organisations to assist in the search for missing children; this includes the set-up of a dedicated Police Expert Network on Missing Persons.[24]

16 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210, 11 May 2011, entered into force 1 August 2014 (thereinafter Istanbul Convention).

17 See ibid., Art 63. However, such transfer is only 'encouraged', thus, with weaker wording than Art 33 of the CoE Convention against Trafficking ('shall').

18 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (thereinafter EU Victims' Rights Directive) (OJ L 315/57).

19 Ibid., Art 26.

20 See, for instance, an overview in Missing Children Europe, *Figures and Trends 2018 from hotlines for missing children and cross-border family mediators* (2019). On missing children and risk factors for child trafficking, see Alessandra Cancedda, Barbara De Micheli, Dafina Dimitrova, Brigitte Slot, *Study on High-risk Groups for Trafficking in Human Beings* (European Commission 2015).

21 EC, Commission Decision 2007/116/EC of 15 February 2007 on reserving the national numbering range beginning with 116 for harmonised numbers for harmonised services of social value; and EC, Commission Decision 2009/884/EC of 30 November 2009 amending Decision 2007/116/EC as regards the introduction of additional reserved numbers beginning with 116.

22 Missing Children Europe is the European Federation for Missing and Sexually Exploited Children, coordinating also the network of missing children hotlines (see below on the 116 000 number in Europe), <http://missingchildreneurope.eu> (last accessed 14 August 2020).

23 Missing Children Europe, *Figures and Trends 2018 from hotlines for missing children and cross-border family mediators* (2019) 2, with the report noting that while 'national data show that more children in migration may have gone missing across borders, the lack of cross-border data, investigation and follow up efforts probably lead to underrepresentation of data for this group of children'.

24 See <https://www.amberalert.eu/police-expert-network/ (last accessed 14 August 2020).

D. ISSUES OF INTERPRETATION

1. Co-operation on endangered persons

33.10 Both Article 33(1) and (2) are conceived as victim protection measures through means of international co-operation. At the core of Article 33(1) of the Convention lies the obligation of State Parties to transmit information 'without delay' which is relevant for urgent protection measures. Such an emergency procedure is triggered when information meets several criteria: the content of the information needs to be substantiated and concrete enough to pass the reasonable grounds test. It has to concern an 'immediate danger' to the 'life, the freedom or the physical integrity' of a person and it needs to involve a cross-border element. The person at risk is currently located in the territory of another State Party,[25] which would then have to take protection measures appropriate to the individual situation. The Explanatory Report exemplifies such situations through cases where trafficked persons report threats against family members in the country of origin.[26] Protection measures may include physical protection, relocation or identity change.[27]

33.11 Apart from the relevant information, emergency co-operation is also qualified in terms of certain relevant persons, who are considered in danger and need of protection. Article 33 directly refers to Article 28 of the Convention, which lists the following four potential target groups for protection measures: victims of trafficking; 'collaborators with the judicial authorities'; witnesses of the offence established in accordance with Article 18; and 'when necessary' their family members. The term 'collaborators' should be understood in a narrow meaning.[28] Protection for this group of persons is granted 'as appropriate'.[29] Furthermore, the term 'witness' means all 'persons who possess information relevant to criminal proceedings concerning human-trafficking', 'whistle blowers and informers'.[30]

33.12 Only limited information can be drawn for Article 33(1) from the evaluation procedure by the Group of Experts on Action against Trafficking in Human Beings (GRETA). Out of three GRETA questionnaires disseminated so far, only those for the first and second evaluation round contained questions on international co-operation. During the second round, GRETA was asking for practical examples of information sharing and for concrete protection measures

25 Otherwise, if the person at risk is located in the same State, the State Party would have the direct obligation to protect that person from any 'potential retaliation or intimidation' under Art 28 of the CoE Convention against Trafficking; see similar protection obligations according to Art 30 of the CoE Convention against Trafficking 'in the course of judicial proceedings'.

26 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 346.

27 These measures should be understood as examples only, based on an individual risk assessment, see Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 286 and see on this also the Commentary on Art 28.

28 See Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 283 referring to Committee of Ministers, Recommendation CM/Rec (97)13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence, 10 September 1997, which defines 'collaborators of justice'. Meanwhile, this Recommendation has been effectively replaced by Recommendation CM/Rec(2005)9 of the Committee of Ministers to Member States on the protection of witnesses and collaborators of justice, 20 April 2005.

29 See CoE Convention against Trafficking, Art 28(1)(b).

30 Council of Europe, *Explanatory Report- CoE Convention against Trafficking*, CETS No. 197, para 284.

taken. However, few countries provided information on cross-border protection measures,[31] while a majority referred to general co-operation measures, mostly on investigation.[32] GRETA has regularly welcomed the reported measures and invited the governments to continue their co-operation programmes.[33]

2. Co-operation on missing persons, in particular, missing children

33.13 Article 33(2) addresses a distinct target group for priority level international co-operation, namely, missing persons. The drafting process has shown that particular attention was given to missing children. As discussed above, manifold reasons can lead to a situation when relatives and authorities may lose contact with a child under their custody, and many of these situations do not have a child trafficking background. Nevertheless, from a child trafficking preventive perspective, missing children in general constitute a group at risk of getting into situations of dependency and exploitation. GRETA has highlighted particular risks especially of unaccompanied and separated asylum-seeking and migrant children, noting that 'in many countries, unaccompanied children disappear within a few days of being placed in reception centres. The inadequacy of child protection measures and the lack of coordination at national level as well as between countries increase the risk of unaccompanied children falling victim to trafficking'.[34] At the same time, it should be noted that GRETA's reports confirm that adequate assistance for unaccompanied and separated asylum-seeking children and effective prevention of risk situations have been an ongoing challenge for several States already well before the migration developments in 2015, with some countries developing policies to address foreign children going missing from institutions as far back as 2009.[35]

33.14 Article 33(2) deals with the situation of missing persons, however, in less clear and commanding terms than in respect to endangered persons within the meaning of paragraph 1. The second paragraph requires that Parties 'may consider' reinforcing co-operation in searching for missing persons, and that they 'may conclude' bilateral or multilateral treaties for that purpose. This could, at first glance, create the impression of weaker international co-operation standards in situations which would actually call for even closer joint efforts. However, taking into account both the exact wording of Article 33(2) and the relationship of Article 33 with Article 32 and Article 27(2) of the CoE Convention against Trafficking, Article 33(2) needs to be understood in a way, which ensures application of the general obligation to co-operate across borders also to cases of missing persons, including children, while, in addition, encouraging State Parties to further enhance ('reinforce') their means of co-operation specifically in relation to these target groups.

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31 See for instance GRETA, *Report on France*, II GRETA(2017)17, paras 286–295; GRETA, *Report on Poland*, II GRETA(2017)29, para 198; GRETA, *Report on Romania*, II GRETA(2016)20, paras 153–154.

32 See, for instance, GRETA, *Report on Portugal*, II GRETA(2017)4, paras 191–199; GRETA, *Report on Serbia*, II GRETA(2017)37, paras 202–208.

33 See, for instance, GRETA, *Report on Serbia*, II GRETA(2017)37, para 210.

34 GRETA, *5th General Report on GRETA's Activities*, February 2016, para 103; see also the thematic section on child trafficking in GRETA, *6th General Report on GRETA's Activities*, March 2017, para 78 and following.

35 See, GRETA, *Report on Ireland*, I GRETA(2013)15, para 153.

33.15 GRETA has paid particular attention to child trafficking[36] by assessing also the establishment of early-warning systems for missing children or the availability of the harmonised European telephone number for missing children. Several GRETA reports make reference to such mechanisms,[37] and GRETA has regularly invited Parties to further support them. No case of a violation of Article 33(2) has yet been found by GRETA.[38]

36 GRETA, *4th General Report on GRETA's Activities*, March 2015, 12.

37 See, for instance, GRETA, *Report on Serbia*, II GRETA(2017)37, para 209 (NGO Astra operating the 116000 hotline); GRETA, *Report on Slovenia*, II GRETA(2017)38, para 187 (GRETA encouraging conclusion of co-operation agreement with AMBER Alert Europe); GRETA, *Report on Poland*, II GRETA(2017)29, para 201 (police alert system, NGO operating hotline, AMBER alert member); GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 195 (police co-operation on missing children, including Interpol); GRETA, *Report on France*, II GRETA(2017)17, para 294 (with critical notes by GRETA on the lack of early-warning on situations of children gone missing from the Calais refugee camps); GRETA, *Report on Portugal*, II GRETA(2017)4, para 200 (search for missing persons through mutual legal assistance).

38 GRETA has in two cases 'invited' the national authorities to 'reinforce international co-operation' for the search of missing children, GRETA, *Report on North Macedonia*, II GRETA(2017)39, para 180 (no missing children hotline in the country); GRETA, *Report on Norway*, II GRETA(2017)18, para 192 (no hotline).

ARTICLE 34

INFORMATION

Julia Planitzer

1 The requested Party shall promptly inform the requesting Party of the final result of the action taken under this chapter. The requested Party shall also promptly inform the requesting Party of any circumstances which render impossible the carrying out of the action sought or are likely to delay it significantly.

2 A Party may, within the limits of its internal law, without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request for co-operation by that Party under this chapter.

3 Prior to providing such information, the providing Party may request that it be kept confidential or used subject to conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them.

4 All information requested concerning Articles 13, 14 and 16, necessary to provide the rights conferred by these articles, shall be transmitted at the request of the Party concerned without delay with due respect to Article 11 of the present Convention.

A. INTRODUCTION

34.01 Article 34 deals with sharing information between the State Parties of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings.[1] Article 34(1) obliges the requested Party to inform the requesting Party of the results on the action regarding the request for international co-operation. Article 34(2) and (3) deals with providing information

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

for co-operation in criminal matters without prior request of a State Party for this information. Article 34(4) requires the State Parties to transmit without delay any information necessary in order to ensure access to rights stemming from Articles 13 (Recovery and reflection period), 14 (Residence permit) and 16 (Repatriation and return of victims) of the Convention.

B. DRAFTING HISTORY

34.02 During the 1st Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting, delegations discussed whether it was necessary to provide for a system of international co-operation, including mutual assistance and extradition specific to the future European convention on trafficking in human beings or whether it would be sufficient to use existing conventions.[2] Delegations pointed out the model applied in the CoE Convention on Cybercrime,[3] which is based on traditional international co-operation conventions on criminal matters but also includes co-operation systems that are adapted to the offence covered by the CoE Convention against Trafficking.[4]

34.03 Initially, Article 34 was divided into two separate articles: (1) an article dealing with the matter of 'spontaneous information'; and (2) a further article on information.[5] The articles were merged during the 4th CAHTEH meeting since the two separate articles both dealt with co-operation regarding information.[6] During the 6th CAHTEH meeting, the delegations decided to add a fourth paragraph to Article 34. Article 34(4) concerns information that is necessary in order to be able to provide the rights included in Articles 13 (Recovery and reflection period), 14 (Residence permit) and 16 (Repatriation and return of victims).[7]

C. ARTICLE IN CONTEXT

1. United Nations Convention against Transnational Organized Crime

34.04 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[8] contains no general provision on assistance and co-operation of the State Parties, since Article 18 of the United Nations Convention against Transnational Organized Crime[9]

2 CAHTEH, *1st meeting (15–17 September 2003)* – Meeting Report, CAHTEH(2003)RAP1, 29 September 2003, para 69.
3 Convention on Cybercrime, ETS No. 185, 23 November 2001, entered into force 1 July 2004 (thereinafter Budapest Convention).
4 CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, para 71.
5 See CAHTEH, *Revised Preliminary Draft – European Convention on Action against trafficking in human beings*, CAHTEH(2003)9, 27 November 2003, former Article 37 (Spontaneous information) and Article 41 (Information).
6 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 91.
7 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 104.
8 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000, entered into force 25 December 2003 (thereinafter Palermo Protocol).
9 United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000.

(UNOTC) contains 'a very detailed mini mutual legal assistance treaty in its own right'.[10] Article 18(4) and (5) UNTOC are the equivalent to Article 34(2) and (3) of the CoE Convention against Trafficking and provide for spontaneous transmission of information.[11] Different from the CoE Convention against Trafficking, the Palermo Protocol does not contain a provision on information sharing in order to ensure access to victims' rights such as residence permits.

2. Relation to other instruments of the CoE

34.05 Article 34(2) and (3) of the CoE Convention against Trafficking are derived from earlier CoE conventions.[12] The text of the CoE Convention's Explanatory Report in relation to Article 34(2) and (3)[13] largely draws on the text of Article 26 (spontaneous information) of the CoE Cybercrime Convention's Explanatory Report.[14]

34.06 Article 62 of the CoE Convention on preventing and combating violence against women and domestic violence,[15] adopted in 2011, is equivalent to Article 34 of the Convention. Similarly, Article 64(3) states that information received from another State Party needs to be submitted to its competent authorities, which are, for instance, police, prosecution services or judges.[16] Compared to Article 34(2) and (3) of the CoE Convention against Trafficking, that are concerned with information spontaneously provided for purposes of co-operation in criminal matters, spontaneous information sharing under Article 64(2) and (3) of the CoE Convention on preventing and combating violence against women and domestic violence is not limited to co-operation in criminal matters but also covers civil law action, including protection orders.[17]

D. ISSUES OF INTERPRETATION

34.07 Article 32 of the CoE Convention against Trafficking refers, for instance, to mutual legal assistance and extradition, reciprocal arrangements between Parties to such instruments in relation to co-operation in criminal matters for the purposes of investigations or proceedings.[18] On the other hand, Article 34 gives further details on how this co-operation between the State

10 Neil Boister, 'The Cooperation Provisions of the UN Convention against Transnational Organised Crime: A "Toolbox" Rarely Used?' (2016) 16 *International Criminal Law Review*, 52.

11 UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations 2004) 168, paras 569–572.

12 See for instance, Art 10 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No. 141, 8 November 1990, entered into force 1 September 1993; Art 26 of the Criminal Law Convention on Corruption, ETS No. 173, 27 January 1999, entered into force 1 July 2002.

13 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, paras 349 and 350.

14 Council of Europe, *Explanatory Report to the Council of Europe Convention on Cybercrime*, CETS No. 185, 23 November 2001, paras 260 and 261.

15 CoE Convention on preventing and combating violence against women and domestic violence, CETS No. 210, 11 May 2011, entered into force 1 August 2014.

16 Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, CETS No. 210, 11 May 2011, paras 334 and 335.

17 Ibid., para 335.

18 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 343.

Parties should be conducted. Article 34(1) and (4) is not limited to international co-operation in criminal matters as it also covers co-operation to prevent and combat trafficking in human beings and protect and assist victims.[19] Article 34(1) clarifies that the requested Party 'shall promptly inform the requesting Party of the final result of the action taken'. Furthermore, in case of delays or circumstances that make it impossible to meet the request, the requested Party should also promptly inform the requesting Party.

34.08 Article 34(2) and (3) of the CoE Convention against Trafficking deal with the matter of 'spontaneous information'.[20] 'Spontaneous information' means that the State Parties can forward information for purposes of co-operation in criminal matters, for instance about investigations, to another State Party without prior request. A State Party can forward such information when it considers 'that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning trafficking in human beings or when there is reason to believe the information might lead to a request for co-operation by the receiving Party'.[21] Frequently, the State Parties believe they have valuable information, which the involved Party is unaware of, and may assist the respective State Party in a criminal investigation or proceedings.[22] These clauses of spontaneous exchanges of information should urge the state that owns the information to share its knowledge with other interested states.[23] In such a scenario, no request for mutual assistance will be forthcoming. There is no obligation to spontaneously forward information. The State Parties have full discretion on forwarding information and can still investigate or initiate proceedings despite having forwarded information to another state if they have jurisdiction.[24]

34.09 Article 34(3) of the CoE Convention against Trafficking regulates the confidentiality of such information and is based on Article 33(3) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Before forwarding information, the State Parties can request conditions on the use of the information, such as confidentiality. If the receiving Party is unable to meet the requests, it must advise the providing Party, who is then given the option to decide against sharing the information.[25]

34.10 Article 34(4) of the CoE Convention against Trafficking was included in order to 'facilitate recognition of rights'[26] stemming from Articles 13, 14 and 16 of the CoE Convention against

19 Ibid., para 347.

20 In early drafts of the CoE Convention against Trafficking, Art 34 (2) and (3) formed a separate article entitled 'Spontaneous information'. See CAHTEH, *Revised Draft of CoE Convention against Trafficking, 3rd meeting (3–5 February 2004) – Meeting Report*, CAHTEH(2004)RAP3, Appendix IV, 6 April 2004, 51. At the time of the adoption of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in 1990, 'spontaneous information' was described as a novelty in the field of legal assistance in criminal matters, see Council of Europe, *Explanatory Report to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, ETS No. 141, 8 November 1990, para 38.

21 CoE Convention against Trafficking, Art 34(2).

22 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 349.

23 Gaetano Amicis, 'Horizontal Cooperation' in Roberto E Kostoris (ed), *Handbook of European Criminal Procedure* (Springer 2018), 272.

24 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 349.

25 Ibid., para 350.

26 CAHTEH, *6th meeting – Meeting Report*, CAHTEH(2004)RAP6, para 104.

Trafficking. The information needed in order to ensure access to rights should be provided 'without delay' and should take into account Article 11 (Protection of private life) of the CoE Convention against Trafficking. The data shared 'should be limited to what is necessary for the purpose for which it is processed'.[27]

27 Council of Europe, *Explanatory report to the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, para 52. See on this also the Commentary on Art 11.

ARTICLE 35

CO-OPERATION WITH CIVIL SOCIETY

Julia Planitzer

Each Party shall encourage state authorities and public officials, to co-operate with non-governmental organisations, other relevant organisations and members of civil society, in establishing strategic partnerships with the aim of achieving the purpose of this Convention.

A. INTRODUCTION

Article 35 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] formulates a duty, not a choice, to encourage co-operation between state agencies and NGOs.[2] Whereas the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[3] makes references to co-operation with NGOs in relation to assistance to victims of trafficking, prevention and trainings, the CoE Convention against Trafficking strengthens the importance of co-operation with NGOs by encouraging strategic partnerships for all matters of the Convention, including also for instance identification. **35.01**

1 Council of Europe, Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Occasional Paper No. 8: The Critical Role of Civil Society in Combating Trafficking in Human Beings* (OSCE 2018), 23.

3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

B. DRAFTING HISTORY

35.02 Prior to the drafting process of the CoE Convention against Trafficking, the Council of Europe stressed the importance of co-operation between state actors and non-governmental organisations (NGOs) in the context of protection of women against violence.[4] During the 1st Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting, several references to co-operation with NGOs in the context of various topics such as prevention, awareness raising and assistance to victims of trafficking were made,[5] however, a provision addressing co-operation with civil society, in general, did not exist. At a later stage, the Organisation for Security and Co-operation in Europe's (OSCE) suggested to include a provision on the co-operation with civil society.[6] The wording of OSCE's proposed provision was not amended in the later ongoing drafting process.

35.03 During the 6th CAHTEH meeting, the OSCE's provision was discussed, and some delegations stressed that co-operation with NGOs should go beyond prevention and should extend to all matters covered by the Convention. Furthermore, strategic partnerships were seen as highly relevant, which would include on-the-ground co-operation between public authorities and NGOs to assist victims of trafficking and roundtable meetings to ensure ongoing dialogue.[7] In order to underline that by this provision the co-operation with NGOs forms a principle for all matters covered by the Convention, it was placed in Chapter VI (Substantive criminal law) instead of placing it under Chapter II (Prevention, co-operation and other measures) or Chapter III (Measures to protect and promote the rights of victims, guaranteeing gender equality).[8]

C. ARTICLE IN CONTEXT

1. Co-operation with civil society in the CoE Convention against Trafficking

35.04 Based on the discussions on Article 35 during the drafting history, it can be derived that Article 35 describes the overarching, general principle of co-operation with NGOs that covers all matters of the Convention. Article 35 obliges the State Parties to encourage the establishment of strategic partnerships. Additionally, several articles of the Convention refer to co-operation with the civil society. The text of Article 5(6) states that 'where appropriate', NGOs and civil society should be involved in implementing prevention measures. The text of Article 6 on discouraging the demand that fosters all forms of exploitation of persons does not explicitly refer to the involvement of NGOs, but the Group of Experts on Action against

4 See Parliamentary Assembly of the Council of Europe, Recommendation No. 1450 (2000) on violence against women in Europe, 3 April 2000, para 10.3; Committee of Ministers, Recommendation CM/Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence, 30 April 2002, para I.3.

5 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003.

6 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings – Amendments to Preamble and to Articles 1 to 24 proposed by national delegations and observers*, CAHTEH(2004)14, 11 June 2004, 17.

7 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP 6, 11 October 2004, paras 96–98.

8 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP 7, 6 January 2005, paras 28–30.

Trafficking in Human Beings (GRETA) recommended that the implementation should take place in partnership with civil society.[9]

35.05 In relation to the identification of victims of trafficking and relevant support organisations civil participation, Article 10(2) of the CoE Convention against Trafficking obliges the State Parties to implement measures that enable identification 'in collaboration with other Parties and relevant support organisations'. According to the Convention's Explanatory Report, support organisations could be NGOs tasked with providing aid and support to victims.[10] Article 12(5) establishes the obligation for the State Parties to take measures to co-operate with NGOs, relevant organisations or other elements of civil society in assistance to victims, 'where appropriate' and 'under the conditions provided for by its internal law'. Assistance during the criminal proceedings is further regulated in Article 27(3) of the Convention. It states that State Parties have an obligation to give, for instance, NGOs the possibility to assist or support victims during criminal proceedings based on the victims' consent. NGOs should also be involved in the establishment of repatriation programmes.[11]

2. Co-operation with civil society in other international and European standards

35.06 The Palermo Protocol makes references to co-operation with NGOs, other relevant organisations and other elements of civil society in relation to the provision of assistance to victims of trafficking (Art 6(3) of the Palermo Protocol), concerning the implementation of prevention measures (Art 9(3) of the Palermo Protocol)[12] and concerning training for law enforcement, immigration and other relevant officials that should encourage co-operation with NGOs (Art 10(2) of the Palermo Protocol). The CoE Convention against Trafficking further strengthened the importance of co-operation with NGOs by adopting Article 35, thereby encouraging strategic partnerships for all matters of the Convention. Co-operation with NGOs under the CoE Convention against Trafficking should therefore also cover, for instance, identification or the planning of repatriation programmes.[13]

35.07 The Office of the United Nations High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking[14] establishes several links for co-operation with NGOs, starting with their involvement in the development, adoption, implementation and review of anti-trafficking legislation, policies and programmes. National action plans should be used in order to establish partnerships with civil

9 See for instance GRETA, *Report on Denmark*, II GRETA(2016)7, para 70.

10 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, 16 May 2005, para 130. See also GRETA, *Report on Spain*, II GRETA(2013)16, para 280.

11 CoE Convention against Trafficking, Art 16(5).

12 See on Art 9(3) of the Palermo Protocol the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* that indicate that States Parties are required, where appropriate, to co-operate with nongovernmental organisations, other relevant organisations and other elements of civil society in matters relating to the prevention of trafficking and the provision of assistance to its victims; UNODC, *Legislative Guides for the Implementation of the United National Convention against Transnational Organized Crime thereto* (United Nations 2004) 313, para 95.

13 See also Art 16(5) of the CoE Convention against Trafficking on the involvement of NGOs in establishing repatriation programmes.

14 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.

society.[15] Concerning identification, the OHCHR's Guideline 2.3 recommends establishing formalised co-operation agreements between relevant authorities, officials and NGOs in order to 'facilitate identification and provision of assistance to trafficked persons'. Assistance in co-operation with NGOs is further defined in Guideline 6.1, which states that the provision of safe and adequate shelter should take place in co-operation with NGOs.

D. ISSUES OF INTERPETATION

1. NGOs, other relevant organisations and members of civil society

35.08 Although difficult to define, there are several definitions of the concept of 'civil society'. For instance, David Held defines civil society as follows: 'Civil society constitutes those areas of social life – the domestic world, the economic sphere, cultural activities and political interaction – which are organized by private or voluntary arrangements between individuals and groups outside the *direct* control of the state.'[16] Civil society has also been described as 'the arena, outside the family, the state, and the market, which is created by individual and collective actions, organisations and institutions to advance shared interests'.[17] Civil society involvement in anti-trafficking activities is diverse and is comprised of, for instance, registered entities, informal associations of civil, human rights movements and academia.[18] Key characteristics of NGOs are: (1) formal and institutionalised; (2) separate from government; (3) nonprofit; (4) self-governing; and (5) includes voluntary participation.[19]

35.09 Other relevant organisations can be trade unions and the private sector. Partnerships with these actors can be relevant to the prevention of trafficking for the purpose of labour exploitation.[20] In this context, GRETA referred to the United Nations (UN) Guiding Principles on Business and Human Rights.[21] The UN Guiding Principles on Business and Human Rights define a state duty to protect human rights and a 'smart' mix of measures should be applied, including mandatory and voluntary measures to strengthen businesses respect for human rights.[22] Besides implementing legislation with reporting obligations for

15 Ibid., Guidelines 1.2 and 1.3.

16 David Held, *Political Theory and the Modern State* (Cambridge Polity Press 1993) 6; cited after David Armstrong and Julie Gilson, 'Introduction – Civil society and international governance', in David Armstrong, Valeria Bello, Julie Gilson and Debora Spini (eds), *Civil Society and International Governance – The role of non-state actors on global and regional regulatory frameworks* (Routledge 2011) 4.

17 Lorenzo Fioramonti and Olga Kononykhina, *Methodological note on the CIVICUS' Civil Society Enabling Environment Index (EE Index)*, 2, https://www.civicus.org/downloads/Methodological%20note%20on%20the%20CIVICUS%20Civil%20Society%20Enabling%20Environment%20Index.pdf (last accessed 31 March 2020).

18 See for an overview of civil society involvement in anti-trafficking activity: OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Occasional Paper No. 8: The Critical Role of Civil Society in Combating Trafficking in Human Beings* (OSCE 2018) 18.

19 David Lewis, 'Nongovernmental Organizations, Definition and History' in Helmut K. Anheiner and Stefan Toepler (eds), *International Encyclopaedia of Civil Society* (Springer Link 2010) 1057–8.

20 See for instance GRETA, *Report on Georgia*, II GRETA(2016)8, para 201.

21 UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework'*, A/HRC/17/31, 21 March 2011.

22 UN Guiding Principles on Business and Human Rights, Principle 3.

companies on prevention measures against trafficking,[23] strategic partnerships could be established when developing or implementing a national action plan on business and human rights.[24]

2. Strategic partnership

35.10 The Convention's Explanatory Report defines 'strategic partnership' as 'co-operative frameworks through which state actors fulfil their obligations under the Convention, by coordinating their efforts with civil society'.[25] Under Article 35, the State Parties have to set up a co-operative framework in which co-operation with NGOs takes place. Regular dialogue through the establishment of roundtable discussions involving all actors is necessary in order to achieve a strategic partnership.[26]

35.11 The wording of establishing strategic partnerships was suggested by the OSCE during the drafting process[27] and stemmed from the OSCE's Action Plan to Combat Trafficking in Human Beings.[28] The OSCE Action Plan recommends establishing 'National Referral Mechanisms by creating a co-operative framework within which participating states fulfil their obligations to protect and promote the human rights of the victims of THB in co-ordination and strategic partnership with civil society and other actors working in this field'.[29] Part of a 'National Referral Mechanism (NRM)' is the establishment of an institutional anti-trafficking framework starting with a roundtable that includes governmental and non-governmental actors. Meetings of the roundtable should lead to a spirit of co-operation among its members, efficient information dissemination and feedback and to a work plan. Ideally, the co-operation of actors in the referral process is based on a formal co-operation agreement, such as a memorandum of understanding.[30]

35.12 Despite these standards concerning strategic partnerships, both European and international organisations observe a shrinking space for civil society. Increasingly, NGOs face restrictions such as the obligation to register as 'foreign agent' in case of receiving funding from abroad or strict approval and licensing procedures for the registration of NGOs.[31] This can be also observed in some State Parties of the CoE Convention against Trafficking, where the

23 Mike Dottridge, *Emerging Good Practice by State Authorities, the Business Community and Civil Society in the Area of Reducing Demand for Human Trafficking for the Purpose of Labour Exploitation* (Council of Europe 2016) 12.

24 See on this for instance ibid., 11. For further discussion on the link between prevention of trafficking and business and human rights see also the Commentary on Art 6.

25 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 352.

26 Ibid., paras 352–3.

27 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings – Amendments to Preamble and to Articles 1 to 24 proposed by national delegations and observers*, CAHTEH(2004)14, 11 June 2004, 17.

28 OSCE Ministerial Council, *Decision No. 2/03 – Combating Trafficking in Human Beings*, MC.DEC/2/03, 2 December 2003, Annex.

29 Ibid., V. Protection and assistance, Art 3.1.

30 Theda Kröger, Jasna Malkoc and Baerbel Heide Uhl, *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons*. A Practical Handbook (OSCE/ODIHR 2004), 48–9.

31 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Occasional Paper No. 8: The Critical Role of Civil Society in Combating Trafficking in Human Beings* (OSCE, 2018) 15.

regulation of the activities and funding of NGOs can impede the ability of NGOs to assist victims of trafficking.[32]

3. Formalising co-operation

35.13 An institutional anti-trafficking framework can be established by setting up a roundtable, working group or co-ordination council that is usually entrusted with developing a national strategy or national action plan. GRETA emphasised that granting specialised NGOs full membership in the relevant bodies that address national action against trafficking in human beings is a proof of the state authorities' willingness to ensure a multi-stakeholder approach in developing and implementing anti-trafficking policy.[33] GRETA furthermore emphasised that relevant civil society actors should be involved in the planning, drafting, implementing and evaluating of national anti-trafficking policies and should be adequately consulted throughout those processes[34] and seen as equal partners in planning and assessing these measures.[35] The State Parties should develop criteria for membership of NGOs in the relevant bodies and make these criteria available to all interested NGOs.[36]

35.14 However, NGOs are confronted with difficulties that could turn the contributions of NGOs to policy documents into a mere formality, such as, for instance, short and unrealistic deadlines set by governments.[37] Also the implementation of the Convention shows gaps concerning consulting with NGOs and participation of NGOs in decision making processes.[38] NGOs, in some cases, have experienced limitations of participation in meetings, for instance, if their role is solely as an observer; in other cases, meetings are not taking place in a systematic manner.[39]

35.15 In the context of providing assistance to trafficked persons, 'practical implementation of the purposes of the convention may be formalised through, for instance, the conclusion of memoranda of understanding between national authorities and non-governmental organisations for providing protection and assistance to victims of trafficking'.[40] States need to

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32 GRETA, *8th General Report on GRETA's Activities*, May 2019, para 219. See, e.g., the obligation of NGOs in Hungary to register with a court as organisation receiving foreign funding when the funding exceeds a certain threshold, GRETA, *Report on Hungary*, II GRETA(2019)13, para 214.

33 GRETA, *Report on Estonia*, I GRETA(2018)6, para 58; GRETA, *Report on Latvia*, I GRETA(2012)15, para 46.

34 GRETA, *Report on Belarus*, I GRETA(2017)16, para 59; GRETA, *Report on Bulgaria*, I GRETA(2011)19, para 86; GRETA, *Report on Denmark*, II GRETA(2016)7, para 200; GRETA, *Report on Norway*, II GRETA(2017)18, para 196.

35 See for instance GRETA, *Report on Spain*, II GRETA(2018)7, para 280.

36 GRETA, *Report on Croatia*, I GRETA(2011)20, para 48; GRETA, *Report on Slovak Republic*, I GRETA(2015)21, para 53.

37 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Occasional Paper No. 8: The Critical Role of Civil Society in Combating Trafficking in Human Beings* (OSCE, 2018) 39.

38 See for instance GRETA, *Report on France*, I GRETA(2012)16, para 68; GRETA, *Report on Malta*, I GRETA(2012)14, para 57; GRETA, *Report on Norway*, I GRETA(2013)5, para 56; GRETA, *Report on Norway*, II GRETA(2017)18, para 194; GRETA, *Report on Spain*, II GRETA(2013)16, para 279.

39 GRETA, *Report on Bulgaria*, II GRETA(2015)32, para 217; GRETA, *Report on Croatia*, I GRETA(2011)20, para 47.

40 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 353. See, e.g., Julia Planitzer, 'Guiding Principles on Memoranda of Understanding between Key Stakeholders and Law Enforcement Agencies on Counter-Trafficking Cooperation' (UN.GIFT/IOM 2009) and Council of the Baltic Sea States Task Force against Trafficking in Human Beings, 'Model Memorandum of Understanding' in Annex 2 of Council of the Baltic Sea States Task Force against Trafficking in Human Beings, *Model Memorandum of Understanding between Law Enforcement Agencies and Specialist Service Providers in the Baltic Sea Region*. Expert Seminar Report (2011).

ensure transparency and non-discrimination in their decision-making processes in relation to formal agreements and respect the independence of NGOs and not reduce their role to that of contracted service-providers.[41] GRETA underlined that formal agreements should be introduced as they clarify roles, increase transparency and legal certainty and ensure quality assistance to victims.[42] The types of formal agreements chosen by the State Parties may vary and can encompass for instance memoranda of understanding,[43] protocols of co-operation,[44] service level agreements[45] or co-operation agreements.[46]

4. Delegation of the provision of services to civil society and its funding

35.16 Part of the institutional anti-trafficking framework or NRM is the development of a work plan or action plan. As shown in practice, action plans recognise and define roles of NGOs, but lack adequate budgets for implementation.[47] Therefore, GRETA stressed that for the implementation of an action plan or strategy, budgetary resources need to be allocated.[48] At the same time, funding of measures delegated to NGOs also has the risk of limiting the NGOs' work to that requested by the state. For instance, states often exclusively fund assistance to officially identified trafficked persons, while NGOs might want to support a broader defined group of persons in need as a result of exploitation and abuse.[49]

35.17 In the context of delegating measures of assistance to NGOs, it is underlined that NGOs need to receive adequate funding when assistance is delegated to them.[50] Article 35 describes the general principle of co-operation with NGOs in order to fulfil the obligations under the Convention, including the obligations deriving from Article 12 of the CoE Convention against Trafficking. Furthermore, Article 35 means also that NGOs are involved in the victim identification process.[51] Therefore, also under Article 35, GRETA stressed that in case of delegation of services to NGOs, the State Parties have an obligation 'to ensure the provision of necessary means for the effective functioning of such services'[52] and 'ensure long-term funding for anti-trafficking activities of NGOs'.[53]

41 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Occasional Paper No. 8: The Critical Role of Civil Society in Combating Trafficking in Human Beings* (OSCE 2018) 12, 46, 53.
42 GRETA, *Report on Malta*, I GRETA(2012)14, para 56; GRETA, *Report on Cyprus*, II GRETA(2015)20, paras 166–8.
43 GRETA, *Report on Georgia*, II GRETA(2016)8, para 198; GRETA, *Report on Moldova*, II GRETA(2016)9, para 194.
44 GRETA, *Report on Bosnia and Herzegovina*, II GRETA(2017)15, para 198.
45 GRETA, *Report on Ireland*, II GRETA(2017)28, para 245.
46 GRETA, *Report on Slovenia*, II GRETA(2017)38, para 190; *GRETA, Report on Ukraine*, II GRETA(2018)20, para 228.
47 Suzanne Hoff, 'Where is the Funding for Anti-Trafficking Work? A look at donor funds, policies and practices in Europe' (2014) 3 *Anti-Trafficking Review Issue*, 125.
48 GRETA, *Report on Finland*, I GRETA(2015)9, para 70.
49 Marieke van Doorninck, 'Changing the System from Within – The Role of NGOs in the Flawed Anti-Trafficking Framework', in Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2017), 426.
50 See on this also the Commentary on Art 12.
51 GRETA, *Report on Spain*, II GRETA(2013)16, para 280.
52 GRETA, *Report on Moldova*, II GRETA(2016)9, para 195; GRETA, *Report on Malta*, II GRETA(2017)3, para 170.
53 GRETA, *Report on Spain*, II GRETA(2018)7, para 281.

ARTICLE 36

GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS

Helmut Sax

1 The Group of experts on action against trafficking in human beings (hereinafter referred to as "GRETA"), shall monitor the implementation of this Convention by the Parties.

2 GRETA shall be composed of a minimum of 10 members and a maximum of 15 members, taking into account a gender and geographical balance, as well as a multi-disciplinary expertise. They shall be elected by the Committee of the Parties for a term of office of 4 years, renewable once, chosen from amongst nationals of the States Parties to this Convention.

3 The election of the members of GRETA shall be based on the following principles:

a they shall be chosen from among persons of high moral character, known for their recognised competence in the fields of Human Rights, assistance and protection of victims and of action against trafficking in human beings or having professional experience in the areas covered by this Convention;

b they shall sit in their individual capacity and shall be independent and impartial in the exercise of their functions and shall be available to carry out their duties in an effective manner;

c no two members of GRETA may be nationals of the same State;

d they should represent the main legal systems.

4 The election procedure of the members of GRETA shall be determined by the Committee of Ministers, after consulting with and obtaining the unanimous consent of the Parties to the Convention, within a period of one year following the entry into force of this Convention. GRETA shall adopt its own rules of procedure.

A. INTRODUCTION

36.01 Empowerment of the holder of human rights and accountability of the duty bearer, mandated to effectively guarantee the rights, constitute the essence of a human rights-based approach, including to action against trafficking in human beings. In order to assess the duty bearers' compliance with standards and their domestic implementation, international human rights treaties have set up mechanisms for independent review of States Parties' performance.

36.02 Since the first discussions regarding the need for a Council of Europe (CoE) Convention on Action against Trafficking in Human Beings, its foundation in human rights and the establishment of an instrument for monitoring its implementation were among its main added value.[1] To date, the CoE Convention remains the only anti-trafficking treaty with an independent monitoring mechanism – neither the UN Palermo Protocol[2] nor any of the existing documents in other regions of the world provide for such an instrument.

36.03 Chapter VII of the CoE Convention against Trafficking on the 'Monitoring mechanism' is comprised of three articles. Article 36 concerns the creation of the 'Group of Experts on Action against Trafficking in Human Beings' as an independent expert body for review and evaluation. Article 37 establishes the Committee of the Parties (CoP) to the Convention, which adds a political peer dimension to the review process. Finally, Article 38 outlines the main features of the evaluation procedure. Taken together, these articles aim to ensure that the Convention standards are transformed into concrete measures of law, policy and practice to guarantee rights to trafficked persons.

36.04 More specifically, Article 36 first establishes GRETA as a legal body and defines its main task of monitoring the implementation of the Convention. Secondly, it sets out the key features of the structure, including composition and expected expertise by its members, as well as the procedure for the election of qualified candidates. Finally, Article 36 empowers GRETA to adopt its own set of rules of procedure.

B. DRAFTING HISTORY

36.05 Already at the very beginning of the negotiating process the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) declared that the new Convention would establish a monitoring mechanism.[3] Achieving such an instrument, however, proved difficult, with serious controversies during the drafting process among State Parties, and in particular in relation to European Union Member States (EU MS). The two main contested issues concerned the questions, 'who' is going to monitor implementation – an independent expert body or state representatives – and how should Convention monitoring work in relation to EU competences also in the anti-trafficking field.

1 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No 197, 16 May 2005, para 36.

2 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000, entered into force 25 December 2003 (thereinafter Palermo Protocol).

3 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, 5.

36.06 The CAHTEH was set with the task to propose a mechanism for the purpose of assessing compliance of State Parties with the Convention standards, in order 'to identify the implementation problems of the future European Convention and to provide technical assistance for their resolution'.[4] During the 1st CAHTEH meeting, delegations discussed various existing monitoring models by the CoE and the United Nations (UN).[5] Main features for the Convention were outlined: it should go 'beyond a mere Conference of the States Parties' and create an 'innovatory, sui generis monitoring system', which 'should be at once flexible, effective and active', 'distinguished by its independence and expertise and cooperation with the States Parties', while also recognising the 'importance of involving civil society in the monitoring process'.[6] Eventually, the draft prepared after the 1st meeting of the CAHTEH[7] proposed a model quite similar to the one adopted by the 1994 CoE Framework Convention for the Protection of National Minorities,[8] with the final word on the assessment by the Committee of Ministers (CM). Consequently, the draft determined that the 'Committee of Ministers of the Council of Europe shall monitor the implementation of this Convention by the Parties', and that it 'shall be assisted […] by a Group of experts on action against trafficking in human beings (hereinafter referred to as "GRETA")'.[9]

36.07 However, during the first reading of the relevant parts of the draft at the CAHTEH's 4th meeting, a majority of delegations were in favour of a model which placed GRETA as an independent expert body into the centre of the implementation assessment. Still, no final agreement about the model could be reached and the following Convention draft text included both options, for further discussion.[10] The CAHTEH also discussed the composition of GRETA, and it became clear that a model would be preferable, which is not based on the number of States Parties, but rather sets a maximum number (within a preliminary range of five/seven/ten to 15 members), while ensuring geographical and gender balance.[11] Various proposals were made concerning also the length of term of members serving GRETA, ranging from two to six years, without reaching final agreement.[12]

36.08 At the 6th CAHTEH meeting, a hearing with civil society organisations took place, which called for a strong independent body consisting of experts in human rights and anti-trafficking.[13] The body should engage with civil society and should be able to adopt its own

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4 Ibid., para 78.

5 Such as in relation to prevention of torture (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT), addressing corruption (Group of States against Corruption, GRECO), economic, social and cultural rights (European Committee of Social Rights), racism (European Commission against Racism and Intolerance, ECRI) and national minorities (Advisory Committee on the Framework Convention for the Protection of National Minorities); at UN level, the instruments available to the UN Committee on the Elimination of Racial Discrimination were considered, CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, para 76.

6 CAHTEH, *1st meeting*, ibid., para 77.

7 CAHTEH, *Revised Preliminary Draft – European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003.

8 Framework Convention for the Protection of National Minorities, ETS No 157, 1 February 1995, entered into force on 1 February 1998.

9 (Then) Art 42(1), CAHTEH(2003)9.

10 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 105.

11 Ibid., para 102.

12 Ibid., para 103.

13 In terms of further qualification of GRETA experts, the NGO Terre des hommes has urged the CAHTEH to include as a criterion 'knowledge or expertise in relation to cases of trafficked children', because 'many of the characteristics of

reports and findings. Moreover, the organisations lobbied for GRETA's competence to receive collective complaints,[14] similar to the mechanism under the European Social Charter.[15] No decision was taken by the CAHTEH on the question of the relationship between GRETA and the CM in the monitoring process. Additionally, 'with an eye to European Community accession to the Convention', the need arose to resolve matters concerning relations between the European Community and the CoE which has also implications for the monitoring model envisaged.[16]

36.09 Initially, it was intended to conclude examination of the draft Convention at the 7th meeting of the CAHTEH. In order to overcome the issue with the European Community, CAHTEH had agreed that the legal services of the European Commission and of the CoE Secretariat would work out proposals for discussion, which, however, were not ready at the 7th meeting.[17] Moreover, there was still no consensus on the question of whether GRETA could assess country situations and publish findings independently from the CM. An indicative vote at the meeting showed a strong majority (19 to four) of delegations in favour of GRETA's independence, and in order to accommodate the concerns of the minority, a new compromise model was proposed. The monitoring process would consist of two steps, first with the expert assessment by GRETA, followed by a second discussion at a newly to be created 'Committee of the Parties',[18] which would consist of representatives of State Parties. Despite this breakthrough in the negotiations concerning the monitoring mechanism, the European Commission delegation entered a general reservation to the monitoring chapter, for further discussion at political level. Consequently, at the end of the 7th meeting, the draft Convention could not be approved by consensus.[19]

36.10 During the 8th meeting, set to discuss the Opinion of the CoE Parliamentary Assembly,[20] controversy deepened after the European Commission had submitted its final proposals, including on the monitoring chapter. There, the European Community advocated for an

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such trafficking and of the action needed to protect trafficked children are different from the action that is appropriate in relation to adults', Terre des Hommes, *Comments by the International Federation Terre des Hommes to the Ad Hoc Committee on Action against Trafficking in Human Beings on the draft Convention of the Council of Europe on Action against Trafficking in Human Beings as adopted by the CAHTEH after the first reading of the text* (4th meeting/11–14 May 2004) (29 June 2004).

14 Joint NGO Statement on the draft European Convention against Trafficking in Human Beings, CAHTEH(2004)17, Addendum X, para 24.

15 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, ETS No 158, 9 November 1995, entered into force 1 July 1998.

16 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 108. The European Commission was concerned that in case of accession to the Convention, the European Community, as a non-CoE member, would nevertheless not be represented in the CM, see also, CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 45. In general, also non-CoE members may become State Parties to the Convention, see Art 42(1) (in relation to the Convention being 'open for signature by the member States of the Council of Europe, the non member States which have participated in its elaboration and the European Community') and Art 43(1) (in relation to later accession).

17 CAHTEH, *7th meeting – Meeting Report*, CAHTEH(2005)RAP7, para 36.

18 See, now CoE Convention against Trafficking, Art 37.

19 CAHTEH, *7th meeting – Meeting Report*, CAHTEH(2005)RAP7, para 83.

20 Parliamentary Assembly, *Opinion No. 253(2005) on the Draft Council of Europe Convention on action against trafficking in human beings*, 26 January 2005.

approach splitting up monitoring competences and 'concerning the provisions of Convention falling within the competence of the European Community, the Commission would be in charge of the monitoring of these provisions instead of the GRETA'.[21] These proposals were strongly criticised by the CoE Secretariat for creating double monitoring standards and 'many delegations and the Parliamentary Assembly voiced deep concern' about these proposals, which would lead to potential inequality of treatment between State Parties. Ultimately, CAHTEH decided 'not to examine the substance of the amendments' but to 'submit them directly to the CM for decision'[22] – where, eventually, agreement on a uniform monitoring mechanism could be reached. Apart from that, the Parliamentary Assembly had supported the NGOs' call for a collective complaint mechanism as part of GRETA's competences, as a way to draw attention to issues not within the scope of the state evaluation process. However, the proposal was not sufficiently supported by government delegations, and, thus, not accepted.[23]

C. ARTICLE IN CONTEXT

36.11 At the core of the monitoring mechanism lies the establishment of GRETA, tasked to 'monitor the implementation of this Convention'. Functions, composition, election of GRETA members and procedures, as provided for in Article 36, should be read together with Article 37 and Article 38, jointly constituting the Convention's 'monitoring mechanism' under chapter VII. Article 37 establishes the 'Committee of the Parties' as a distinct political body of state representatives. As shown in the drafting history, it constitutes a structural compromise, which made it possible to set up GRETA as an independent expert body, while maintaining a political dimension to the Convention monitoring process through the Committee. Apart from that, both bodies are linked through the GRETA election process, which falls under the CoP competence.[24] On the substantive level, Article 38 sets out the main elements of the monitoring procedure.

36.12 From a comparative perspective within the CoE, it should be noted that the establishment of GRETA together with the CoP fulfilled the drafters' promise of creating an original, unique monitoring system *sui generis*.[25] Some CoE evaluation mechanisms[26] consist of bodies with

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21 CAHTEH, *8th meeting (22–25 February 2005) – Final Activity Report*, CAHTEH(2005)RAP8, 16 March 2005, para 93. More specifically, the European Commission had proposed:

> For matters falling within the competence of the European Community, by way of derogation to articles 36 to 37, the Commission of the European Communities shall be responsible to monitor the proper implementation of these provisions of the Convention by the Member States of the European Community who have transferred their competence in these matters to the European Community. To this aim, the Commission of the European Communities establishes, for each evaluation round determined by GRETA, a report concerning the specific provisions selected by GRETA on which the evaluation procedure shall be based. This report and conclusions shall be sent to the Party concerned, to GRETA and to the Committee of the Parties.

See ibid., Appendix III – Draft Convention, footnote 5.

22 Ibid., para 97.

23 Ibid., para 98.

24 CoE Convention against Trafficking, Art 36(2).

25 CAHTEH, *1st meeting – Meeting Report*, CAHTEH(2003)RAP1, para 77.

26 For a classification of the various CoE monitoring mechanisms (excluding GRETA), see Gauthier de Beco, 'Introduction – The role of European human rights monitoring mechanisms', in Gauthier de Beco (ed) *Human Rights Monitoring Mechanisms of the Council of Europe* (Routledge 2011) 6.

state representatives only, such as GRECO in the field of monitoring anti-corruption standards[27] or the 'Lanzarote Committee' tasked with the assessment of the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;[28] others have expert bodies only, like the 'Advisory Committee' on the Framework Convention for the Protection of National Minorities, 'assisting' the CoE Committee of Ministers in 'evaluating the adequacy of the measures taken by the Parties'.[29] More recently, the CoE Convention on preventing and combating violence against women and domestic violence[30] developed a similar monitoring mechanism consisting of an independent expert monitoring body and a political counterpart.

36.13 As discussed, there is no complaint mechanism under the CoE Convention against Trafficking, for individual nor collective complaints. Nonetheless, alleged violations of human rights of trafficked persons may be submitted through individual applications under Article 34 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[31] or through collective complaints according to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.[32]

36.14 As far as EU structures are concerned, there is no comparable anti-trafficking monitoring mechanism or body. From 2003 to 2015, an EU Group of Experts on trafficking in human beings was in place, consisting of 15 independent experts, whose role, however, was limited to advisory functions and support to the European Commission only.[33]

36.15 With respect to anti-trafficking monitoring mechanisms in other regions of the world, reference should be made to efforts by the Association of Southeast Asian Nations (ASEAN). In 2015, ASEAN adopted the Convention against Trafficking in Persons, Especially Women and Children,[34] which in Article 24 speaks of 'Monitoring, Reviewing and Reporting'. However, no independent body is established. Instead, the ASEAN Senior Officials Meeting

27 Established in 1999, with 50 states represented, see <https://www.coe.int/greco/> (accessed 14 August 2020).

28 CETS No 2011, 25 October 2007, entered into force 1 July 2010 (thereinafater Lanzarote Convention). Effectively, the Lanzarote Committee constitutes the Committee of the Parties of the Lanzarote Convention.

29 Art 26 of the Framework Convention for the Protection of National Minorities; the Committee was set up in 1998 and consists of 18 independent experts.

30 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No 210, 11 May 2011, entered into force 1 August 2014, establishing the Group of experts on action against violence against women and domestic violence (GREVIO).

31 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No 5, 4 November 1950, entered into force 3 September 1953 (thereinafter ECHR) 47 ratifications. For a summary of case-law of the European Court of Human Rights in relation to Art 4 ECHR, see European Court of Human Rights, *Guide on Article 4 of the Convention on Human Rights – Prohibition of slavery and forced labour* (CoE/ECtHR 2019); additionally, for further analysis, see the Commentary on Art 4 of the CoE Convention against Trafficking (definition of trafficking).

32 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No 158. For further analysis on the European Social Charter, see further the Commentary on Art 12 of the CoE Convention against Trafficking (access to assistance services).

33 See Art 2 ('Tasks') of the Commission Decision of 10 August 2011 on setting up the Group of Experts on Trafficking in Human Beings and repealing Decision 2007/675/EC (2011/502/EU, OJ L207/14); despite its narrow mandate, the Group drafted influental position papers ('Opinions'), see on this also the Commentary on Art 13 of the CoE Convention against Trafficking.

34 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017 (thereinafter ASEAN Convention against Trafficking in Persons).

on Transnational Crime (SOMTC) 'shall be responsible for promoting, monitoring, reviewing and reporting periodically to the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) on the effective implementation of this Convention', with support from the ASEAN Secretariat.[35] Another inter-governmental institution in the Asian region, the South Asian Association for Regional Cooperation (SAARC), started to address trafficking in human beings in 2002 through its Regional Convention on Combating the Crime of Trafficking in Women and Children for Prostitution.[36] Still, as already indicated by its title, this Convention has a very limited thematic scope only, using an outdated concept of trafficking.[37] Moreover, only a 'Regional Task Force consisting of officials of the Member States' is set up for periodic reviews, but no independent monitoring system.[38]

36.16 No dedicated, comprehensive anti-trafficking treaty exists in the Americas region.[39] The Inter-American Convention on International Traffic in Minors focuses only on the prevention and criminalisation of cross-border child abduction for 'unlawful', exploitative purposes;[40] it does not set up a monitoring mechanism.[41] Nevertheless, trafficking in human beings has been the subject of analysis under the Inter-American human rights system,[42] with particular attention to child trafficking.[43]

35 Ibid., Art 24; for a critical analysis of the Convention, see, for instance, Ranyta Yusran, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment'(2018) 8(1) *Asian Journal of International Law*, 258–92.

36 SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution, 5 January 2002, entered into force 15 November 2005.

37 See Art I ('definitions') of the SAARC Convention: '"Trafficking" means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking'; see also, Anne T Gallagher, *The International Law of Human Trafficking*, (Cambridge University Press 2010), 130.

38 For comments critical of the lack of experts monitoring, see, Rowshan Jahan Farhana, 'SAARC Trafficking Convention and Human Trafficking Crisis In Bangladesh: A Critical Appraisal' (2015) 20(12) *IOSR Journal Of Humanities And Social Science* 67, 69. Gallagher even suggests a possible scenario of 'desuetude', in which the Convention becomes obsolete and ultimately replaced by the Palermo Protocol, Gallagher, *The International Law of Human Trafficking*, 132.

39 The same assessment can be made for the African region.

40 Inter-American Convention on International Traffic in Minors (B-57) 18 March 1994, entered into force 15 August 1997. According to its Art 2(b), '"International traffic in minors" means the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means', with 'unlawful purpose' to include 'among others, prostitution, sexual exploitation, servitude or any other purpose unlawful in either the State of the minor's habitual residence or the State Party where the minor is located' (Art 2(c)), and 'unlawful means' to cover 'among others, kidnaping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons or institution having care of the child, or any other means unlawful in either the State of the minor's habitual residence or the State Party where the minor is located' (Art 2(d)); 'minors' are defined as persons below the age of 18. See also, Helmut Sax, 'Child Trafficking – a Call for Rights-based Integrated Approaches' in R Piotrowicz, C Rijken, B Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2017) 251–60.

41 Ibid.

42 See, Inter-American Commission on Human Rights, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System* (OEA,Ser.L/V/II; Doc.46/15, 2015).

43 See, the Inter-American Cooperation Programme for the Prevention and Eradication of the Sexual Exploitation, Smuggling of and Trafficking in Children, and, OAS Inter-American Children's Institute, *Public Policy Monitoring and Evaluation – An approach to addressing the sexual exploitation of children, based on the National Action Plans of the States in the region* (Issues Note No 2/15, 2015).

36.17 At the international level, the UN Convention against Transnational Organized Crime (UNTOC),[44] as the parent Convention to the Palermo Protocol,[45] provides for the establishment of a 'Conference of the Parties'.[46] This body has the objective to 'improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of this Convention'.[47] Amongst its tasks, it is expected to develop mechanisms for 'reviewing periodically the implementation of' UNTOC and 'making recommendations to improve this Convention and its implementation',[48] including through 'supplemental review mechanisms'.[49] However, due to lack of agreement among the members of the CoP, no such instrument has been set up for many years.[50] Only in 2018, a political breakthrough was achieved by the Conference, when it adopted resolution 9/1[51] establishing a review mechanism for the UNTOC and its Protocols, including the Palermo Protocol. Consequently, an open-ended intergovernmental expert group was mandated with preparing the necessary operational tools (self-assessment questionnaires, guidelines for country reviews and lists of observations).[52] The mechanism builds on a complex State Party peer review process, organised in thematic clusters (criminalisation; prevention and protection; law enforcement and judicial system; international cooperation) along a multi-year work plan for its implementation. General thematic reviews are conducted in the plenary, complemented by specific country reviews. They are based on state self-assessment questionnaires and desk reviews by two other State Parties: however, no separate independent body for review has been established. Moreover, the resolution assigns only limited possibilities for engagement with civil society organisations through a 'constructive dialogue'.[53]

36.18 Despite the lack of an independent expert monitoring body dedicated specifically to trafficking in human beings at the international level, trafficking has increasingly become the subject of discussion and interpretation at UN human rights treaty bodies.[54] Article 6 of the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[55]

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44 UN Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003.

45 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2237 UNTS 319, 15 November 2000, entered into force 25 December 2003.

46 UNTOC, Art 32.

47 Ibid., Art 32(1).

48 Ibid., Art 32(3)(d)(e).

49 Ibid., Art 32(4).

50 On the implications of an only 'very loose oversight' mechanism through a State Parties working group, see Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 *Anti-Trafficking Review*, 22.

51 Resolution 9/1: Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto.

52 For further information see: <https://www.unodc.org/unodc/en/treaties/CTOC/open-ended-intergovernmental-expert-group-established-by-res-9_1.html> accessed 6 February 2020.

53 Resolution 9/1, para 53. For an early critique of the process and its outcomes, see, Global Initiative against Transnational Organized Crime/UN-TOC Watch, 'UNTOC review mechanism: One year to go', <https://globalinitiative.net/untoc-review-mechanism-one-year-to-go/> accessed 6 February 2020.

54 For an overview, see Julia Planitzer, *The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings* (NWV 2014) 37–41.

55 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979, entered into force 3 September 1981.

requires State Parties to 'take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women'.[56] The CEDAW Committee is set up as an independent expert body and has the competence to engage in a reporting procedure with States Parties, but may also hear individual complaints and issue General Recommendations for interpretative guidance. In 2018, a process was started to prepare a 'Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration'.[57] As far as human rights of children in the context of trafficking is concerned, the 1989 UN Convention on the Rights of the Child (CRC) sets standards to address protection of children from all forms of exploitation as well as to prevent the 'sale of or traffic in children for any purpose or in any form' (Art 35),[58] complemented by an Optional Protocol on the sale of children, child prostitution and child pornography.[59] The CRC has established an independent monitoring body with similar competences as in the case of CEDAW. The CRC Committee regularly issues General Comments on the interpretation of child rights standards; several of them have addressed child trafficking issues (children in situations of vulnerability, in migration context, in street situations; situation of girls, children with disabilities).[60]

D. ISSUES OF INTERPRETATION

1. Monitoring and human rights

36.19 Once the CoE Convention against Trafficking had been adopted in 2005, expectations were high, particularly concerning the monitoring mechanism.[61] The 'monitoring machinery to ensure that Parties implement its provisions effectively' was described as one of its main added values[62] and 'undoubtedly one of its main strengths'.[63] As observed by scholars, 'trafficking and the forms of exploitation with which it is most commonly associated have traditionally not been served well by the international human rights system',[64] resulting in the first modern international anti-trafficking instrument, the Palermo Protocol, being elaborated in a criminal justice context, and not under a UN human rights mandate. Moreover, experts have long noted

56 For further interpretation, see Janie Chuang, 'Article 6' in Marsha A Freeman, Christine Chinkin, and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press 2012).

57 See the CEDAW Committee: <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx> accessed 6 February 2020.

58 Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, entered into force 2 September 1990.

59 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2171 UNTS 227, 25 May 2000, entered into force 18 January 2002. On the difference between child trafficking and sale of children, see also the Commentary on Art 4 of the CoE Convention against Trafficking, and Sax, 251–60.

60 See, UN CRC Committee's General Comments No. 22 and 23 (on migration), No. 6 (on separated children) and No. 13 (on violence). For further interpretation, see Wouter Vandenhole, Gamze Erdem Türkelli and Sara Lembrechts (eds), *Children's Rights – A Commentary on the Convention on the Rights of the Child and its Protocols* (Edward Elgar 2019).

61 See, Gallagher, *The International Law of Human Trafficking*, 476: 'Certainly the architecture, as laid down by the Convention and fleshed out by GRETA and the Committee of Parties, appears sufficiently robust to support real and effective monitoring of State Party performance.'

62 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No 197, para 36.

63 Ibid., para 354.

64 Gallagher, *The International Law of Human Trafficking*, 477.

the strong need for more robust research and relevant data for monitoring and impact assessment to inform evidence-based anti-trafficking policies,[65] and, ultimately, to ensure accountability of duty bearers.[66]

36.20 The CoE Convention against Trafficking addresses these concerns by declaring trafficking a human rights issue, advocating for a victim-centred approach and setting up a mechanism to assess compliance of State Parties with their obligations. The drafting history of Article 36 was marked by controversy, but in the end, negotiations led to an original dual-structure monitoring system which intertwines technical expertise with political strength. Still, particular attention has been paid to GRETA, since so far, no other dedicated independent anti-trafficking monitoring body has been established at regional or international level. Combined with the fact that the Convention's trafficking definition mirrors the international Palermo Protocol's definition, and its openness to accession by non-CoE member states (Art 43), the potential impact of GRETA's work may extend beyond the European regional context. On a procedural level it is remarkable to what extent State Parties have complied with their reporting obligations: delays in GRETA's work schedule due to late submission of replies to the questionnaire or due to difficulties in preparing country visits have been rare (contrary to experiences of UN human rights treaty bodies, for instance). On the substantive level, in terms of interpretation of the Convention's provisions, GRETA has already started its third round of evaluation of State Parties. Still, it has not yet issued general interpretative guidance documents, such as General Comments by UN bodies, or 'Thematic Commentaries' by the Advisory Committee of the CoE Framework Convention for the Protection of National Minorities. At the same time, the thematic sections of GRETA's General Reports of activities have become an important source for understanding the CoE Convention's against Trafficking provisions and GRETA's monitoring approach.

2. Functions of GRETA

36.21 According to Article 36, GRETA is established to 'monitor the implementation of this Convention'. There is no indication for any limitation in terms of the scope of this task, consequently, the mandate of GRETA covers the entire Convention standards, from its fundamental principles to its relations with other international instruments. The monitoring procedure is outlined in Article 38 of the Convention, which includes a regular (four-year) evaluation cycle for all States Parties to the Convention. Further details on the procedure are laid out in GRETA's Rules of procedure for evaluating implementation of the CoE Convention on Action against Trafficking in Human Beings by the parties.[67]

65 See Sallie Yea, 'The Politics of Evidence, Data and Research in Anti-trafficking Work' (2017) 8 *Anti-Trafficking Review Special Issue*, 1–13. See also, Benjamin Harkins, 'Constraints to a Robust Evidence Base for Anti-Trafficking Interventions' (2017) 8 *Anti-Trafficking Review*, 113–30; Harkins identifies nine constraining factors linked to poor monitoring and evaluation commitment and capacities.

66 See, Anne Gallagher and Rebecca Surtees, 'Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who decides—and how?' (2012) 1 *Anti-Trafficking Review*, 10–30.

67 GRETA, Rules of procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties, THB-GRETA(2014)52, adopted on 17 June 2009 and amended on 21 November 2014; for further information see the Commentary on Art 38 of the CoE Convention against Trafficking.

36.22 GRETA has also adopted Internal rules of procedure, and according to its Rule 6, GRETA members shall elect a President as well as a First and Second Vice-President (for a two-year term); the President shall 'direct the work of GRETA' and chair its meetings, as well as further tasks defined in the rules of procedure. The President also regularly provides updates on GRETA's work at meetings of the Committee of the Parties. The President and his/her two Vice-Presidents together form GRETA's Bureau (Rule 8); in practice, they are joined by the Executive Secretary of the Convention as the head of the GRETA Secretariat. Over the years, the Bureau (including the Executive Secretary) has started to sometimes meet separately for meeting preparation and pending issues. In carrying out its tasks, GRETA receives support from the CoE Secretariat,[68] which falls under the Directorate General of Democracy/ Directorate of Human Dignity, Equality and Governance. In addition, the Secretariat also engages in cooperation activities with State Parties, such as multi-stakeholder round tables at the national level, which build on the findings from GRETA and the recommendations from the CoP, and which provide an important avenue for the follow-up dialogue with countries.[69]

36.23 GRETA regularly holds three plenary meetings per year (typically lasting for five days), at CoE headquarters in Strasbourg. However, Rule 13 does not prescribe a fixed number of meetings, and GRETA has arranged further meetings, for instance, for the preparation of a new questionnaire.[70] In addition, GRETA has set up temporary internal working groups for specific purposes, such as developing methodologies for its country assessment.[71] In principle, all meetings of GRETA are held in closed sessions, unless GRETA decides otherwise, and all meeting documents are considered confidential. Formally, decisions are taken by a majority of voting members present,[72] while, in practice, voting rarely happens: GRETA reports, for instance, are typically adopted by consensus.

36.24 GRETA engages regularly with other bodies of the Council of Europe, other international organisations as well as with civil society active in the field of trafficking of human beings.[73] Repeatedly, GRETA has commented, for instance, on draft documents prepared by the CoE Parliamentary Assembly and the Committee of Ministers. Furthermore, during each plenary session in Strasbourg, it usually meets with representatives of other actors, including judges from the European Court of Human Rights, and other monitoring bodies such as the European Committee of Social Rights, the Lanzarote Committee and GRECO. Discussions on relevant trafficking issues have also been held with UN representatives, such as the UN Special Rapporteur on trafficking in persons, especially women and children, representatives from UNODC, UNHCR and UNICEF, as well as from the European Union, including the Anti-Trafficking Coordinator, and the OSCE. GRETA has repeatedly met NGOs, which

68 GRETA, Internal rules of procedure of the Group of Experts on Action against Trafficking in Human Beings, THB-GRETA(2009)1, 24 February 2009 (hereinafter Internal rules of procedure), Rule 10. For its current staff composition, see GRETA's General Reports, such as GRETA, *8th General Report on GRETA's Activities*, May 2019, Appendix 4.

69 For an overview, see GRETA, *8th General Report*, para 24.

70 See GRETA, *4th General Report on GRETA's activities*, March 2015, 12.

71 See, for instance, in preparation for the third evaluation round, GRETA, *8th General Report on GRETA's activities*, para. 19.

72 Internal rules of procedure, Rule 23.

73 For an overview, see GRETA's annual General Reports on its activities.

provided feedback and suggestions to GRETA's monitoring work, for instance, in preparation for the evaluation round's questionnaires.[74]

36.25 Article 41 of the CoE Convention against Trafficking assigns another function to GRETA: if any State Party to the Convention proposes an amendment to the treaty, such proposal must be forwarded to GRETA for its opinion, which opinion, then, has to be taken into account also by the Committee of Ministers when deciding on the proposed amendment (Art 41, paras 2 and 3).

3. GRETA composition and expertise

36.26 The Convention states that GRETA shall consist of 'a minimum of ten members and a maximum of 15 members'.[75] GRETA members are elected for four years of terms of office, with the possibility for re-election once (Art 36(2)).[76] In December 2008, the first elections for GRETA membership took place, in which 13 candidates were elected by the CoP. Two years later, in December 2010, two more members were elected, bringing the group to its maximum of 15 members.[77] The composition of the group shall reflect a gender and geographical balance as well as ensure multi-disciplinary expertise and representation of the main legal systems.[78]

36.27 As far as individual qualifications are concerned, Article 36 lists several criteria for GRETA membership, including, above all: 'independence and expertise'.[79] In more concrete terms, members 'shall be chosen from among persons of high moral character, known for their recognised competence in the fields of human rights, assistance and protection of victims and of action against trafficking in human beings or having professional experience in the areas covered by this Convention'.[80] Most importantly, 'they shall sit in their individual capacity and shall be independent and impartial in the exercise of their functions and shall be available to carry out their duties in an effective manner'.[81] In this regard, Rule 3 of the CoP Rules on the election procedure of GRETA members provides for further clarifications concerning eventual conflicts of interest: first, members 'shall take no instructions from any government, organisation or person on how to perform their duties as members of GRETA'; secondly, while GRETA members may be public officials, they should not have leading decision-making

74 See, GRETA, *4th General Report on GRETA's activities*, 9 and *8th General Report on GRETA's activities*, para 80.

75 CoE Convention against Trafficking, Art 36(2).

76 CoE, Rules on the election procedure of the members of the Group of Experts on Action against Trafficking in Human Beings (GRETA), Resolution CM/Res(2013)28, adopted by the CoE Committee of Ministers on 24 October 2013, Rule 15.

77 GRETA, *1st General Report on GRETA's Activities*, September 2011, para 10; on the maximum number, see also Rule 6 of the Rules on the election procedure.

78 CoE Convention against Trafficking, Art 36(2) and (3)(d). For a current overview of the GRETA composition and individual member's expertise, see GRETA's website <https://www.coe.int/en/web/anti-human-trafficking/composition> accessed 6 February 2020. In 2020, GRETA consisted of eight male and seven female members from all geographical sub-regions in Europe, including members with common law background.

79 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No 197, para 357.

80 CoE Convention against Trafficking, Art 36(3)(a). By way of example, in 2020, the composition of GRETA reflected expertise in various academic disciplines, with government and civil society background, from police and the justice sector, and specialists on labour exploitation, child trafficking, gender issues, migration, internet and communication technologies.

81 CoE Convention against Trafficking, Art 36(3)(b).

powers on anti-trafficking policies.[82] In the context of GRETA country evaluation visits, the rules of procedure for evaluating implementation of the Convention preclude participation of a GRETA member in the visit to a country of his/her own nationality. Furthermore, GRETA members need to commit sufficient resources for the carrying out of their mandate.[83] Each State Party has the right to nominate up to three candidates, but there might be only one GRETA member per State Party nationality.[84]

4. Procedure for GRETA elections

36.28 GRETA members are elected by the CoP, following a process defined by the CoP's parent body, the CoE Committee of Ministers (Art 36(4)).[85] Consequently, the CM's Rules on the election procedure of the members of GRETA of 2013[86] spell out the main elements of the election; this includes required qualifications of the candidates and eligibility criteria, nomination and the voting process as well as provisions on maintaining a balanced composition of GRETA.

36.29 When the term of office of GRETA members expires or otherwise a seat is vacant, the GRETA Secretariat would make a public announcement to invite State Parties to submit nominations. Rule 11 of the Rules on the election procedure requires for each State Party to 'ensure that the national selection procedure leading to the nomination of candidates for GRETA is in accordance with published national guidelines or otherwise transparent and designed to lead to the nomination of the most qualified candidates'. Furthermore, nominations may include a maximum of three candidates, with diverse qualifications and consideration given to gender balance.[87] Submissions must reach the CoE Secretariat two months before the election date, at the latest.[88]

36.30 According to Rule 14, voting takes place in rounds, and each member of the CoP has the same number of votes per round as there are vacant seats in GRETA. In cases where a country has nominated more than one candidate, voting is possible only for one national of that country. Furthermore, to ensure a balanced, multidisciplinary composition of GRETA, Rule 13 sets out guidance for voting considerations: accordingly, priority should be given to experts with

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82 CoE, Rules on the election procedure, Rule 3, third sentence:

> The independence and impartiality of GRETA members shall not be put into question by the mere fact that they are civil servants or otherwise employed in the public sector. However, individuals holding decision-making positions as regards defining and/or implementing policies in the field of action against trafficking in human beings in government or in any other organisation or entity, which may give rise to a conflict of interest with the responsibilities inherent to membership of GRETA, shall not be eligible.

For instance, GRETA membership and function as contact person for a State Party have been considered incompatible, see the discussion at Committee of the Parties, *23rd meeting (9 November 2018) – Meeting Report*, THB-CP (2018)RAP23, 19 March 2019, para. 78.

83 In terms of time and capacity for participation in meetings, preparation for country visits etc, see Rule 4 of the Rules on the election procedure.

84 CoE Convention against Trafficking, Art 36(3)(c); Rules 5, 8 and 9 of the Rules on the election procedure.

85 See also Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, para 358.

86 Council of Europe, Rules on the election procedure of the members of the Group of Experts on Action against Trafficking in Human Beings (GRETA), Resolution CM/Res(2013)28.

87 Rules on the election procedure, Rules 6, 9 and 10.

88 Ibid., Rule 12.

expertise currently lacking at GRETA, experts from geographical areas or from legal systems not represented, and experts from the under-represented sex. Up to three candidates receiving most votes per round (and at least a majority of votes cast) are elected as GRETA members.[89] This procedure is repeated until all empty seats are filled. In the case of the 2018 elections, for instance, it took the CoP a total of 12 rounds of voting to fill the seven vacant seats; initially, 24 candidates from 16 different State Parties competed for that election.[90] It has become established practice that NGOs send letters to the CoP Parties to declare their support for certain candidates.[91]

36.31 The term of office of GRETA membership is set at four years; however, as mentioned above, at the first GRETA election in 2008, only 13 members were elected, followed by two more members in 2010. As a consequence, this led to a situation alternating between elections of only two members or of almost the entire group (13 out of 15 members), with potential challenges for GRETA to maintain its operational capacity. In order to achieve a more balanced renewal of the GRETA composition during elections, the Committee amended its Rules on the election procedure in 2013. This move – which later proved quite controversial[92] – allowed for an exceptional drawing of lots at the elections in 2016 in order to determine (five) GRETA members just elected to have their terms of office terminated already after two years (instead of four years).[93] As a result, from that moment on, only about a half of GRETA seats could become vacant at a time.

5. GRETA's Rules of Procedure

36.32 Underlining GRETA's status as an independent body, Article 36 declares that 'GRETA shall adopt its own rules of procedure'. As referred to already above, GRETA has made use of this competence in several ways. At its first meeting in February 2009, GRETA adopted its Internal Rules of Procedure.[94] This document addresses the exercise of functions by GRETA members, main organs (Presidents, Bureau) and the role of the Secretariat, internal working methods (seat of GRETA in Strasbourg, meetings, decision-making, annual reporting) and relations with the CoP and other CoE bodies. The main aspects of these Rules have been the setup of the Bureau for steering and effective decision-making, working methods to balance confidentiality of information with transparency and regular meetings between GRETA and the CoP as the two pillars of the monitoring mechanism.[95]

89 Ibid., Rule 14.

90 Committee of the Parties, *23rd meeting (9 November 2018) – Meeting Report*, THB-CP(2018)RAP23, 19 March 2017, para 71. It should be noted that candidates are not present at the Committee meeting.

91 Ibid., para 81.

92 As it turned out, all five persons drawn by lot in 2016 to stay for a two-year term only were female GRETA members, which led to internal discussions about the appropriateness of the measure for maintaining a balanced GRETA composition, see, Committee of the Parties, *19th meeting (4 November 2016) – Meeting Report*, THB-CP(2016)RAP19, 9 February 2017, and, GRETA, *7th General Report on GRETA's Activities*, March 2017, para. 23.

93 Rules of Procedure on the election procedure, Rule 15(2).

94 GRETA, Internal rules of procedure of the Group of Experts on Action against Trafficking in Human Beings, THB-GRETA(2009)1, 24 February 2009.

95 GRETA, *1st General Report*, para 14.

36.33 The second meeting of GRETA was used for the adoption of its separate rules of procedure for the actual evaluation process and the external dimension of GRETA's work.[96] Building on the provisions of the treaty text in Article 38 of the CoE Convention against Trafficking itself, Rules contain further details, such as setting the length of each evaluation round at four years,[97] outlining the composition of delegations for country visits[98] or regulating GRETA's relations with civil society actors.[99] In November 2014, GRETA revised the Rules on the evaluation process: previously, state replies to GRETA's questionnaire were kept confidential, unless the state agreed to its publication. Under the revised rules, the opposite became the default standard, thus, replies are generally public documents, except where the state requests confidentiality.[100] Information from civil society, however, remains confidential (unless otherwise declared) in order to guarantee that 'civil society representatives are able to speak freely' to GRETA.[101] A major development in regard to GRETA's Rules of procedure for evaluation, finally, was the adoption of Rule 7, allowing GRETA to issue 'urgent requests for information', eventually followed up through an Ad hoc evaluation visit, outside the regular GRETA evaluation cycle.[102] Invoking this 'urgent procedure' is linked to certain conditions, including the receipt of 'reliable information indicating a situation where problems require immediate attention to prevent or limit the scale or number of serious violations of the Convention'.[103] In order to maintain flexibility and respond quickly, the GRETA Bureau may decide on its application even outside GRETA plenary meetings 'in case of urgency'.[104]

96 GRETA, Rules of procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties, initially adopted on 17 June 2009, later amended on 21 November 2014 (amended rules entry into force on 1 January 2015) (thereinafter GRETA Rules of procedure for evaluation).

97 GRETA Rules of procedure for evaluation, Rule 1.

98 Ibid., Rule 9.

99 Ibid., Rule 8; for further discussion of this Rules, see the Commentary on Art 38 of the CoE Convention against Trafficking.

100 GRETA, *5th General Report on GRETA's Activities*, February 2016, para 8.

101 Ibid.

102 Ibid., para 9.

103 GRETA Rules of procedure for evaluation, Rule 7(1).

104 Ibid., Rule 7(4); so far, this procedure has been triggered three times, all in connection with lack of safeguards and protection for migrants as possible victims of trafficking: in relation to Greece (written urgent request for information only, on situation in 'hotspots'/reception centers; no country visit), GRETA, *Report on Greece*, I GRETA(2017)27, para 4; in relation to Italy (on forced returns of migrants, including visit to 'hotspot' area on Sicily), GRETA, *Report on Italy under Rule 7*, GRETA(2016)29; in relation to Hungary (including visit to border 'transit zones'), GRETA, *Report on Hungary under Rule 7*, GRETA(2018)13. For further information on this procedure, see the Commentary on Art 38 of the CoE Convention against Trafficking.

ARTICLE 37

COMMITTEE OF THE PARTIES

Helmut Sax

1 The Committee of the Parties shall be composed of the representatives on the Committee of Ministers of the Council of Europe of the member States Parties to the Convention and representatives of the Parties to the Convention, which are not members of the Council of Europe.

2 The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention in order to elect the members of GRETA. It shall subsequently meet whenever one-third of the Parties, the President of GRETA or the Secretary General so requests.

3 The Committee of the Parties shall adopt its own rules of procedure.

A. INTRODUCTION

The inclusion of Article 37, establishing the 'Committee of the Parties', was a rather late development in the negotiations leading to the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings.[1] The Committee eventually became the second pillar of the Convention's monitoring mechanism, next to the CoE Group of Experts on Action against Trafficking in Human Beings (GRETA), set up in Article 36 of the CoE Convention against Trafficking. Together, these two bodies seek to ensure effective monitoring of anti-trafficking standards through a combination of technical expertise by an independent body (GRETA) and of political commitment for following up on these assessments by state representatives (Committee of the Parties). **37.01**

1 Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter Convention or CoE Convention against Trafficking).

37.02 The Committee of the Parties (CoP) is comprised of all State Parties to the CoE Convention against Trafficking, which includes both CoE Member States and non-members,[2] as the Convention is open to signature and accession by CoE Non-member States as well.[3]

37.03 Apart from its specific role in the monitoring process, the CoP also regards itself as an international 'observatory on trafficking in human beings'[4] in order to support international cooperation among anti-trafficking stakeholders, as requested by Article 32 of the Convention.

B. DRAFTING HISTORY

37.04 Early drafts of the CoE Convention against Trafficking did not specifically mention the CoP. Instead, discussion at the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) initially centred around the question of which body should bear primary responsibility for the monitoring of the Convention: According to the Draft Convention from November 2003,[5] prepared after the first meeting of the CAHTEH, the 'Committee of Ministers of the Council of Europe shall monitor the implementation of this Convention by the Parties'. They would merely 'be assisted in carrying out' the monitoring procedure by an independent expert body called 'Group of experts on action against trafficking in human beings'.[6] In the ensuing debate, several delegations, however, were in favour of GRETA taking the lead regarding monitoring. Also, non-governmental organisations (NGOs) lobbied for a strong independent monitoring body.[7]

37.05 In order to break the political stalemate, at the seventh and almost final meeting of the CAHTEH, agreement was reached on a compromise setup of the monitoring machinery: the first pillar would be GRETA, consisting of 15 independent experts, explicitly tasked with monitoring compliance of the Convention by State Parties (Art 36 of the CoE Convention against Trafficking). And, for the second pillar, a new provision was introduced, providing for the CoP (Art 37 of the CoE Convention against Trafficking), comprised of as many state representatives as there are State Parties to the Convention. According to Article 38 of the CoE Convention against Trafficking, based on GRETA's findings, they should adopt recommendations at peer level to the State Parties under review, and, thus, provide for a strong 'political dialogue between the Parties' and follow-up to GRETA.[8]

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2 Such as Belarus; for an updated list of ratifications, <https://www.coe.int/en/web/anti-human-trafficking/about-the-convention> accessed 4 February 2020.

3 See, CoE Convention against Trafficking, Arts 42 and 43.

4 Committee of the Parties, Rules of Procedure of the Committee of the Parties, adopted on 5 December 2008 and revised on 18 October 2019, CP(2020)01, 20 January 2020 (thereinafter CoP Rules of Procedure) Rule 1.c.

5 CAHTEH, *Revised Preliminary Draft of the European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 18.

6 Then Art 42 ('Implementation of the Convention') of CAHTEH(2003)9. As far as inclusion of non-CoE State Parties at the political level was concerned, then Art 44 only provided for an invitation by the CM to 'a representative from each non-member Party to attend the meetings of the Committee of Ministers whenever it exercises its functions under this Convention, with the right to participate in the adoption of decisions'. For a more detailed account of the debate, see the Commentary on Art 36 of the CoE Convention against Trafficking.

7 CAHTEH, *Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Joint statement of 127 Non-Governmental Organisations*, CAHTEH(2004)17 Addendum X, para 24.

8 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 39.

37.06 However, controversy continued over a connected issue, in respect to relations between CoE Convention against Trafficking standards and relevant European Communities legislation,[9] as far as monitoring is concerned. The European Community proposed to set up its own, separate monitoring process for 'matters falling within the competence of the European Community' – for this purpose:

> the Commission of the European Communities shall be responsible to monitor the proper implementation of these provisions of the Convention by the Member States of the European Community who have transferred their competence in these matters to the European Community, which would include a separate Commission report and conclusions, then, sent to the respective State Party, to GRETA and to the Committee of the Parties.[10]

And, as far as voting in the CoP is concerned, the European Commission would also vote on behalf of the European Community member states that are also State Parties to the CoE Convention against Trafficking.[11] These proposals could have led to a parallel monitoring structure and were met with strong criticism.[12] Since no agreement could be reached at the CAHTEH, only a political decision by the Committee of Ministers (CM) could solve the crisis, ultimately rejecting such double monitoring structure and procedure.[13]

C. ARTICLE IN CONTEXT

37.07 The establishment of a distinct mechanism monitoring compliance of State Parties with standards set by the CoE Convention against Trafficking is considered as one of the main achievements of the Convention,[14] and commentators have noted its potential for strengthened anti-trafficking accountability.[15] While most of the attention is usually drawn to GRETA as the technical, analytical body, comprised of individuals sitting in their expert

9 See, Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA) (OJ L 203/1) and Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (thereinafter Dir 2004/81/EC) (OJ L 261/19).

10 See CAHTEH, *8th Meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, 60, footnote 5 (in relation to the monitoring procedure).

11 See ibid., 59, footnote 3 (in relation to the CoP). At that time, there was political consideration given to the possibility of the European Communities becoming a Party to the Convention, see CAHTEH, *8th Meeting – Meeting Report*, CAHTEH(2005)RAP8, paras 87–97.

12 Ibid., para 93–97. See also the strong critical words by the Parliamentary Assembly on the CAHTEH draft Convention and the controversial relationship between the CoE and the European Union, in its *Recommendation No. 1695 (2005) Draft Council of Europe Convention on action against trafficking in human beings*, 18 March 2005, para 9: 'The Assembly considers that the way in which this convention has been drafted within CAHTEH raises questions regarding the competences and procedures of Council of Europe treaty-making.'

13 Final decision taken at the 925th meeting of the Committee of the Ministers' Deputies on 4 May 2005, CM/Del/Dec(2005)925/4.5 (10 May 2005).

14 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 36.

15 See Anne T Gallagher, *The International Law on Human Trafficking* (Cambridge University Press 2010) 476; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered* (Cambridge 2017) 13; Julia Planitzer, 'GRETA's First Years of Work: Review of the monitoring of implementation of the Council of Europe Convention on Action against Trafficking in Human Beings' (2012)1 *Anti-Trafficking Review* 33.

capacity,[16] the role and importance of the political CoP for the functioning of the monitoring process should not be underestimated.[17] Linked together through a procedure as described in Article 38 which designates tasks to both bodies at different stages of the evaluation process, the CoP has a particular role to play to ensure follow-up measures based on the analysis by GRETA. At the same time, as the body responsible for the election of GRETA members, the CoP is trusted with significant power in ensuring a multi-disciplinary and balanced composition of GRETA.[18]

37.08 In structural, organisational terms, the CoP might be compared to the monitoring structure under the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.[19] According to Article 39 of the Lanzarote Convention, another 'Committee of the Parties' is established, with provisions in terms of composition and meetings worded almost identically to Article 37 of the CoE Convention against Trafficking. Consequently, that 'Lanzarote Committee' also consists of representatives from all State Parties to that Convention, being CoE members or not. Still, several differences should be noted: Article 41 of the Lanzarote Convention explicitly mandates its Committee with the task to 'monitor the implementation of this Convention' – in the absence of a dedicated independent body under that Convention. It also describes the Lanzarote Committee's function to identify any implementation problems, express opinions on any relevant subject and to act as a facilitator for the 'collection, analysis and exchange of information, experience and good practice between States' for the prevention and combatting of sexual exploitation and sexual abuse of children.[20]

37.09 Following from this, the Lanzarote Committee adopted Rules of Procedure,[21] which set criteria both for its membership and evaluation procedure. According to Rule 2.1., State Parties should 'nominate – as their representatives – experts of the highest possible rank in the field of children's rights, in particular in the protection of children against sexual exploitation and sexual abuse'. On the procedural side, in its Rules of Procedure, the Lanzarote Committee has also decided to work in evaluation rounds and through questionnaires addressed to State Parties. Published reports based on the responses aim to provide a general overview of the legal, institutional and policy framework, covering specific thematic issue (such as 'protection of children against sexual abuse in the circle of trust'), or may be issued as special reports on

16 CoE Convention against Trafficking, Art 36(3)(b).

17 On the important role of political monitoring mechanisms in the CoE context in general (without discussing the CoE Anti-Trafficking Convention), see Gauthier de Beco, 'Introduction – The role of European human rights monitoring mechanisms', in Gauthier de Beco (ed), *Human Rights Monitoring Mechanisms of the Council of Europe* (Routledge 2011) 4.

18 See, CoE, Rules on the election procedure of the members of the Group of Experts on Action against Trafficking in Human Beings (GRETA), Resolution CM/Res(2013)28, adopted by the CoE Committee of Ministers on 24 October 2013, Rule 13, which lists certain criteria for priority-setting during the election process (missing existing competences amongst GRETA members, geographical balance, legal traditions, gender balance).

19 CETS No 2011, 25 October 2007, entered into force 1 July 2010 (thereinafter Lanzarote Convention).

20 Lanzarote Convention, Art 41(2). Or, in the words of its Explanatory Report, as a 'centre' and 'clearing house' for such information, Council of Europe, *Explanatory Report – CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, CETS No. 201, paras 270 and 271.

21 Lanzarote Committee/Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse – Rules of Procedure, adopted by the Committee at its 2nd meeting (Strasbourg, 29–30 March 2012), and revised by the Committee at its 14th meeting (Strasbourg, 15–17 March 2016).

urgent situations (Rule 28).[22] After all, while the Lanzarote Committee and the CoP under the CoE Convention against Trafficking may structurally be similar, their roles and working methods differ significantly and conceptually, since the Lanzarote mechanism lacks a comparable complementary independent expert body similar to GRETA.

D. ISSUES OF INTERPRETATION

1. Functions of the Committee of the Parties

37.10 Article 37 forms part of chapter VII of the CoE Convention against Trafficking, establishing its monitoring mechanism. As the political body consisting of state representatives, it is placed between Article 36 on GRETA, and Article 38 on the evaluation procedure, involving both structures. The text of Article 37 itself does not directly specify the functions of the CoP.[23] Still, Article 37(2) of the CoE Convention against Trafficking implicitly refers to one of its essential functions, namely, the election of members of GRETA, which is stated in Article 36(2) of the Convention.[24]

37.11 Next to that, the CoP plays an essential role in the country evaluation process by adopting recommendations to each State Party 'concerning the measures to be taken by that party to implement the conclusions of GRETA' and for the promotion of cooperation with that State Party 'for the proper implementation of the Convention'.[25] Article 38(7) of the CoE Convention against Trafficking also provides for the possibility of the CoP to designate a date to the country concerned on which the CoP expects further information regarding the implementation of its recommendation. The CoP has consistently made use of this competence. During the first evaluation round, after adopting the recommendations, governments were given a two-year period for reporting back on measures taken to comply with the recommendations, based on GRETA's findings. A modified approach was taken by the CoP in 2015, starting with the second evaluation round. Since then, more focused information on follow-up to the recommendations about 'issues for immediate action identified by GRETA in its second evaluation report' is requested, within a deadline of one year.[26] In order to maintain further dialogue with the State Party until the next evaluation round, follow-up cooperation activities such as the organisation of multi-stakeholder national round tables have been implemented.[27]

22 The Committee has published such special reports under two 'urgent monitoring rounds', on 'Protecting children affected by the refugee crisis from sexual exploitation and sexual abuse' (March 2017), and on a Committee delegation visit to the 'transit zones' at the border of Hungary (July 2017), see the Lanzarote Committee: <https://www.coe.int/en/web/children/monitoring1> accessed 4 February 2020.

23 On an operational level, see the overview of functions in CoP Rules of Procedure, Rule 1.

24 For further information, see also the Commentary on Art 36 of the CoE Convention against Trafficking.

25 CoE Convention against Trafficking, Art 38(7).

26 See Committee of the Parties, *17th meeting of the Committee of the Parties (30 November 2015) – Meeting Report*, THB-CP(2015)RAP17 (8 February 2016), para 12. For further details on the involvement of the CoP in the evaluation process, see on this also the Commentary on Art 38 of the CoE Convention against Trafficking.

27 CoP, *17th meeting of the Committee of the Parties- Meeting Report*, THB-CP(2015)RAP17, para 23.

37.12 Finally, apart from its monitoring role, and according to the Convention's Explanatory Report, the CoP is intended to 'ensure equal participation of all the Parties alike in the decision-making process and in the monitoring procedure of the Convention', and to strengthen cooperation between the Parties as well as between the Committee and GRETA.[28] In this regard, the Committee's Rules of Procedure speak of the Committee to 'function as an international observatory on the prevention and combating of trafficking in human beings and the protection of the human rights of the victims of trafficking'.[29]

37.13 Both its functions in the monitoring process as well as in providing a platform of exchange for governments and anti-trafficking stakeholders have helped to install the CoP as an important bridging structure between external critical assessment by GRETA and peer-level political push for State Parties to follow-up and implement the recommendations. Such a role is particularly necessary to keep the political momentum for anti-trafficking efforts between the regular four-year country assessments by GRETA. An indication for the successful establishment of political dialogue at the Committee level may be seen in the – so far – overall strong compliance by State Parties with their reporting obligations under the Convention, such as replying to the GRETA questionnaire or reporting on COP recommendations – to a large extent within the deadlines set by the bodies.[30]

2. Composition and meetings

37.14 The CoP constitutes the body in which all State Parties to the CoE Convention against Trafficking are represented. This includes Member States of the CoE and non-members.[31] It should be noted that according to Article 42(1), the Convention is open for signature also to all non-CoE member states which participated in the drafting process. Furthermore, the Convention is open for accession by all other non-CoE members interested to join at a later stage, upon invitation by the CoE CM.[32] Consequently, there is no fixed final number of members of the CoP. All members have voting rights.

37.15 Apart from members, other 'participants' and 'observers' may join the deliberations of the Committee, without the right to participate in votings. Participants[33] include those states having signed but not yet ratified or acceded to the Convention as well as the following CoE entities: the CM, the Parliamentary Assembly, the Congress of Local and Regional Authorities, the Commissioner for Human Rights, the Conference of International Non-Governmental Organisations of the Council of Europe. In addition, the European Commission has participant status. Moreover, the Committee 'may authorise' other States,

28 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No, 197, para 361.

29 CoP Rules of Procedure, Rule 1(c).

30 Which made it possible for GRETA to maintain its tight time schedule for evaluation rounds, effectively launching a new round every four years (2010, 2014, 2018); see also GRETA's assessment of 35 country evaluation processes after the first evaluation round ('The vast majority of the replies were received within the time limit set by GRETA', with 26 of 35 replies received on time, and only two delayed longer than one month), GRETA, *4th General Report on GRETA's Activities*, March 2015, 61.

31 CoE Convention against Trafficking, Art 37(1).

32 Ibid., Art 43(1). So far, Belarus is the only non-CoE State Party to the CoE Convention against Trafficking, having ratified the Convention in November 2013. Tunesia has expressed interest to join the Convention, and in February 2018 has been invited by the CM to accede to the Convention, CM/Del/Dec(2018)1306/10.9, 7 February 2018.

33 CoP Rules of Procedure, Rule 2(b).

international governmental[34] as well as NGOs[35] to join meetings as observers on an ad hoc basis.[36] As a regular item on the agenda, the President of GRETA is invited to the Committee meetings for an exchange on the monitoring process.[37]

37.16 State Parties are represented by officials from the respective state, typically at ambassador level, one of them being elected as chair of the Committee for a term of one year, with the possibility of being re-elected once.[38] Next to members, participants and observers, provision has been made to encourage expert participation in the Committee meetings.[39]

37.17 The CoP meets regularly at the CoE seat in Strasbourg; it held its first meeting in December 2008, followed by one to three meetings per year until 2014. Since 2015, there have been two meetings every year. Administrative support to the Committee is provided through the Executive Secretary of the Convention and further Secretariat staff.

37.18 As provided for in Article 37(3), the CoP has adopted its own Rules of Procedure,[40] addressing functions, composition, decision-making and working methods; in addition, it contains provisions for the practical implementation of the GRETA election process (Rule 21), complementing the CM Rules on the election procedure of the members of GRETA.[41]

34 Explicit mention ('in particular') is made of UNODC, ILO, UNICEF, OHCHR, UNHCR, IOM, OSCE, Interpol and Europol.

35 'In particular', Amnesty International, Anti-Slavery International, La Strada International and the International Federation Terre des Hommes.

36 CoP Rules of Procedure, Rule 2(c).

37 The President of GRETA, on the other hand, may also request to convene an extra meeting of the CoP, see Art 37(2) and CoP Rules of Procedure, Rule 9.

38 CoP Rules of Procedure, Rule 4.

39 At the Committee meeting in October 2019, CoP Rules of Procedure, Rule 2(a) was amended to make participation of such national experts possible with reimbursement of expenses by the CoE, see Committee of the Parties, *25th meeting (18 October 2019) – Meeting Report*, THB-CP(2019)RAP25 (16 January 2020), para 41-43. See also Rule 15 for the organisation of additional experts hearings.

40 CoP Rules of Procedure.

41 Resolution CM/Res(2013)28.

ARTICLE 38

PROCEDURE

Helmut Sax

1 **The evaluation procedure shall concern the Parties to the Convention and be divided in rounds, the length of which is determined by GRETA. At the beginning of each round GRETA shall select the specific provisions on which the evaluation procedure shall be based.**

2 **GRETA shall define the most appropriate means to carry out this evaluation. GRETA may in particular adopt a questionnaire for each evaluation round, which may serve as a basis for the evaluation of the implementation by the Parties of the present Convention. Such a questionnaire shall be addressed to all Parties. Parties shall respond to this questionnaire, as well as to any other request of information from GRETA.**

3 **GRETA may request information from civil society.**

4 **GRETA may subsidiarily organise, in co-operation with the national authorities and the 'contact person' appointed by the latter, and, if necessary, with the assistance of independent national experts, country visits. During these visits, GRETA may be assisted by specialists in specific fields.**

5 **GRETA shall prepare a draft report containing its analysis concerning the implementation of the provisions on which the evaluation is based, as well as its suggestions and proposals concerning the way in which the Party concerned may deal with the problems which have been identified. The draft report shall be transmitted for comments to the Party which undergoes the evaluation. Its comments are taken into account by GRETA when establishing its report.**

6 **On this basis, GRETA shall adopt its report and conclusions concerning the measures taken by the Party concerned to implement the provisions of the present Convention. This report and conclusions shall be sent to the Party concerned and to the Committee of the Parties. The report and conclusions of GRETA shall be made public as from their adoption, together with eventual comments by the Party concerned.**

7 **Without prejudice to the procedure of paragraphs 1 to 6 of this article, the Committee of the Parties may adopt, on the basis of the report and conclusions of GRETA, recommendations addressed to this Party (a) concerning the measures to be taken to implement the conclusions of GRETA, if necessary setting a date for submitting information on their implementation, and (b) aiming at promoting co-operation with that Party for the proper implementation of the present Convention.**

A. INTRODUCTION

38.01 The Council of Europe (CoE) Convention on Action against Trafficking in Human Beings has been conceived as an instrument for the protection of the human rights of victims of trafficking in human beings.[1] As the Convention's Explanatory Report states, the 'added value provided by the CoE Convention against Trafficking lies firstly in the affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity, and that greater protection is therefore needed for all of its victims'.[2] Such protection is not possible without accountability, to hold the duty bearers of human rights responsible for their actual implementation and victim's access to justice. Consequently, from the beginning of the drafting process of the Convention, the need for a 'monitoring machinery to ensure that Parties implement its provisions effectively' was made clear and considered another major added value of the Convention[3] – and, in fact, it remains the only such independent treaty monitoring mechanism in the field of human trafficking to date.

38.02 Article 38 forms part of Chapter VII (Monitoring mechanism) of the Convention and lays out the main features of the evaluation procedure, addressing questions of the methodology of the process (regular evaluation rounds, sources of information, evaluation report and publication) as well as the relationship between GRETA and civil society actors and between GRETA and the Committee of the Parties (CoP).

38.03 'To a large extent, anti-trafficking efforts operate without a sufficient evidence-base':[4] for many years, weaknesses in the field of monitoring and evaluation of anti-trafficking interventions have been stressed by researchers and agencies, including the lack of baseline studies and relevant data and indicators for continuous monitoring, impact assessment and evaluation.[5] The evaluation procedure outlined by Article 38 of the CoE Convention against Trafficking

1 See Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention), Art 1(1)(b).

2 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 36.

3 Ibid.

4 Global Alliance Against Traffic in Women, *Feeling good about feeling bad …A global review of evaluation in anti-trafficking initiatives* (2010), <https://www.gaatw.org/publications/GAATW_Global_Review.FeelingGood.AboutFeelingBad.pdf> accessed 5 March 2020.

5 Anne T. Gallagher and Rebecca Surtees, 'Measuring the Success of Counter – Trafficking Interventions in the Criminal Justice Sector: Who decides—and how?' (2012) 1 *Anti-Trafficking Review* 10. Mike Dottridge, 'Research Needs Concerning the Monitoring, Evaluation and Impact Assessment of Both Research about Human Trafficking and Projects and Programmes to Address Human Trafficking' in Christine Aghazarm, Frank Laczko, Amy Farrel et al., *Human Trafficking: New Directions for Research. Geneva: International Organization for Migration* (IOM 2008).

has, thus, led to high expectations by stakeholders in the anti-trafficking field.[6] In practice, GRETA has already started its third cycle of evaluation rounds, resulting in almost 100 country evaluation reports,[7] accompanied by recommendations from the CoP, providing for a far-reaching, sound body of information and documentation on failures and successes of anti-trafficking legislation, policy and practice in the European region.[8]

B. DRAFTING HISTORY

38.04 The process of drafting Article 38 was overshadowed by the controversial question of which body should have primary responsibility for the monitoring of the Convention: GRETA as an independent expert body, or – as initially proposed – the Committee of Ministers (CM) of the CoE, 'assisted' only by GRETA.[9] The main elements of the monitoring procedure itself, however, were already contained in draft texts at the beginning of the work of the CAHTEH, the Ad hoc Committee on Action against Trafficking in Human Beings.

38.05 There was early agreement on working in regular evaluation cycles ('rounds'), on the use of questionnaires sent to governments for the collection of baseline information and data, the use of on-site country visits for additional information, the possibility to use other sources of information, including from civil society, an analysis by GRETA with two readings to allow for comments on the draft by State Parties, and on publication of the report.[10] Still, in comparison to the final result, several important differences should be noted.

38.06 The 1st meeting of the CAHTEH set the frame for further discussion, agreeing already in general terms on a mechanism 'that went beyond a mere Conference of the State Parties', which should be 'at once flexible, effective and active and should be distinguished by its independence and expertise and cooperation with the State Parties' and which acknowledges the 'importance of involving civil society in the monitoring process'.[11] Consequently, the delegates discussed various existing monitoring models from the CoE and the United Nations (UN) as possible starting points.[12] The draft, following the 1st meeting of the CAHTEH, required GRETA to send its analytical report directly to the CM which would then adopt

6 See, for instance, Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 476; Julia Planitzer, 'GRETA's First Years of Work: Review of the Monitoring of Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings' (2012) 1 *Anti-Trafficking Review* 41.

7 See GRETA's country monitoring work at: <https://www.coe.int/en/web/anti-human-trafficking/country-monitoring-work> accessed 4 March 2020.

8 For an overview of country-specific examples of the impact of GRETA monitoring, see GRETA, *Practical impact of GRETA's monitoring work* (Council of Europe 2019).

9 See also discussion in the Commentary on Art 36 of the CoE Convention against Trafficking.

10 CAHTEH, *Revised Preliminary Draft European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 September 2003, (then) Art 43.

11 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, paras 75 and 77.

12 CAHTEH, *1st meeting-Meeting Report*, CAHTEH(2003)RAP1, para 76. Reference was made, inter alia, to the European Committee of Social Rights, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Group of States against Corruption (GRECO), European Commission against Racism and Intolerance (ECRI), Advisory Committee on the Framework Convention for the Protection of National Minorities and to the UN Committee on the Elimination of Racial Discrimination.

conclusions and recommendations and make them public, at the same time with the GRETA report and eventual comments by State Parties.[13]

38.07 Discussion on the procedure resumed at the 4th CAHTEH meeting, including a proposal that GRETA can use information from civil society only 'after first informing the Committee of Ministers of its intention' to do so – which was rejected.[14] Furthermore, delegations considered that replies to a questionnaire would be less of 'a heavy burden on the Parties such as the requirement to write a State report'. They also agreed on the first evaluation round to cover all substantial chapters II to VI, for a baseline overview of anti-trafficking measures and to oblige State Parties to nominate a 'contact person' for the organisation of the country visits.[15] There was still no agreement on the lead responsibility for the monitoring process, with two options included in the draft: monitoring by the CM assisted by GRETA or independent monitoring by GRETA.[16]

38.08 Consequently, concern was growing among civil society organisations. After an invitation to the 6th CAHTEH meeting, non-governmental organisations (NGOs) stressed the need for an independent expert monitoring body, which also would seek input from NGOs, would conduct country visits and adopt its own recommendations. The recommendations would then be 'reviewed and reinforced by the Council of Europe's Committee of Ministers, which should play a role in ensuring the implementation of such recommendations'.[17] Additionally, the NGOs recommended to give GRETA the mandate to receive collective complaints by organisations on alleged violations of the Convention. Nevertheless, the CAHTEH only finished discussing GRETA member qualifications at that meeting, while negotiations on the structural set-up of the monitoring process and the relationship with the European Union (EU) had to continue.[18]

38.09 The 7th CAHTEH meeting was intended for the final adoption of the draft text of the Convention, despite several issues of controversy persisting. A break-through, at least, was achieved in mandating GRETA as the independent body to perform the monitoring function of the Convention, while creating a second stage of political review by a distinct Committee of the Parties consisting of state representatives, which gives recommendations to Parties and plays a strong role in the follow-up process. However, in relation to the monitoring of anti-trafficking implementation of EU Member States (EU MS), the European Commission delegation at the CAHTEH declared a general reservation to the entire draft monitoring mechanism.[19] Furthermore, discussion arose on the sources of information to be used by GRETA for the evaluation, including the use of questionnaires and information from civil society, and on the purpose of country visits. Eventually, it was accepted 'that it was for

13 CAHTEH(2003)9, (then) Art 43(6) and (7).

14 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 107.

15 Ibid., paras 107 and 108.

16 Ibid., para 110.

17 See CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Joint Statement of 127 Non-Governmental Organisations*, CAHTEH(2004)17 Addendum X, 27 September 2004, para 24.

18 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 109.

19 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 45.

GRETA to decide which methods were the most appropriate'.[20] Still, following concerns of some delegations, which wanted country visits only 'if no other appropriate means were available'; the term 'subsidiarily' was inserted in the draft.[21] A majority of delegations objected to include a collective complaints procedure into the mandate of GRETA, although 'the possibility of drafting an Additional Protocol on this question could be discussed at a later date'.[22] A final attempt for a collective complaint procedure, following the 2005 Opinion by the Parliamentary Assembly on the draft text,[23] failed at the CAHTEH's last meeting in February 2005.[24] Apart from that, no agreement was reached at that meeting regarding the relationship with the EU. The latter had proposed that the European Commission itself would monitor the implementation of CoE Convention's against Trafficking provisions, 'falling within the competence of the European Community'.[25] These proposals were rejected, because they would create 'double-standards' in the monitoring procedure; it was therefore left to the CM to eventually agree on the current monitoring mechanism.[26]

C. ARTICLE IN CONTEXT

38.10 The evaluation procedure under Article 38 of the Convention builds on the infrastructure established by Article 36 (GRETA) and Article 37 (Committee of the Parties). Most of the provisions of Article 38 concern activities by GRETA, as the Convention's independent expert monitoring body, such as sending out questionnaires to State Parties, the possibility of country visits and the drafting of the evaluation report. The CoP sets the second stage of the procedure, adopting – 'on the basis of the report and conclusions of GRETA' – its recommendations for the State Party concerned (Art 38(7)). As can be seen from practice so far, the CoP recommendations typically focus on those areas which have previously been identified by GRETA to constitute issues for urgent response, i.e. where State Parties are considered in violation of the CoE Convention against Trafficking.[27] Consequently, the CoP specifies a date after one year by which it expects a follow-up report by the Party regarding measures taken to address these matters, which will then be shared with GRETA for further consideration.

38.11 Primary sources for the evaluation procedure are information and (statistical) data received from governments in their replies to GRETA's questionnaire. Nevertheless, complementary information can be requested by GRETA from other sources, such as from civil society. Provision of assistance for victims is often organised through civil society organisations, thus, they have essential information about the practical functioning of the anti-trafficking response. Article 35 (Co-operation with civil society) of the Convention encourages State Parties to

20 Ibid., para 48.
21 Ibid., para 50.
22 Ibid., para 54.
23 Parliamentary Assembly, *Opinion No. 253 (2005) on the Draft Council of Europe Convention on Action against Trafficking in Human Beings*, 26 January 2005.
24 CAHTEH, *8th meeting (22–25 February 2005) – Final Activity Report*, CAHTEH(2005)RAP8, 16 March 2005, para 98.
25 Ibid, para. 94.
26 Final decision taken at, Committee of Ministers, 925th meeting of the Minsters' Deputies on 3 and 4 May 2005, CM(2005)32-Add 1.
27 For further details on the assessment methodology developed by GRETA, see section D below.

enter into 'strategic partnerships' with NGOs,[28] and their own assessments have proven invaluable to the evaluation procedure.

38.12 As discussed, the complex drafting negotiations resulted in a unique two-pillar structure, consisting of GRETA as the independent expert group and the CoP as a political body of representatives of states, which have ratified the Convention.[29] Both structures contribute to an evaluation procedure, which in the end keeps State Parties engaged in a constant monitoring process spanning the whole four-year evaluation cycle. In terms of division of labour, GRETA is entrusted with information gathering and data collection, including through country visits, while the CoP adds a political dimension by engaging directly with the State Parties under review and drawing attention to implementation priorities and requesting follow-up measures and reports through its recommendations. Together, this anti-trafficking monitoring process sets it apart from several other mechanisms under the Council of Europe in other areas.[30] An essential feature relates to GRETA's independence, with its members serving in their personal capacity only.[31] GRETA does not request regular implementation reports like the European Committee of Social Rights or the UN human rights treaty monitoring bodies – instead, it sends out questionnaires targeting specific aspects of anti-trafficking measures. GRETA conducts country visits in order to engage directly with stakeholders, similar to visits from bodies like the European Commission against Racism and Intolerance (ECRI) or the Advisory Committee under the Framework Convention for the Protection of National Minorities, but with different follow-up; and GRETA's visits are different in purpose from preventive inspection visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Finally, GRETA has no mandate to deal with collective complaints, like the European Committee of Social Rights, but GRETA may take into consideration any relevant information it receives during its country evaluation.

38.13 It should be noted that the CoE Convention mechanism still stands out as the only independent expert-based structure dedicated to anti-trafficking monitoring to date.[32] As far as the EU is concerned, there is no comparable monitoring body in place[33] – only general anti-trafficking progress reports are published by the European Commission and the Anti-Trafficking Coordinator, based on information received from 'National rapporteurs or equivalent mechanisms' of the EU Member States,[34] under the EU Anti-Trafficking Directive.[35]

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28 On the relevance of civil society cooperation see, CoE Convention against Trafficking, Art 5(6) on prevention of trafficking, Art 10(1) on identification and Art 12(5) on assistance.

29 CoE Convention against Trafficking, Arts 42 and 43 concerning signature of and accession to the Convention.

30 For an overview of mechanisms and their impact, see, for instance, Council of Europe, *Practical impact of the Council of Europe monitoring mechanisms in improving respect for human rights and the rule of law in Member States* (2014). See also on this the discussion in the Commentary on Art 36 of the CoE Convention against Trafficking, section C.

31 In contrast, other CoE expert bodies, such as GRECO or the Lanzarote Committee, consist of state representatives.

32 Concerning other regional anti-trafficking instruments in general, see also the Commentary on Art 36 of the CoE Convention against Trafficking.

33 For a set of anti-trafficking indicators for assessing implementation progress, see European Commission and Mike Dottridge, *Measuring Responses to Trafficking in Human Beings in the European Union: An Assessment Manual* (European Commission 2007).

34 See the EC anti-trafficking website, at <https://ec.europa.eu/anti-trafficking/member-states_en> accessed 5 March 2020.

38.14 At the international level, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[36] has set general standards for anti-trafficking response, including a definition of trafficking in human beings, which has also been used for the CoE Convention against Trafficking.[37] Although provisions in the United Nations Convention against Transnational Organised Crime (UNTOC)[38] foresee a review mechanism for evaluating implementation of the Convention and its Protocols, up until 2018, no political agreement on the set-up of such instrument could be reached. Since then, resolution 9/1[39] paved the way for a review mechanism to become operational. However, no independent expert body will carry out this review. Instead, a complex State Party peer review process has been created, with thematic clusters and a multi-year implementation cycle for general thematic and country-specific reviews, based to a large extent on state self-assessment, with limited possibilities for civil society contributions.[40] Beyond the Palermo Protocol, UN human rights treaty monitoring bodies have dealt with trafficking-related aspects during country assessments, such as in the context of the UN Convention on the Rights of the Child and UN Convention on the Elimination of All Forms of Discrimination Against Women.[41]

D. ISSUES OF INTERPRETATION

1. Scope of the evaluation

38.15 Following Articles 36 and 37 establishing the structure for the process, Article 38 explains the evaluation procedure. The central role of GRETA is made clear throughout the provision, from determining the material scope and length of the evaluation rounds to defining the appropriate means and the preparation of the analysis and conclusions as a basis for the recommendations for the CoP. Consequently, GRETA has adopted in 2009 – next to its Internal Rules of Procedure[42] – a specific set of Rules of Procedure for evaluating the implementation of the Convention.[43] In terms of the overall purpose of the evaluation, GRETA's first General Report explains that these Rules 'provide for the establishment of a constructive and confidence-based dialogue with the Parties with a view to the efficient

35 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1), Arts 19 and 20.

36 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

37 See also on this the Commentary on Art 4 of the CoE Convention against Trafficking.

38 United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000, entered into force 29 September 2003.

39 UNODC, Session of the Conference of the Parties, Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2018 resolution 9/1.

40 See also on this the Commentary on Art 36 of the CoE Convention against Trafficking.

41 Again, see on this, ibid. See also, Planitzer, 34.

42 GRETA, Internal rules of procedure of the Group of Experts on Action against Trafficking in Human Beings (GRETA), THB-GRETA(2009)1, 24 February 2009.

43 GRETA, Rules of procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties, adopted on 17 June 2009 and amended on 21 November 2014, THB-GRETA(2014)52 (thereinafter Rules of Procedure for the evaluation).

implementation of the measures provided for by the Convention'.[44] The mechanism can, thus, be regarded as an external human rights-based evaluation in the field of anti-trafficking measures.[45] At the same time, it should be underscored that this must not be seen by State Parties as a replacement of domestic monitoring structures such as national rapporteurs or other mechanisms as mandated by Article 29(4) of the Convention.

38.16 Generally, it should be noted that from the wording of Article 38(1) ('shall concern the Parties') implicitly follows an obligation of equal treatment by GRETA of all Parties in the application of the evaluation procedure.[46] Technically, the process is organised in recurring evaluation cycles ('rounds'), according to Article 38(1); the intervals have been defined by GRETA with four years.[47] In terms of substance of the evaluation, Article 38(1) determines that it is also GRETA's task to select the focus areas and provisions for each evaluation period.[48] The first evaluation round was started by GRETA by sending out the first questionnaire to State Parties in February 2010; remarkably, GRETA has been able so far to broadly stick to its quite tight schedule for maintaining this four-year evaluation cycle.[49]

38.17 For the first evaluation round GRETA has decided for a baseline approach, selecting 'the provisions of the Convention which will provide an overview of implementation of the Convention by each party'. Hence, information about the integration of core concepts of the Convention, such as a human rights-based approach to trafficking and the definition of trafficking, as well as detailed questions on prevention, victim protection, substantive and procedural criminal law[50] was collected. For the second round, GRETA stressed again the need to build anti-trafficking measures on a strong human rights foundation and to demonstrate the impact and practical effect of legislation and policies. Furthermore, State Parties should pay particular attention 'to measures taken to address new trends in human trafficking and the vulnerability of children to trafficking', as well as to trafficking for the purpose of labour exploitation.[51] The third evaluation round focuses on 'access to justice and effective remedies for victims of trafficking in human beings'.[52]

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44 GRETA, *1st General Report on GRETA's activities*, September 2011, para 15.

45 Planitzer, 34.

46 Upon request and further negotiation, GRETA also conducted a country evaluation of Kosovo in 2015, including a country visit, see GRETA, *Report on the compliance of Kosovo with the standards of the Council of Europe Convention on Action against Trafficking in Human Beings*, GRETA(2015)37, 12 April 2016. In this respect, GRETA has underlined 'the importance of not having any "grey zones" on the European continent when it comes to preventing and combating human trafficking', GRETA, *5th General Report on GRETA's activities*, February 2016, para 89.

47 Rules of Procedure for the evaluation, Rule 2. It could be seen as an indication of the constructive relationship built between GRETA and the State Parties, including high levels of compliance by State Parties with deadlines set for replies to the questionnaire or comments to first draft evaluation reports.

48 See also, Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 364: 'The idea is that GRETA will autonomously define at the beginning of each cycle the provisions for the monitoring procedure during the period concerned.'

49 The second round was launched in May 2014 and the third round in November 2018.

50 GRETA, *Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties – First evaluation round*, adopted on 1 February 2010, GRETA(2010)1 rev4.

51 GRETA, *Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties – Second evaluation round*, adopted on 6 May 2014, GRETA(2014)13, 3.

52 GRETA, *Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties – Third evaluation round*, GRETA(2018)26.

38.18 Generally, the questionnaire is sent out to the respective State Party not earlier than one year after the entry into force, with subsequent evaluations every four years, based on the understanding that 'all parties shall undergo all evaluation rounds unless otherwise decided by GRETA by unanimity'.[53] In exceptional cases, GRETA has sent out the first questionnaire a few weeks earlier than the one year-waiting period (following consultation with the respective country) in order to maintain an overall functioning evaluation time schedule.[54] Furthermore, in a few cases GRETA decided to have one combined evaluation report for the first and second evaluation round.[55]

2. Evaluation procedure

38.19 According to Article 38(2), it is up to GRETA to 'define the most appropriate means to carry out this evaluation'. The text mentions the use of questionnaires, which is to be understood as only one example of a request for information.[56] Furthermore, it is made clear that there is an obligation ('shall respond') for State Parties to comply with any such requests.[57] Several means and sources of information are mentioned across Article 38, including questionnaires, information from civil society, the conduct of country visits and the assistance of 'independent national experts' and other specialists.

(a) Questionnaires and state replies

38.20 As mentioned previously, each evaluation round starts with the dissemination of a comprehensive questionnaire addressed to the State Parties, asking also for specific statistical information.[58] In practical terms, the GRETA questionnaire is sent to the 'contact person' nominated by the State Party, typically a state official in a coordinating role at the national level in the field of trafficking in human beings. In the following that contact person would disseminate the questions from GRETA to all relevant stakeholders in the country. Additionally, the questionnaire is sent out by GRETA to known civil society organisations, inviting them to provide answers in their field of work as well.[59]

38.21 The time-limit set by GRETA for State replies to the questionnaire has been consecutively reduced, from six months to four months for the third evaluation round.[60] According to Rule 5 of the Rules of Procedure for the evaluation, State replies to the questionnaire are published on GRETA's website, 'unless otherwise requested by the party concerned'. Such publication of the replies should be seen as an important resource not only in relation to accountability and

53 Rules of Procedure for the evaluation, Rule 3.
54 As in the case of Germany, GRETA, *Report on Germany*, I GRETA(2015)10, para 3.
55 See the case of Liechtenstein, GRETA, *Report on Liechtenstein*, I/II GRETA(2019)12, para 3, and of Monaco, GRETA, *Report on Monaco*, I/II GRETA(2020)02, para 3.
56 See, Council of Europe, *Explanatory Report- CoE Convention against Trafficking*, CETS No. 197, para 365.
57 Ibid.
58 Questions range from the number of identified victims of trafficking (disaggregated by sex, age, nationality and type of exploitation) to the number of reflection periods and residence permits granted and the amounts of compensation awarded to victims of trafficking.
59 See, for instance, GRETA, *8th General Report on GRETA's activities*, May 2019, para 23.
60 Ibid., para 2.

transparency of measures taken, but also provides access to sometimes detailed statistical information on human trafficking in the respective country.[61]

(b) Information from civil society and other sources

38.22 According to Article 38(3), GRETA may request information from civil society,[62] and GRETA has encouraged NGOs to engage with GRETA.[63] Routinely, civil society actors will receive a copy of the questionnaire sent the government.[64] NGOs may be invited to contribute to the official state reply to the questionnaire, or may opt for contributing separate information to GRETA. Some organisations may even prepare alternative ('shadow') reports on the state of implementation in the country; in several countries, such as Germany, Spain, United Kingdom and Ukraine, GRETA has received also joint submissions by civil society anti-trafficking networks and coalitions or by academic institutions.[65] La Strada International and Anti-Slavery International have prepared a guidance document for civil society organisations to assist in the preparation of contributions to the evaluation procedure.[66] All information received from civil society will be treated as confidential, unless otherwise requested by the organisation.[67]

38.23 Concerning relevant sources of information, particular attention should be paid also to the role of trafficked persons, as actual right holders, themselves.[68] In the context of country visits, GRETA has repeatedly met with victims of trafficking, with the support of service providers, and only in such situations, when deemed ethically appropriate by those professionals working with the victim in terms of stability and safety.[69]

38.24 Additional information relevant for the evaluation procedure may reach GRETA through communications addressed to its Secretariat, for instance, by lawyers representing victims or

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61 Before 2015, as a default measure, all state replies to the questionnaire were confidential, and could be published only upon request by the State Party; in 2014, GRETA decided to reverse this Rule (with effect of 2015), see GRETA, *5th General Report on GRETA's activities*, February 2016, para 10.

62 See, Rules of Procedure for the evaluation, Rule 8.

63 For an overview of relevant activities in cooperation with civil society, see the dedicated section in all GRETA General Reports.

64 The preliminary timetable of GRETA country visits is publicly available at GRETA's website, for the third evaluation round, see <https://rm.coe.int/timetable-greta-3rd-evaluation-round/1680925834> accessed 5 March 2020.

65 See, for instance, the alternative reports by the German Network and Coordination Office Against Trafficking In Human Beings (KOK, for the second evaluation round), <https://www.kok-gegen-menschenhandel.de/kok-informiert/detail/ngo-bericht-an-greta-zur-umsetzung-der-europaratskonvention-gegen-menschenhandel>, and by the UK Anti-Trafficking Monitoring Group (for the third round), at <https://www.antislavery.org/reports-and-resources/research-reports/slavery-uk-reports/> accessed 5 March 2020.

66 La Strada International and Anti-Slavery International, Guidance for NGOs to report to GRETA, <http://lastradainternational.org/lsidocs/Guidance%20for%20NGOs%20to%20report%20to%20GRETA.pdf>, accessed 5 March 2020.

67 Rules of Procedure for the evaluation, Rule 8.

68 On matters of ethical participation of trafficked persons see, for instance, Global Alliance Against Traffic in Women, *Feeling good about feeling bad …A global review of evaluation in anti-trafficking initiatives*.

69 Although GRETA's Rules of Procedure for the evaluation do not specifically address victims as possible informants during country visits, nor how to safely engage with them. As part of a long-standing debate, see ICMPD, *Listening to Victims Experiences of identification, return and assistance in South-Eastern Europe* (ICMPD 2007) <https://nexushumantrafficking.files.wordpress.com/2015/03/listening-to-victims.pdf> accessed 5 March 2020, and Mike Dottridge, *Young People's Voices on Child Trafficking: Experiences from South Eastern Europe*, UNICEF Innocenti Working Papers, IWP-2008-05.

trade unions or other organisations. According to Rule 11 of GRETA's Rules of procedure for the evaluation, such communication will be brought to the attention of GRETA by the Executive Secretary of the Convention. While there is no individual complaint mechanism available to GRETA, such information can still be taken into consideration during the country assessments. Moreover, such information may be relevant for an assessment of situations, which may warrant initiation of an 'urgent procedure' under Rule 7.

(c) GRETA country visits

38.25 As discussed in the context of the drafting history of Article 38, there was some debate among delegations about the role of country visits as part of the evaluation process, leading to wording, which considers such visits as subsidiary means (see Art 38(4)), to be 'carried out only when necessary'.[70] According to GRETA's Rules of Procedure for the evaluation, '[s]ubsidiarily to the information submitted in writing, GRETA may decide to carry out a country visit to the Party concerned if it considers it necessary to complement this information or to evaluate the practical implementation of the measures taken'.[71] In practice, GRETA adopted an approach to consistently conduct such visits to all State Parties, 'in order to treat them on an equal footing'.[72]

38.26 First-hand information received directly from all stakeholders during country visits contributes significantly to better understanding and verification of domestic developments, challenges and promising practices.[73] When dealing with trafficking cases under Article 4 ECHR, the European Court of Human Rights has repeatedly made direct reference to GRETA reports.[74] Typically, a GRETA country visit lasts for five days, conducted by a delegation of two GRETA members accompanied by one or two administrators from the GRETA Secretariat.[75] Over the years, GRETA has observed that especially in larger countries or in countries with a strong decentralised form of government, arranging a meeting in the capital of a country only is not sufficient for understanding practical effects of anti-trafficking measures, which typically leads to a splitting up of the evaluation team during the visit.[76] Prior to the visit, the GRETA delegation shares a list of issues with the contact person and authorities, adressing the most pertinent issues for the consultation and the agenda-setting.

38.27 In parallel, GRETA arranges for separate meetings with civil society, typically during the first day of the country visit. This may include consultations with NGOs working as service providers for victims of trafficking, trade unions, journalists investigating trafficking issues, academics, lawyers representing trafficked persons in court as well as victims of trafficking themselves, but also representatives from international organisations present in the country, such as OSCE, ILO, IOM, UNHCR or UNICEF. The agenda for those meetings is kept confidential by GRETA in order to to protect informants and allow for open discussions among participants. Furthermore, during its stay in the country, GRETA usually undertakes

70 Council of Europe, *Explanatory Report- CoE Convention against Trafficking*, CETS No. 197, para 367.
71 Rules of Procedure for the evaluation, Rule 9.
72 GRETA, *2nd General Report on GRETA's activities*, October 2012, para 6.
73 See explanations in, GRETA, *1st General Report on GRETA's activities*, September 2011, para 29.
74 See, for instance, *S.M. v. Croatia*, App no 60561/14 (ECtHR GC, 25 June 2020), para 172.
75 With the exception of shorter missions to smaller countries, such as San Marino or Liechtenstein.
76 See, for instance, GRETA, *Report on Germany*, II GRETA(2019)07, GRETA, *Report on Spain*, II GRETA(2018)7, GRETA, *Report on the United Kingdom*, II GRETA(2016)21, GRETA, *Report on Austria*, II GRETA(2015)19.

visits to shelters accommodating trafficked persons, if safe from a victim's perspective. In addition, and following arrangement with authorities, GRETA has also visited police stations[77] or refugee accommodation centres for verification of information about identification of and assistance to victims of trafficking.[78] According to Article 38(4), GRETA may also be assisted by independent national experts and thematic specialists during the country visits. On the last day of a visit, a debriefing is arranged with the contact person to provide some early, preliminary comments on the country visit. The practical experiences from these intense days of consultations with dozens of stakeholders provide an indispensable resource for the GRETA country assessment, and, thus, have been used consistently as an essential element of the evaluation procedure.

(d) 'Urgent procedure'

38.28 Following the migration developments in 2015, GRETA realised the need for more flexible tools of information gathering and verification, next to the regular evaluation procedure. GRETA therefore adopted a new rule ('Rule 7 – Urgent requests for information') under its Rules of procedure for the evaluation.[79] Under this provision, '[i]f GRETA receives reliable information indicating a situation where problems require immediate attention to prevent or limit the scale or number of serious violations of the Convention, it may make an urgent request for information to any party or parties to the Convention'. Depending on the information received, this may lead to a country visit, 'if necessary'. The Rule also allows GRETA's Bureau to take such decisions about urgent requests of information or country visits, when the full group is not in session.[80]

38.29 Such 'urgent procedures' have already been invoked three times, all related to concerns by GRETA about measures sufficiently taken to ensure proper identification of presumed victims of trafficking, including children, among migrants. Thus, it concerned the situation in reception centres in Greece (urgent information request),[81] forced returns of migrants in Italy as well as the situation in 'hotspots' in Sicily (urgent information request and country visit),[82] and the situation of migrants in 'transit zones' in Hungary (urgent information request and country visit).[83]

3. GRETA analysis and publication

38.30 Article 38(5) explains that the outcome of information gathering will be an analytical report on the state of implementation of the Convention provisions in the respective country. In order to maintain an ongoing dialogue with the State Party following the country visit, the preparation of the report consists of two steps. After a first reading, GRETA adopts a draft report, which

77 GRETA, *Report on Spain*, II GRETA(2018)7, para 147.
78 See, for instance, the visit to Hungary's 'transit zones', GRETA, *Report on Hungary under Rule 7*, GRETA(2018)13.
79 See Rules of Procedure for the evaluation, Rule 7. See also GRETA, *5th General Report on GRETA's activities*, February 2016, para 9.
80 Rules of Procedure for the evaluation, Rule 7(4).
81 GRETA, *Report on Greece*, I GRETA(2017)27, para 4.
82 GRETA, *Report on Italy under Rule 7*, GRETA(2016)29.
83 GRETA, *Report on Hungary under Rule 7*, GRETA(2018)13. For a summary, see also GRETA, *8th General Report on GRETA's activities*, May 2019, paras 16–18.

is sent to the State Party for comments within two months.[84] Afterwards, GRETA decides about the comments during a second reading in plenary and then adopts the final report.

38.31 As explained by Rule 14, the 'analytical part shall contain reasoned observations on the party's implementation', whereas the 'conclusions shall set out suggestions and proposals concerning the way in which the party may deal with any problems which have been identified'. GRETA has developed a distinct three-level methodology for the assessment of implementation: whenever GRETA 'urges' a State Party to take certain measures, GRETA assesses this situation as particularly serious and not in compliance with the Convention provision. In less urgent situations, GRETA may 'consider' it necessary that the Party should further improve the implementation of certain Convention standards. Finally, GRETA may 'invite' or 'encourage' the Party to continue its efforts which already point in the right direction and 'welcomes' promising practices.[85]

38.32 Furthermore, after the first evaluation round in 2014, GRETA initiated a self-assessment and stock-taking exercise. Methodologically, it identified 23 'main issues' as Convention 'indicators' for compliance, such as criminalisation of trafficking, access to a recovery and reflection period or access to state compensation. Based on that, GRETA created a matrix combining indicators and levels of compliance, offering a powerful visualisation of main challenges in the implementation of the Convention.[86] Upon conclusion of the second evaluation round (2018), GRETA set up an internal working group for further refinement of the list of indicators,[87] addressing, for instance, more specifically prevention of child trafficking and identification and assistance to trafficked children.

38.33 Once GRETA has adopted its report and conclusions, the report is forwarded to both the State Party under review and to the CoP.[88] The Party is given one month to prepare any eventual comments on GRETA's final report;[89] however, they cannot lead to any amendments of the already adopted report any more. Any comments from the Party will be made public together with the GRETA report.[90]

4. The role of the Committee of the Parties

38.34 The history of the drafting process has shown the intense struggle in the establishment of a Convention monitoring mechanism. Consequently, Article 37 provides for a CoP, which not only serves as a body for the purpose of electing the members of GRETA, for instance, but which was given also a role in the evaluation. This leads to a sensitive intertwined relationship

84 See Rules of Procedure for the evaluation, Rule 14 and the 'Preamble' of each GRETA country evaluation report; such comments by State Parties may include updates on recent developments or answers to specific additional questions, but may also contain disagreements with GRETA's conclusions.

85 For further explanations on the methodology, see GRETA, *4th General Report on GRETA's activities*, 31–3.

86 For the matrix, see Appendix 8 of GRETA, *4th General Report*, 72–4.

87 GRETA, *8th General Report*, May 2019, para 19.

88 CoE Convention against Trafficking, Art 38(6).

89 See Rules of Procedure for the evaluation, Rule 15.

90 CoE Convention against Trafficking, Art 38(6).

between GRETA and the CoP, aimed at complementing a critical experts' assessment with a constructive political dialogue which allows for an effective follow-up.[91]

38.35 Once the evaluation report by GRETA has been received, the CoP adopts a set of recommendations concerning the Party under review. These recommendations serve two main purposes: to request action 'to implement the conclusions of GRETA' and to promote further cooperation with that Party.[92] In practice, the CoP takes a specific look at the most serious issues in the country concerned (i.e., areas where GRETA has 'urged' action to remedy situations of non-compliance) and uses them as the core of the CoPs recommendations. In addition, the CoP highlights a list of positive developments in the country. In the end, this approach by the CoP helps to significantly reinforce GRETA's assessment. In practical terms, in their recommendations, the CoP also requests written information within one year from the respective State Party to report back on measures taken to address the urgent issues. Once the Committee receives these follow-up reports from the Parties, they are forwarded to GRETA for further consideration.[93]

91 See also Council of Europe, *Explanatory Report- CoE Convention against Trafficking*, CETS No. 197, para 369. It should be noted that the President of GRETA regularly updates the CoP during its meeting.

92 CoE Convention against Trafficking, Art 38(7).

93 See, GRETA, *8th General Report*, May 2019, paras 59–62.

ARTICLE 39

RELATIONSHIP WITH THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME

Julia Planitzer

This Convention shall not affect the rights and obligations derived from the provisions of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime, and is intended to enhance the protection afforded by it and develop the standards contained therein.

A. INTRODUCTION

39.01 Whereas Article 40 refers to the relationship with other international instruments, Article 39 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] specifically points to the relationship with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[2] The purpose of Article 39 is twofold: firstly, it should make sure that the CoE Convention against Trafficking does not interfere with rights and obligations deriving from the Palermo Protocol; secondly, it should

1 Council of Europe, Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

show that the Convention 'reinforces (…) the protection afforded by the United Nations instrument and develops the standards it lays down'.[3]

B. DRAFTING HISTORY

39.02 The division between the relationship with the Palermo Protocol and other international instruments was already established in early drafts of the CoE Convention against Trafficking.[4] The wording of Article 39 was slightly changed in the 4th Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting.[5] Early drafts describe the intention of the Convention as 'to improve the protection afforded' by the Palermo Protocol, which was changed to an intention 'to enhance the protection afforded' by the Palermo Protocol. By this amendment, the wording in Article 39 differentiates from the wording used in the preamble ('with a view to improving the protection').

C. ARTICLE IN CONTEXT

39.03 The terms of reference by the Committee of Ministers issued to the CAHTEH included that the Convention should 'reinforce' the protection afforded by the Palermo Protocol.[6] In comparison to the Palermo Protocol, the CoE Convention against Trafficking obliges its State Parties to implement higher standards concerning protecting the rights of victims,[7] which is reflected in the wording used in the preamble ('improving') and in Article 39 ('to enhance').

39.04 Article 39 starts with the same wording as Article 40 ('[T]his Convention shall not affect the rights and obligations derived from (…)'). Whereas Article 40 refers to other international instruments that are related to trafficking in human beings and ensure greater protection and assistance for victims of trafficking, Article 39 refers to the Palermo Protocol as a whole, but adds that the Convention intends to enhance the protection afforded by the Palermo Protocol and to develop the standards of it.

3 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 371.

4 CAHTEH, *Revised Preliminary Draft – European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 19.

5 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, 57.

6 CoE, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, 16 May 2005, para 371.

7 See for instance the obligations deriving from Art 12 of the CoE Convention against Trafficking concerning assistance to victims. See on this also the Commentary on Art 12.

ARTICLE 40

RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Julia Planitzer

1 This Convention shall not affect the rights and obligations derived from other international instruments to which Parties to the present Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention and which ensure greater protection and assistance for victims of trafficking.

2 The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3 Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.(1)

4 Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian

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1 **Note by the Secretariat:**

See the Declaration formulated by the European Community and the Member States of the European Union upon the adoption of the Convention by the Committee of Ministers of the Council of Europe, on 3 May 2005:

> The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a 'disconnection clause' is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.
>
> This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union Party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.
>
> The disconnection clause is necessary for those parts of the Convention which fall within the competence of the Community/Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any Party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union Parties.

law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.

A. INTRODUCTION

40.01 Article 40 of the Council of Europe Convention on Action against Trafficking in Human Beings[2] has the purpose to regulate the relationship with other international instruments and should ensure that 'the Convention harmoniously co-exists with other treaties'.[3] The final phase of the drafting process was characterised by a heated debate around the inclusion of a so-called disconnection clause as it is included in the final version of Article 40(3) of the CoE Convention against Trafficking.

B. DRAFTING HISTORY

1. Article 40(1) of the CoE Convention against Trafficking

40.02 Article 40(1) of the CoE Convention against Trafficking remained to a large extent unchanged during the drafting process. At the 7th Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meeting, the Committee decided to add the wording 'which ensure greater protection and assistance for victims of trafficking'[4] based on a suggestion made by Hungary.[5]

2 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

3 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 373.

4 CAHTEH, *7th meeting (7–10 December 2004) – Meeting report*, CAHTEH(2005)RAP7, 6 January 2005, para 57.

5 CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Contribution by the delegations of Azerbaijan, Germany, Hungary, Norway, Spain, Sweden, United Kingdom and by the observer of European Women's Lobby*, CAHTEH(2004)17, 30 August 2004, 9 and CAHTEH, *Council of Europe Draft Convention on action against trafficking in human beings: Comments by the delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC Observers*, CAHTEH(2004)24, 19 November 2004, 15.

2. Article 40(3) of the CoE Convention against Trafficking: the 'disconnection clause'

40.03 At the 4th CAHTEH meeting, the European Commission raised concerns that the provision needed to ensure that the European Community would still be able to adopt 'more advantageous rules than those appearing in the Convention'.[6]

40.04 At the 8th and last CAHTEH meeting, the European Commission stressed that the disconnection clause was already used in other CoE instruments and would also be included in further conventions such as the – at that time – draft convention on the Prevention of Terrorism.[7] Nevertheless, the CAHTEH pointed out that this would be the first time the disconnection clause would be used in a human rights treaty. Furthermore, delegations viewed the proposal as too similar to a reservation, which would not be allowed by the Convention.[8] As a result, the CAHTEH adopted a version of Article 40 with the proposal by the European Union (EU) for a clause in the footnote[9] and decided that 'the Commission would have to issue a declaration stating that the European Community could not adopt standards falling below those in the Convention'.[10]

40.05 Despite an urgent appeal by the Parliamentary Assembly to the Committee of Ministers recommending 'to reject the amendments (…) proposed by the European Community concerning (…) the convention's relationship to other international instruments',[11] a final decision on the disconnection clause including a declaration of the EU and its Member States was taken at political level only a few days before the CoE Convention against Trafficking was adopted.[12]

C. ARTICLE IN CONTEXT

40.06 The Palermo Protocol[13] includes in its Article 14(1) a saving clause that is identical to Article 40(4) of the CoE Convention against Trafficking.

6 CAHTEH, *4th meeting (11–14 May 2004) – Meeting report*, CAHTEH(2004)RAP4, 23 June 2004, para 118.
7 Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, 16 May 2005, entered into force 1 June 2007, Art 26(3).
8 CAHTEH, *Final Activity report*, CAHTEH(2005)RAP8, 16 March 2005, 21–2.
9 Ibid., 60.
10 Ibid., 22.
11 Council of Europe Parliamentary Assembly, *Recommendation 1695 (2005)*, 18 March 2005.
12 Council of Europe Committee of Ministers, *925th meeting of the Ministers' Deputies on 3 and 4 May 2005*, CM(2005)32-Add 1, Item 4.5 and Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 375.
13 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (thereinafter Palermo Protocol).

D. ISSUES OF INTERPRETATION

1. Articles 40(1) and 40(4) of the CoE Convention against Trafficking

40.07 Article 40(1) states that the CoE Convention against Trafficking does not affect the rights and obligations derived from other instruments, when firstly, these instruments also contain provisions on trafficking, and secondly, when these instruments ensure greater protection and assistance for victims of trafficking. Hence, Article 40(1) intends to ensure the highest possible standard in relation to protection of rights of and assistance for victims of trafficking. This clause can be classified as a so-called 'most favourable clause'.[14]

40.08 Similar to Article 40(1), Article 40(4) intends to ensure that the CoE Convention against Trafficking does not affect 'rights, obligations and responsibilities of states' under international law. The main purpose of Article 40(4) of the Convention is therefore to stress that 'the exercise of fundamental rights should not be prevented on the pretext of taking action against trafficking in human beings'.[15] Hence, actions against trafficking should not adversely impact human rights of, for example, migrant workers or sex workers and lead to 'collateral damage'.[16]

40.09 The final section of Article 40(4) of the CoE Convention against Trafficking refers to rights relevant for the return of trafficked persons. Returns of trafficked persons must not violate other established rights, such as the principle of *non-refoulement* (nonreturn). Article 33 of the Convention Relating to the Status of Refugees[17] prohibits expulsion or return of a refugee to territories where the 'life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[18] The principle of *non-refoulement* can also be found in other international human rights treaties, such as for instance, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[19] and Article 3 of the European Convention on Human Rights (ECHR).[20] As the first part of the sentence of Article 40(4) refers to international

14 Kerstin von der Decken, 'Article 30. Application of successive treaties relating to the same subject matter' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018), 546. This type of clause has been incorporated into several human rights treaties, for instance Art 5(2) ICCPR (International Covenant on Civil and Political Rights 999 UNTS 171, 16 December 1966, entered into force 23 March 1976), see on this William A. Schabas, *Nowak's CCPR Commentary* (N.P. Engel 2019) 118–19.

15 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 377.

16 See for instance on the implementation of restrictions on irregular migration as measure against trafficking: Mike Dottridge, 'Collateral Damage Provoked by Anti-trafficking Measures', in Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl, *Routledge Handbook of Human Trafficking* (Routledge 2017) 351.

17 Convention Relating to the Status of Refugees, 189 UNTS 137, 28 July 1951, entered into force 22 April 1954 as amended by the Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967, entered into force 4 October 1967.

18 Art 33 of the Refugee Convention. See on this also the Commentary on Art 16.

19 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984, entered into force 26 June 1987 (thereinafter CAT).

20 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 5, 4 November 1950, entered into force 3 September 1953 (thereinafter ECHR).

human rights obligations in general, states have to also consider the obligation to not return a person stemming from other treaties, such as for instance the Convention against Torture.[21]

40.10 In order to ensure that the return of trafficked persons is conducted with due regard to their rights, safety and dignity, including the right to *non-refoulement*, the Group of Experts on Action against Trafficking in Human Beings (GRETA) pointed out that a comprehensive risk assessment prior to return is necessary.[22] The principle of *non-refoulement* should apply when a victim of trafficking is at risk of being re-trafficked if returned to the country of origin.[23]

2. Article 40(2) of the CoE Convention against Trafficking

40.11 Article 40(2) allows the State Parties to conclude bilateral or multilateral agreements that supplement or strengthen the provisions of the Convention. Conclusion of agreements that derogate from the Convention is not allowed.[24]

3. Article 40(3) of the CoE Convention against Trafficking: the 'disconnection clause'

40.12 When Member States of the EU enter an agreement with third countries, in relation to matters that touch upon the sphere of application of Union law, the connection clause:

> is intended to be used as a technique to preserve the primacy of Union law as between the Member States themselves. By using this clause, EU Member States 'disconnect' themselves from the general regime of the treaty, to the extent that the subject matter is covered by EU/EC law and only as far as their mutual relations are concerned.[25]

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21 In order for trafficked persons to be able to use the protection of *non-refoulement* under Art 3 CAT and Art 3 ECHR, it needs to be shown that trafficking, retrafficking or retaliation can amount to torture or ill-treatment, see on this Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment* (OSCE 2013) 32. See on a discussion of the application of the prohibition of torture and ill-treatment to trafficking in human beings: Lorna McGregor, 'Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings' (2014) 36 *Human Rights Quarterly* 210–41. See on the *non-refoulement* principle under Art 3 CAT: Margit Ammer, Andrea Schuechner, 'Article 3. Principle of Non-Refoulement' in Manfred Nowak, Moritz Birk, Giuliana Monina, *The United Nations Convention against Torture: A Commentary* (OUP 2019) 114 et seq. On the application of Art 3 ECHR see *Saadi v. Italy*, App no 37201/06 (ECtHR, 28 February 2018), para 125, cited after William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015), 194–5.

22 GRETA, *Report on Ireland*, II GRETA(2017)28, para 188.

23 GRETA, *Report on Denmark*, II GRETA(2016)7, para 143.

24 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 374.

25 Magdalena Lickova, 'European Exceptionalism in International Law' 19 (2008) *European Journal of International Law* 463, 485. According to Klabbers, disconnection clauses do not illustrate reservations, see Jan Klabbers, 'Safeguarding the Organizational Acquis: The EU's External Practice' (2007) 4 *International Organizations Law Review* 57, 81–3. The ILC has found disconnection clauses to be closest to the idea of conflict clauses as prescribed in Art 30(2) VCLT, see International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission (finalized by Martti Koskenniemi)* (13 April 2006) UN Doc A/CN.4/L.682, para 292. The Committee of Legal Advisers on Public International Law (CAHDI) describes a disconnection clause rather generally as 'a provision in a multilateral treaty allowing certain parties to the treaty not to apply the treaty in full or in part in their mutual relations, while other parties remain free to invoke the treaty fully in their relations with these parties', rooted in the principle found in Art 41 VCLT, see CAHDI, *Report on the consequences of the so-called 'disconnection clause' in international law in general and for Council of Europe conventions, containing such a clause, in particular*, 8 October 2008, para 10.

40.13 An important and recurrent criticism against the use of disconnection clauses concerns the fear that frequent use of such clauses, as CAHDI summarises it, 'may inadvertently lead to the erosion of the object and purpose of important standard setting treaties'.[26] In a similar vein, the CAHTEH pointed out that with being included in the CoE Convention against Trafficking, the clause would be used for the first time in a human rights treaty.[27] The key question is to what extent does the existing regime under EU law overlap with the regime established by the treaty at hand and whether the obligations of Member States under EU legal order are not lower in scope and substance than those introduced by the treaty. In order to tackle this, the disconnection clause in Article 40(3) of the CoE Convention against Trafficking includes the reference to EU law being applied 'without prejudice to the object and purpose of the present Convention'. This might imply that in case of discrepancies between the levels of protection provided, EU Member States have to apply the higher standards stemming from the Convention, as far as this is permitted under EU law.[28] However, this is in contrast to the declaration of the EU stating that EU Member States 'cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves'.[29] This also shows that the disconnection clause allows disconnection from the Convention exclusively in the mutual relations of EU Member States.[30]

40.14 At this point, there is no consistent legal practice established concerning the application of the disconnection clause to the CoE Convention against Trafficking, in particular since, for instance, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims[31] to a large extent led to the alignment of EU standards with the standards of the CoE Convention against Trafficking. However, one example of a different standard concerns the provision of the reflection and recovery period in Article 13 of the CoE Convention against Trafficking.[32] At the EU level,[33] the reflection period – in contrast to the Convention – does not provide for a minimum duration of this period; it follows a different default scope of application (in relation to children) and has different grounds for early termination of the period.[34] Since the EU itself is not Party to the Convention, it is not obliged to align the standards under the EU acquis to the standard of the Convention.[35] EU Member States have certain flexibility in implementing a directive and therefore, can and should implement the standard of the Convention. This would also be in line with the application of

26 CAHDI, *Report on the consequences of the so-called 'disconnection clause' in international law*, para 9.

27 CAHTEH, *Final Activity report*, CAHTEH(2005)RAP8, 16 March 2005, 21.

28 Marise Cremona, 'Disconnection Clauses in EU Law and Practice' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (Hart 2010) 174.

29 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 375.

30 Cremona, 175. This is also stressed by the wording, without prejudice to it's full application with other Parties' in Article 40(3) of the CoE Convention against Trafficking.

31 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1).

32 See on this also the Commentary on Art 13.

33 Art 6 of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (thereinafter Dir 2004/81/EC) (OJ L 261/19) .

34 See on this also the Commentary on Art 13.

35 See Cremona, 175 in relation to mixed agreements.

the disconnection clause without prejudice to the object and purpose of the present Convention, including the purpose of protecting human rights of victims of trafficking.[36] Furthermore, the recovery and reflection period is to a significant extent relevant for victims coming from non-EU Member States, hence applying the EU standard would go beyond the mutual relations of EU Member States and therefore would not be covered by the disconnection clause.

36 See CoE Convention against Trafficking, Art 1(b).

ARTICLE 41

AMENDMENTS

Helmut Sax

1 Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the member States of the Council of Europe, any signatory, any State Party, the European Community, to any State invited to sign this Convention in accordance with the provisions of Article 42 and to any State invited to accede to this Convention in accordance with the provisions of Article 43.

2 Any amendment proposed by a Party shall be communicated to GRETA, which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3 The Committee of Ministers shall consider the proposed amendment and the opinion submitted by GRETA and, following consultation of the Parties to this Convention and after obtaining their unanimous consent, may adopt the amendment.

4 The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5 Any amendment adopted in accordance with paragraph 3 of this article shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.

A. INTRODUCTION

41.01 As an agreement concluded between States under international law, the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] may also be 'amended by agreement between the parties'.[2] For this purpose, Article 41 of the CoE Convention against Trafficking provides for the procedure for such an amendment. It is based on similar provisions contained in other CoE Conventions, with small modifications adapted to the structural context of the CoE Convention against Trafficking.

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, entered into force 27 January 1980, Article 39.

B. DRAFTING HISTORY

41.02 As far as the drafting process in relation to Article 41 is concerned, only a few issues for discussion arose during the negotiations at the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH). Already the first revised draft of the CoE Convention against Trafficking,[3] contained a provision which was identical to its final version, with only one exception in its (current) Article 41(3). The issue concerned the decision-making process on the amendment and the role of non-members of the CoE, which might become State Parties to the Convention. The initial draft text required 'consultation of the non-member State Parties to this Convention',[4] while the final text approved by the Committee of Ministers (CM) in May 2005 more explicitly spoke of adoption of amendments only 'following consultation of the Parties to this Convention and after obtaining their unanimous consent' (Art 41(3) of the CoE Convention against Trafficking). The Explanatory Report to the Convention asserts that such 'a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing'.[5] As a background to this, it should be understood that only at the very final meeting of the CAHTEH, the European Commission had submitted – controversial – proposals for amendment of several draft provisions, including on the treaty amendment provision; all of them aiming at securing influence of the European Union (EU) as a potential State Party, but non-CoE member, on decision-making processes related to the Convention.[6] Since no final agreement on these proposals could be reached in the CAHTEH, the final decision was left to the political level before the final adoption of the Convention by the Committee of Ministers in May 2005.

41.03 Apart from that, the *travaux préparatoires* only highlight discussions on Article 41 of the Convention on two occasions: at the 4th CAHTEH meeting, one delegation questioned – unsuccessfully – the role of the Group of Experts on Action against Trafficking in Human Beings (GRETA) in the amendment procedure.[7] During the 7th meeting of the CAHTEH, it was suggested to have an evaluation of the entire CoE Convention (undertaken by the Committee of the Parties) every ten years to assess the need for any treaty amendments. However, in light of the procedure in Article 41 itself, and 'that GRETA could always draw attention in its report to any specific shortcomings which might emerge in the functioning of the convention', this proposal for an additional review process was not accepted by the CAHTEH.[8]

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3 CAHTEH, *Revised Preliminary Draft European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 20.

4 Then Art 47(3), see CAHTEH(2003)9, 27 November 2003.

5 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 379.

6 Which is why efforts were made by the European Commission to strengthen the role of the State Parties vis-à-vis the CoE CM, see CAHTEH, *8th meeting (22–25 February 2005) – Final Activity Report*, CAHTEH(2005)RAP8, 16 March 2005, para 93. See on this also the Commentary on Art 36.

7 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 121.

8 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, paras 64 and 65.

C. ARTICLE IN CONTEXT

41.04 Article 41 of the CoE Convention against Trafficking outlines a procedure for treaty amendment, which has been followed in several other CoE instruments. Almost identical provisions can be found in the CoE Convention on Cybercrime,[9] the CoE Convention on the Prevention of Terrorism[10] and the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.[11]

41.05 As explained in the respective Explanatory Reports, this is considered a more simplified, accelerated amendment procedure, 'for relatively minor changes of a procedural and technical character'; on the other hand, 'major changes to the Convention could be made in the form of additional protocols'.[12] Differences between the provisions on amendment are typically only related to the expert body consulted prior to adoption of the amendment – which, in the context of the CoE Convention against Trafficking, means consultation with GRETA, mandated to monitor the implementation of the Convention.[13]

D. ISSUES OF INTERPRETATION

41.06 As described above, Article 41 is based on a model for (minor) amendments to CoE treaties, which has been included in several other CoE Conventions. It follows general principles of international treaty law, as enshrined in Article 39 and 40 VCLT, stipulating the possibility of treaty amendments by agreement between the parties, following due notification regarding the proposal for amendment.

41.07 Consequently, the five paragraphs of Article 41 of the CoE Convention against Trafficking deal with the following main steps of the procedure, including: (1) a proposal for amendment by a State Party; (2) communication to the CoE Secretary General; (3) communication to all CoE Member States as well as to 'any signatory, any State Party, the European Community' and States invited to sign and States invited to accede to the Convention (para 1); (4) communication to GRETA for an expert opinion on the proposal (para 2); (5) consultation with Parties seeking unanimous consent;[14] (6) adoption of the amendment by the Committee of Ministers (para 3); (7) request for and notification of acceptance by all Parties; and finally (8), entry into force of the amendment (paras 4 and 5).

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9 Council of Europe Convention on Cybercrime, ETS No. 185, 23 November 2001 (thereinafter Budapest Convention), Art 44.

10 Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, 16 May 2005, Art 27.

11 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS No. 198, 16 May 2005, Art 54, which contains some additions allowing for more flexibility concerning criminal offences.

12 See, in relation to the CoE Cybercrime Convention: Council of Europe, *Explanatory Report to the Convention on Cybercrime*, ETS No. 185, 23 November 2001, para 323. For the drafting of Amending Protocols, see Ministers' Deputies of the Council of Europe at their 1291st meeting, *Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe*, CM(2017)62, 5 July 2017.

13 For further information on GRETA, see on this also the Commentary on Art 36.

14 As emphasised by the Explanatory Report, in order to ensure equal participation of all Parties to the Convention in the decision making on the amendment, Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 379.

41.08 It should be noted that in the case of the CoE Convention against Trafficking, GRETA, as its independent expert monitoring body, is requested to prepare an opinion on any proposed amendment, and not the CoE's internal technical expert bodies, such as the European Committee on Crime Problems.[15]

15 See, for instance, CoE Cybercrime Convention, Art 44(2).

ARTICLE 42

SIGNATURE AND ENTRY INTO FORCE

Vahnessa Espig

1 This Convention shall be open for signature by the member States of the Council of Europe, the non member States which have participated in its elaboration and the European Community.

2 This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which 10 Signatories, including at least 8 member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.

4 In respect of any State mentioned in paragraph 1 or the European Community, which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of its instrument of ratification, acceptance or approval.

A. INTRODUCTION

Article 42 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] specifies the procedures required to become bound to the Convention and its entry into force conditions. The Convention is open for signature by the CoE Member States, **42.01**

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

Non-members States of the CoE, which participated in the Convention's elaboration, and the European Union (EU).

B. DRAFTING HISTORY

42.02 Throughout the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meetings, Article 42 of the CoE Convention against Trafficking was not heavily discussed. The positioning of Article 42 varied throughout the drafting process. During the 4th CAHTEH meeting, Article 42, which at the time was Article 48, was deliberated by the Committee, specifically concerning the number of ratifications, accessions and approvals that should be required for the Convention to enter into force.[2]

42.03 At the 7th CAHTEH meeting, Article 42(3) and (4) on the entry into force of the Convention were discussed and surfaced differing opinions.[3] For instance, some delegations were in favour of keeping the number of states required low 'in order to hasten the entry into force of the Convention, thus benefiting the victims of trafficking'. In the end, the Committee decided to set the number of states required for the Convention to enter into force at ten, including eight Member States of the CoE.[4] Additionally, at this meeting, Article 41 was repositioned and fixed as Article 42. At the CAHTEH's final meeting, the wording in Article 42(3) was changed from '10 States' to '10 Signatories'.[5]

C. ARTICLE IN CONTEXT

1. Model final clauses of the CoE for conventions and agreements

42.04 As noted in the drafting history, Article 42 of the CoE Convention against Trafficking did not experience significant debate by the CAHTEH, and overall, minor changes were made, which can be attributed to the 1980 Model Final Clauses for Conventions and Agreements concluded within the CoE.[6]

42.05 The final clauses of the CoE Convention against Trafficking are fundamentally based on the Model Final Clauses for Conventions and Agreements concluded within the CoE[7] 'or are based on longstanding treaty-making practice at the Council of Europe'.[8] Since the drafting of the CoE Convention against Trafficking, and in light of developments since 1980, such as the increased participation of Non-member States in the elaboration of conventions and protocols,

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2 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 123.
3 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 68.
4 Ibid.
5 CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 8th meeting of CAHTEH (22–25 February 2005)*, CAHTEH(2004)INFO 10, 25 February 2005, 61.
6 Ministers' Deputies of the Council of Europe, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, 18 February 1980, Art a.
7 Ministers' Deputies of the Council of Europe, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, 18 February 1980.
8 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 380.

the model final clauses have been changed and further elaborated. In 2017, the Committee of Ministers adopted three sets of model clauses to apply to conventions, additional protocols and amending protocols. These are non-binding and can be adapted to fit particular cases.[9]

42.06 The Secretary General of the CoE is the depositary of almost all CoE conventions.[10] As the custodian of the CoE Convention againt Trafficking, the Secretary General manages its final clauses. In the context of Article 42(2) of the CoE Convention against Trafficking, the depository presides over the Convention's signature and the deposit of the instruments of ratification, acceptance, approval or accession.

2. Entry into force and State Parties of the CoE Convention against Trafficking

42.07 Article 42(3) and (4) refers to the conditions of the CoE Convention against Trafficking entering into force. When these requirements are met, the Convention's provisions become binding on all State Parties that have ratified or acceded to it. The number of ratifications, acceptances and approvals required for the Convention's entry into force reflects the drafters' 'belief that a significant group of states is needed to successfully set about addressing the challenge of trafficking in human beings. The number is not so high, however, as to unnecessarily delay the Convention's entry into force'.[11]

42.08 On 3 May 2005, the CoE Convention against Trafficking was adopted by the CoE Committee of Ministers, opened for signature on 16 May 2005 and entered into force on 1 February 2008, following its 10th ratification.[12] As of 2019, the CoE Convention against Trafficking holds 47 ratifications/accessions, namely 46 ratifications from Member States of the CoE, and one accession[13] from a Non-member State of the CoE. On multiple occasions, GRETA has called upon the Russian Federation, the only remaining CoE Member State, to sign and ratify the Convention to ensure a 'pan-European response' to human trafficking.[14] Additionally, GRETA has called on the Non-member States of the CoE, which have participated in the elaboration of the CoE Convention against Trafficking, namely Canada, the Holy See, Japan, Mexico, and the United States of America, as well as the EU, to sign and ratify the Convention.[15]

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9 Ministers' Deputies of the Council of Europe at their 1291st meeting, *Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe*, CM(2017)62, 5 July 2017, 2.

10 With the exception of the Statute of the Council of Europe, ETS 1, 5 May 1949, for which the UK is the depositary, cited after Jörg Polakiewicz 'Council of Europe Depositary Practice', Seminar 'Managing the International Order – The Functions of Treaty Depositaries' (Helsinki, 19 September 2018) 2.

11 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 382.

12 GRETA, *1st General Report on GRETA's Activities*, September 2011, para 2.

13 See further the Commentary on Art 43.

14 GRETA, *8th General Report on GRETA's Activities*, May 2019, para 30; GRETA, *7th General Report on GRETA's Activities*, March 2018, para 27. See also, GRETA, *6th General Report on GRETA's Activities*, March 2017, para 21.

15 GRETA, *5th General Report on GRETA's Activities*, February 2016, para 38; GRETA, *4th General Report on GRETA's Activities*, March 2015, 17; GRETA, *3rd General Report on GRETA's Activities*, October 2013, para 14; GRETA, *2nd General Report on GRETA's Activities*, October 2012, para 20; GRETA, *1st General Report*, para 70.

D. ISSUES OF INTERPRETATION

1. Article 42(1) of the CoE Convention against Trafficking: 'open for signature'

42.09 Per Article 42(1), the CoE Convention against Trafficking is 'open for signature' by the CoE Member States, Non-member States that participated in the development of the Convention and the EU. The signing of the Convention—which must be completed by the Head of State, Head of Government, Minister for Foreign Affairs or by someone with full powers[16]—is a form of authentication of the text.[17] Once the Convention is signed, it does not automatically become a binding legal obligation. Signature shows the intent of the State to take the necessary steps (ratification, acceptance, or approval) to become party to the Convention in the near future.[18] Additionally, signature obliges States to refrain from acts that would go against the Convention's objective and purpose.[19]

2. Article 42(2) of the CoE Convention against Trafficking: 'subject to ratification, acceptance or approval'

42.10 Upon signature, the act of ratification, acceptance or approval follows. These actions 'refer to acts undertaken at the international level requiring the execution of an instrument and the deposit of such instrument with the depository'.[20] Ratification, acceptance, or approval of the Convention becomes effective when it is deposited with the CoE Secretary General.[21] 'Ratification', 'acceptance' and 'approval' are analogous processes referring to 'an act by which the State expresses its definitive consent to be bound by the treaty'.[22] Articles 2(1)(b) and 14(2) of the United Nations Vienna Convention on the Law of Treaties (VLCT) denotes that 'acceptance' and 'approval' have the same legal effect as ratification. The difference between ratification and acceptance (or approval) is more to do with terminology than of international law.[23]

3. Article 42(1) of the CoE Convention against Trafficking: 'States which have participated in its elaboration and the European Community'

42.11 The more inclusive approach of opening the Convention for signature by Non-member States of the CoE, which participated in the elaboration of the Convention, and the EU is not

16 'Full powers' refers to a document whereby the Head of State, Head of Government or Minister for Foreign Affairs authorises a person, such as an Ambassador or a Minister, to sign a treaty on behalf of the State. See VCLT, Art 7.

17 Jörg Polakiewicz, *Treaty-making in the Council of Europe* (Council of Europe Publishing 1999) 31.

18 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations 2010) 18.

19 See VCLT, Art 18. See further Oliver Dörr, 'Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 244.

20 United Nations, *Final Clauses of Multilateral Treaties Handbook* (United Nations 2013) 34.

21 Polakiewicz, *Treaty-making in the Council of Europe*, 12.

22 Council of Europe, Glossary <https://www.coe.int/en/web/conventions/glossary#Ratification> accessed 14 October 2019.

23 Frank Hoffmeister, 'Article 14. Consent to be bound by a treaty expressed by ratification, acceptance or approval' in Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, 207.

reflected in the provision contained in the 1980 Final Model Clauses. This development originated with the CoE's environmental treaties, in particular, the 1979 Conservation of European Wildlife and Natural Habitats.[24] [25] Since then, this provision has been established in the CoE's 2017 Model Final Clauses.[26]

42.12 Since the entering into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community[27] on 1 December 2009 all references to the European Community shall be read as the EU.

24 Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats, ETS No. 104, 19 September 1979, entered into force 1 July 1982.

25 Sia Spiliopoulou Åkermark, 'Reservation clauses in treaties concluded within the Council of Europe' (1999) 48 *International and Comparative Law Quarterly*, 483.

26 Ministers' Deputies of the Council of Europe at their 1291st meeting, *Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe*, 5 July 2017, Art a(1).

27 Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, entered into force 1 December 2009 (OJ C 306/1).

ARTICLE 43

ACCESSION TO THE CONVENTION

Vahnessa Espig

1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consultation of the Parties to this Convention and obtaining their unanimous consent, invite any non-member State of the Council of Europe, which has not participated in the elaboration of the Convention, to accede to this Convention by a decision taken by the majority provided for in Article 20 d. of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

2 In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

A. INTRODUCTION

43.01 Article 43 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] outlines how any Non-member States of the CoE, which did not participate in drawing up the Convention, may accede to it and its entry into force details.

B. DRAFTING HISTORY

43.02 Article 43 of the Convention remained relatively unchanged throughout the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) meetings. At the 4th CAHTEH meeting, the Committee examined Article 43, which at the time was Article 49,

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

and decided to refer to the 'European Community' in paragraph 2.[2] This reference was later removed.[3] During the 7th CAHTEH meeting, the then Article 42 became Article 43.[4]

C. ARTICLE IN CONTEXT

1. Model final clauses of the CoE for conventions and agreements

43.03 Article 43 of the Convention is a standard clause based on the Model Final Clauses for Conventions and Agreements concluded within the CoE.[5]

2. Accession to the Convention by Non-member States of the CoE

43.04 The Convention – like most CoE treaties – is open to participation by Non-member States of the CoE by accession, provided they have formally been invited as held in Article 43(1).[6] It is customary for States requesting accession to send a letter addressed to the Secretary General of the CoE, who is the depositary[7] of the Convention.[8] However, in theory, an invitation for accession could be initiated by the Committee of Ministers.[9] Before a formal notation is adopted to the Committee of Ministers' agenda, the Secretariat consults with all Member States of the CoE, as well as those Parties to the Convention, that are not Member States, regarding the request to accede.[10]

43.05 Upon consultation with the State Parties to the Convention and receiving their unanimous consent, the Committee of Ministers may invite any Non-member State of the CoE, which did not participate in the elaboration of the Convention.[11] This decision of the Committee of Ministers needs to be a two-thirds majority as held in Article 20(d) of the Statute of the CoE[12]

2 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 125.
3 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 62, footnote 12 and 13.
4 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 71.
5 Ministers' Deputies of the Council of Europe, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, 18 February 1980, Art c; Ministers' Deputies of the Council of Europe at their 1291st meeting, *Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe*, CM(2017)62, 5 July 2017, Art b. See also Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 380. For further examination of the CoE Model Final Clauses for Conventions and Agreements, see the Commentary on Art 42 of the CoE Convention against Trafficking.
6 Directorate of Legal Advice and Public International Law, *Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 – Accessions by States which are not member States of the Council of Europe and which have not participated in the elaboration of the Convention* (November 2018) para I.
7 For further discussion on the depository's role, see the Commentary on Art 42 of the CoE Convention against Trafficking.
8 Jörg Polakiewicz, *Treaty-making in the Council of Europe* (Council of Europe Publishing 1999) 35.
9 Directorate of Legal Advice and Public International Law, para 1.
10 Polakiewicz, 35.
11 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 383.
12 Council of Europe, Statute of the Council of Europe, ETS 1, 5 May 1949.

and the unanimous vote of the Parties to the CoE Convention against Trafficking.[13] The decision to provide an invitation to accede or not is usually at the level of the Ministers' Deputies.[14]

43.06 If successful, the invitation, which is a 'legally non-binding statement of intent', indicates that the requesting Party will indeed be accepted to become a Party to the treaty in the future.[15] Invitations to accede to CoE conventions are valid for a period of five years.[16] Before acceding, the State has to take the necessary steps to ensure that its domestic law allows for the implementation of the Convention.[17] Further, when depositing the instrument of accession, any reservations[18] or declarations must be made.[19]

3. Accessions to the Convention

43.07 In light of a request from the Republic of Belarus to accede to the CoE Convention against Trafficking, the Committee of Ministers' Group of Rapporteurs on Democracy reviewed the submission of Belarus on 6 September 2011.[20] On 11 January 2012, the Committee of Ministers decided to invite Belarus to accede to the Convention.[21] On 26 November 2013, Belarus became the first Non-member State to accede to the Convention.[22]

43.08 In October 2017, Tunisia submitted a request to be invited to accede to the Convention, and on 7 February 2018, the Committee of Ministers decided to invite Tunisia to accede to the Convention. GRETA has, on various occasions, recalled that the CoE Convention against Trafficking is open to accession by Non-member States of the CoE.[23]

D. ISSUES OF INTERPRETATION

1. Consent to be bound

43.09 A State may express its consent to be bound by a treaty through accession.[24] Accession 'resembles ratification, acceptance or approval, as it is a unilateral act under international law'.[25]

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13 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 383.
14 Directorate of Legal Advice and Public International Law, para 3.
15 Polakiewicz, 34.
16 Committee of Ministers, 1168th Meeting of the Ministers' Deputies, CM/Del/Dec(2013)1168, 10 April 2013. See also GRETA, *8th General Report on GRETA's Activities*, May 2018, para 31.
17 See Polakiewicz, 36 and Directorate of Legal Advice and Public International Law, para 5.
18 See on this also the Commentary on Art 45 of the CoE Convention against Trafficking.
19 Directorate of Legal Advice and Public International Law, para 7.
20 GRETA, *2nd General Report on GRETA's Activities*, 4 October 2012, para 19.
21 Ibid.
22 GRETA, *4th General Report on GRETA's Activities*, March 2015, 17.
23 GRETA, *2nd General Report* para 20; GRETA, *4th General Report*, 17; GRETA, *5th General Report on GRETA's Activities*, February 2016, 44; GRETA, *6th General Report on GRETA's Activities*, March 2017, para 25; GRETA, *7th General Report on GRETA's Activities*, March 2018, para 29.
24 See Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, Arts 2(b) and 15.
25 Frank Hoffmeister, 'Article 15. Consent to be bound by a treaty expressed by accession' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 220.

Compared to ratification, acceptance or approval, whereby a signature precedes it, accession only requires the deposit of the instrument of accession.[26]

2. Evaluation before invitation to accede

When a request for accession is made to a CoE convention, the Committee of Ministers' Rapporteur Group on Legal Co-operation examines it followed by the Committee of Ministers.[27] In certain circumstances, the Committee of Ministers may request 'an expertise' be completed in order to evaluate the compatibility of the requesting State's domestic laws with the CoE standards.[28] While CoE treaties do not mention this element, 'it takes place particularly if the subject of the treaty renders it adviseable and if at least one member state so requested during the deliberations of the Committee of Ministers'.[29] **43.10**

26 United Nations, *Treaty Handbook* (United Nations Treaty Section of the Office of Legal Affairs 2012), para 3.3.4.
27 Directorate of Legal Advice and Public International Law, para 3.
28 Polakiewicz, 35.
29 For instance, regarding treaties concerning mutual assistance in criminal matters, see Polakiewicz, 35.

ARTICLE 44

TERRITORIAL APPLICATION

Julia Planitzer

1 Any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2 Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

A. INTRODUCTION

44.01 Article 44 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] specifies the territorial application of the Convention. According to Article 44(1), State Parties should at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which the Convention shall apply. Under Article 44(2), State Parties can extend the application of this Convention to territories 'for whose international relations it is responsible or on whose behalf it is authorised to give undertakings'. According to Article 44(3), declarations made can be withdrawn by a notification addressed to the Secretary General of the CoE.

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

B. DRAFTING HISTORY

44.02 Article 44 of the CoE Convention against Trafficking was already included in early drafts of the Convention, and the wording of this provision remained unchanged throughout the drafting process.[2] The Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) adopted the article on territorial application without any amendments at the 4th meeting of the CAHTEH.[3]

44.03 During the 8th CAHTEH meeting, regarding the Convention's Explanatory Report on Article 44, Azerbaijan wished to add a note that it would be allowed for State Parties to exclude parts of territories from the application of the Convention, over which the State Party did not have effective control. However, it was stressed that this would be more appropriately addressed at the time of the deposit of the instruments of ratification.[4] Consequently, Azerbaijan made a declaration in the abridged report of the 8th CAHTEH meeting for the Committee of Ministers for information.[5]

C. ARTICLE IN CONTEXT

44.04 The text of Article 44 of the CoE Convention against Trafficking is a standard clause based on the Model Final Clauses for Conventions and Agreements concluded within the CoE, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.[6]

D. ISSUES OF INTERPRETATION

44.05 Article 44(1) of the CoE Convention against Trafficking allows 'any State or the European Community' to specify the territory or territories to which the Convention shall apply. In contrast, Article 29 of the Vienna Convention on the Law of the Treaties states that 'a treaty is binding upon each party in respect of its entire territory'.[7] Nevertheless, the long-standing practice of the CoE Member States shows a much more restricted scope of the territorial clauses and that these clauses in CoE treaties do not give State Parties discretion to decide on

2 CAHTEH, *Revised Preliminary Draft – European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 21. 'Territorial application' was dealt with under Article 50 in early drafts of the Convention.

3 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 127.

4 CAHTEH, *8th meeting (22–25 February 2005) – Meeting Report*, CAHTEH(2005)RAP8, 16 March 2005, para 108.

5 Committee of Ministers, *917 Meeting (2 March 2005)*, CM(2005)32, 1 March 2005, 4.3 (CAHTEH), para 8.

6 Ministers' Deputies of the Council of Europe, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, 18 February 1980, Art d; see also Ministers' Deputies of the Council of Europe at their 1291st meeting, *Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe*, CM(2017)62, 5 July 2017, Art c. See also Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 380. For further examination of the CoE Model Final Clauses for Conventions and Agreements, see Commentary on Art 42 of the CoE Convention against Trafficking.

7 United Nations Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155 (thereinafter the VLCT).

which parts the treaty applies.[8] The Convention's Explanatory Report further clarifies that 'it would be incompatible with the object and purpose of the Convention for States Parties to exclude parts of their territory from application of the Convention without valid reason'.[9]

44.06 The following categories of territories are considered as falling outside the automatic scope of application of a European treaty: (1) overseas territories; and (2) territories that belong to the national territory in Europe but enjoy some form of autonomy or special status. Concerning these two categories, State Parties declare the scope of application of a treaty.[10] For instance, with regard to the first category, the Netherlands declared that it accepts the application of the Convention for Aruba.[11] An example of the second category pertains to Denmark, who stated, in its declaration that the CoE Convention against Trafficking does not apply to the Faroe Islands and Greenland 'until further decision'.[12]

44.07 In general, five Member States of the CoE, namely Azerbaijan, Cyprus, Georgia, Moldova and Ukraine, have declared their inability to ensure compliance with different conventions of the CoE in relation to parts of their territory that fall out of the sphere of their effective control.[13] In relation to the CoE Convention against Trafficking, Azerbaijan,[14] Georgia,[15] Moldova[16] and Ukraine[17] made declarations in this respect. These declarations are interpreted 'rather as declarations relating to a factual situation in the territories in question', than as reservations.[18]

44.08 The Group of Experts on Action against Trafficking in Human Beings (GRETA) refers to these declarations in its reports. For instance, GRETA explained that due to these declarations, 'GRETA is (…) not in a position to cover the situation in the areas which are not under the effective control of the Azerbaijani authorities'.[19] In relation to Moldova and Georgia, GRETA expresses its concern about the possible impacts of the respective conflicts in the affected areas in relation to the prevention of trafficking in human beings, protection of the

8 Jörg Polakiewicz, *Treaty-making in the Council of Europe* (Council of Europe Publishing 1999) 42–3.
9 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 384.
10 Polakiewicz, 44.
11 Council of Europe Secretariat General, Notification of territorial application – Netherlands, JJ7908C Tr./197-66, 30 January 2015.
12 Council of Europe Secretariat General, Notification of ratification – Denmark, JJ6540C Tr./197-25, 21 September 2007. According to Polakiewicz, the 'exclusion of such territories is often due to the fact that the local representative bodies had not yet been consulted on the application of the treaty when it was ratified (…)', see Polakiewicz, 45. The territories of these second category can be also located in Europe, hence, it would be incorrect to use the term 'colonial clause', according to Polakiewicz. On the debate of 'colonial clauses', see Kerstin von der Decken, 'Article 29. Territorial scope of treaties' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 524. In relation to the second category of territories, Spain declared concerning Gibraltar that the international relations of Gibraltar come under the responsibility of the UK, see Council of Europe Secretariat General, Notification of signature – Spain, JJ6713C Tr./197-36, 11 July 2008.
13 Jörg Polakiewicz, 'Council of Europe Depositary Practice', Seminar 'Managing the International Order – The Functions of Treaty Depositaries' (Helsinki, 19 September 2018), 6.
14 Council of Europe Secretariat General, Notification of ratification – Azerbaijan, JJ7086C Tr./197-52, 2 July 2010.
15 Council of Europe Secretariat General, Notification of ratification – Georgia, JJ6458C Tr./197-19, 16 March 2007.
16 Council of Europe Secretariat General, Notification of ratification – Moldova, JJ6298C Tr./197-9, 26 May 2006.
17 Declaration contained in a Note verbale from the Ministry of Foreign Affairs of Ukraine, dated 12 October 2015, transmitted by a Note verbale from the Permanent Representation of Ukraine, dated 13 October 2015, registered at the Secretariat General on 16 October 2015.
18 Polakiewicz, 'Council of Europe Depositary Practice', 7.
19 GRETA, *Report on Azerbaijan*, I GRETA(2014)9, para 13.

rights of trafficked persons and prosecution. Therefore, GRETA encourages seeking 'pragmatic solutions in the interest of combating trafficking in human beings'.[20]

20 GRETA, *Report on Georgia*, I GRETA(2011)24, para 12 and GRETA, *Report on Moldova*, I GRETA(2011)25, para 12.

ARTICLE 45

RESERVATIONS

Katerina Simonova

No reservation may be made in respect of any provision of this Convention, with the exception of the reservation of Article 31, paragraph 2.

A. INTRODUCTION

45.01 Article 45 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings clearly establishes that no reservation to the CoE Convention against Trafficking[1] is permitted, except the possibility to submit a reservation set forth in Article 31(2). Due to this clear and almost absolute prohibition, the interpretation and admissibility issues that commonly arise in the discussion regarding reservations to multilateral international treaties, including the question of whether the reservation does not violate any of the rules on reservations (from Arts 19–23 of the Vienna Convention on the Law of Treaties[2]), are irrelevant in relation to Article 45 of the CoE Convention against Trafficking.[3]

B. DRAFTING HISTORY

45.02 The preliminary draft of Article 45 established that no State Parties may submit reservations in respect of any provision of the Convention.[4] Following an extensive disagreement between delegations on Article 31 (jurisdiction), at its 4th meeting, the Ad hoc Committee on Action against Trafficking in Human Beings (CAHTEH) decided to add paragraph 2 to Article 31

1 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, entered into force 27 January 1980.

3 For more on the admissibility of reservations and other common issues, see Jörg Polakiewicz, *Treaty-making in the Council of Europe* (Council of Europe Publishing 1999) 77–80.

4 CAHTEH, *Revised Preliminary Draft of the European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, 21.

allowing State Parties to submit a reservation to jurisdiction rules listed in Article 31(1)(d) and (e).[5]

Due to this amendment, experts decided to modify Article 45 to reflect this possibility. However, since Article 45 relies directly on the final wording of Article 31, the CAHTEH decided to examine the final wording of Article 45 closer to the end of negotiations.[6] **45.03**

The final examination of Article 45 took place at the CAHTEH's 7th meeting.[7] At this point, several delegations supporting the idea of allowing reservations to the Convention argued that if reservations are not allowed, the ratification process will be slowed down.[8] Others disagreed and noted that the current text of the Convention is in many aspects a compromise already, containing many non-mandatory provisions. As such, it should not allow more reservations other than the ones referred to in Article 31(2).[9] Additionally, some delegations were proposing to delete the provision on reservations entirely.[10] Because of these disputes, the CAHTEH held a vote[11] and decided to adopt the text of Article 45 without amendment.[12] **45.04**

C. ARTICLE IN CONTEXT

Article 45 of the Convention was modelled according to the Model Final Clauses for Conventions and Agreements which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.[13] This document specifies that 'where a treaty contains no reservation clause, any reservation compatible with the object and purpose of the treaty may be formulated'.[14] However, if the drafters of the treaty intend that no reservations are allowed, an explicit clause, such as the following: 'No reservation may be made in respect of the provisions (…) of this Convention', should be adopted.[15] **45.05**

5 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 66.
6 Ibid., para 129.
7 CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 75.
8 Ibid., para 76.
9 Ibid., para 77.
10 For example, Denmark. See CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers*, CAHTEH(2004)24, 19 November 2004, 7.
11 CAHTEH, *7th meeting- Meeting Report*, CAHTEH(2005)RAP7, para 78.
12 Ibid., para 79.
13 Ministers' Deputies of the Council of Europe, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, 18 February 1980, 4; see also Ministers' Deputies of the Council of Europe at their 1291st meeting, *Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe*, CM(2017)62, 5 July 2017, Art d. For further examination of the CoE Model Final Clauses for Conventions and Agreements, see Commentary on Art 42 of the CoE Convention against Trafficking.
14 Ibid.
15 Ibid. For more on the drafting practice within the CoE, see Polakiewicz, 85–90.

D. ISSUES OF INTERPRETATION

45.06 Article 45 further clarifies that State Parties may enter their reservation as defined in Article 31(2).[16] This provision of Article 31(2) allows State Parties to submit reservations to Article 31(1)(d) and (e) establishing extra-territorial grounds for jurisdiction, based on the nationality and passive personality principle.[17] As the Explanatory Report emphasises, any other reservation is not permitted.[18]

16 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 386.

17 See on this also Commentary on Art 31 of the CoE Convention against Trafficking.

18 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 386.

ARTICLE 46

DENUNCIATION

Vahnessa Espig

1 Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

A. INTRODUCTION

46.01 Denunciation refers to 'a procedure initiated unilaterally by a State to terminate its legal engagements under a treaty'.[1] Article 46 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[2] is a standard clause based on the 1980 Model Final Clauses for Conventions and Agreements concluded within the CoE.[3] Article 46 was adopted without amendment by the Ad hoc Committee on Action against Trafficking in Human Beings.[4]

B. ISSUES OF INTERPRETATION

46.02 Parties to the Convention may denounce it, for instance, by means of notification through the instrument of denunciation addressed to the Secretary General of the CoE, who acts as the depository[5] of the Convention.[6]

1 United Nations, *Final Clauses of Multilateral Treaties Handbook* (United Nations Publication 2013), 109.

2 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

3 Ministers' Deputies of the Council of Europe, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, 18 February 1980, Art f; Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 380. See Commentary on Art 42 of the CoE Convention against Trafficking for further examination on the Model Final Clauses for Conventions and Agreements concluded within the CoE.

4 See CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 130; CAHTEH, *7th meeting (7–10 December 2004) – Meeting Report*, CAHTEH(2005)RAP7, 6 January 2005, para 81.

5 For further discussion on the depository's role, see Commentary on Art 42.

46.03 Article 54(a) of the United Nations Vienna Convention on the Law of Treaties (VCLT),[7] which expresses a party may withdraw or denounce a treaty 'in conformity with the provisions of the treaty', is of particular relevance in this respect.[8] Although Article 54 VCLT uses terms like 'withdrawal', it denotes the same legal concept as denunciation.[9]

6 See 'Instrument of Denunciation' at Council of Europe, Templates – Legal instruments related to Council of Europe Treaties <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/20498421> accessed 13 November 2019.

7 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969.

8 United Nations, *Final Clauses of Multilateral Treaties Handbook*, 109. See on this also Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 384.

9 United Nations, *Final Clauses of Multilateral Treaties Handbook*, 109.

ARTICLE 47

NOTIFICATION

Vahnessa Espig

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, any State signatory, any State Party, the European Community, to any State invited to sign this Convention in accordance with the provisions of Article 42 and to any State invited to accede to this Convention in accordance with the provisions of Article 43 of:

a any signature;
b the deposit of any instrument of ratification, acceptance, approval or accession;
c any date of entry into force of this Convention in accordance with Articles 42 and 43;
d any amendment adopted in accordance with Article 41 and the date on which such an amendment enters into force;
e any denunciation made in pursuance of the provisions of Article 46;
f any other act, notification or communication relating to this Convention;
g any reservation made under Article 45.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Warsaw, this 16th day of May 2005, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention, to the European Community and to any State invited to accede to this Convention.

A. INTRODUCTION

47.01 Article 47 of the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings[1] is a standard clause based on the 1980 Model Final Clauses for Conventions and Agreements concluded within the CoE.[2]

B. ISSUES OF INTERPRETATION

47.02 The Secretary General of the CoE[3] is responsible for making and providing the relevant entities with the notifications listed in Article 47.[4] Notifications are electronically delivered 'to all member states and other parties at a set time each week'.[5] The CoE Treaty Office's website has a record of notifications issued since 2005, available in English and French.[6]

1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter the CoE Convention against Trafficking or the Convention).

2 Ministers' Deputies of the Council of Europe, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, 18 February 1980, Art g; Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 380. See on this also Commentary on Art 42 of the CoE Convention against Trafficking for further examination of the Model Final Clauses for Conventions and Agreements concluded within the CoE.

3 For further discussion on the depository of the Convention, see on this also Commentary on Art 42 of the CoE Convention against Trafficking.

4 Council of Europe, *Explanatory Report – CoE Convention against Trafficking*, CETS No. 197, para 388.

5 Jörg Polakiewicz, 'Council of Europe Depositary Practice', Seminar 'Managing the International Order – The Functions of Treaty Depositaries' (Helsinki, 19 September 2018) 3.

6 Council of Europe, Notifications <https://www.coe.int/en/web/conventions/notifications> accessed 14 November 2019.

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