

# The Council of Europe Convention on Action Against Trafficking in Human Beings

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*This Article will provide an introduction to the Council of Europe Convention on Action Against Trafficking in Human Beings and focus on those affected most by human trafficking: the victims.*

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## I. INTRODUCTION

“Everyone has the right to life, liberty and security of person.”<sup>1</sup>

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1. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 3, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

The above quote comes directly from article 3 of the Universal Declaration of Human Rights (UDHR), and it demonstrates that liberty and security of a person are paramount among internationally recognized human rights.<sup>2</sup> Liberty is also emphasized in article 4 of the UDHR, which prohibits all forms of slavery, as well as the slave trade.<sup>3</sup> Sadly, although liberty and security have become norms under customary international law, these rights are still being violated across the globe. It is only in recent years that trafficking in human beings, a conduct that should be considered a form of modern-day slavery,<sup>4</sup> has emerged from the shadow of impunity. Fortunately, Europe has recognized that legislative action needs to go beyond simply attaching laws against human trafficking to organized crime bills and, therefore, has adopted a comprehensive approach to this matter.

## II. DRAFTING THE CONVENTION

The Council of Europe Convention on Action against Trafficking in Human Beings (Convention), adopted by the Council of Europe on May 16, 2005,<sup>5</sup> is a ground-breaking legislative instrument. Although the impetus behind the Convention has been present since the early 1990s, it was only recently acted on by a recommendation of the Committee of Ministers in 2000. This recommendation urged the member states to focus on the “Three P’s”: *prevention* of human trafficking, *protection* of victims, and *prosecution* of perpetrators.<sup>6</sup> These three areas then laid the foundation for the comprehensive approach adopted by the Council of Europe. This Article suggests that the ideas of prevention and protection should always be at the forefront in analyzing the text of the Convention. Not only has the Council of Europe set a high standard for prosecution, but it has recognized that victims of human trafficking, regardless of age

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2. *See id.*

3. *Id.* art. 4.

4. In her address to the Ad Hoc Committee on Action Against Trafficking in Human Beings at the occasion of their first meeting on September 15, 2003, Deputy Secretary General of the Council of Europe, Maud de Boer-Buquicchio, qualified trafficking in human beings as “a new form of slavery affecting the whole of Europe.” Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, Address at the First Meeting of CAHTEH (Sept. 15, 2003), available at [http://www.coe.int/t/e/human\\_rights/trafficking/2\\_Cahteh/Speech.asp](http://www.coe.int/t/e/human_rights/trafficking/2_Cahteh/Speech.asp).

5. Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197 [hereinafter Convention].

6. Council of Eur. Comm. of Ministers, *Recommendation of the Committee of Ministers to the Member States on Action Against Trafficking in Human Beings for the Purpose of Exploitation*, 710th Sess., Doc. No. R(2000) 11 (May 19, 2000) [hereinafter *Committee Recommendation*], available at <https://wcd.coe.int/ViewDoc.jsp?id=355371>.

or gender, can only be helped when preventive measures are taken and protection is provided.<sup>7</sup>

At its 838th meeting on April 30, 2003, the Committee of Ministers decided to establish the Ad Hoc Committee on Action Against Trafficking in Human Beings (CAHTEH), which was mandated to draft what would become the Convention by December 31, 2004.<sup>8</sup> This mandate was later revised and the deadline was extended until April 30, 2005.<sup>9</sup> Nonetheless, by the end of 2004, CAHTEH had created a draft convention which it approved at its meeting in December 2004.<sup>10</sup> The draft convention was then presented to the Committee of Ministers and submitted to the Parliamentary Assembly for opinion.<sup>11</sup> The Parliamentary Assembly adopted the Committee's opinion on January 26, 2005.<sup>12</sup>

On May 3, 2005, the Committee of Ministers adopted the draft convention<sup>13</sup> and opened it for signature on May 16, 2005.<sup>14</sup> As of January 2006, twenty-four member states have signed the Convention, but none have ratified it.<sup>15</sup> Additionally, none of the nonmember states have signed or ratified the Convention, nor has the European

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7. The Council of Europe has repeatedly requested a higher level of protection. In 2002, the Committee of Ministers declared trafficking in women a major human rights violation. Council of Eur. Comm. of Ministers, *Recommendation of the Committee of Ministers to Member States on the Protection of Women Against Violence*, app., § 1(b)-(c), 794th Sess., Doc. No. R(2002)5 (Apr. 30, 2002), available at <https://wcd.coe.int/ViewDoc.jsp?id=280915>.

8. Council of Eur. Comm. of Ministers, *Specific Terms of References of the Ad Hoc Committee on Action Against Trafficking in Human Beings*, app. 4 §§ 4, 8, 838th Sess., Doc. No. CM/Del/Dec(2003)838/4.4/appendix4E (May 5, 2003), available at <https://wcd.coe.int/ViewDoc.jsp?id=20333>.

9. Council of Eur. Comm. of Ministers, *Revised Draft Convention on Action Against Trafficking in Human Beings—Progress Report and Forthcoming Deadlines—Report by the Rapporteur on Equality between Women and Men*, § 3, 905th Sess., Doc. No. RAP-EG(2004)3, RAP-EG(2004)5 (Dec. 1-2, 2004), available at <https://wcd.coe.int/ViewDoc.jsp?id=799047>.

10. *Id.*

11. *Id.*

12. Council of Eur. Parliamentary Assemb., *Draft Council of Europe Convention on Action Against Trafficking in Human Beings*, 5th Sess. Op. No. 253 (Jan. 26, 2005), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/EOP1253.htm>.

13. Council of Eur. Comm. of Ministers, *Council of Europe Convention on Action Against Trafficking in Human Beings: Addendum 1 Final 3*, 925th Sess., Doc. No. CM(2005)32 (May 3, 2005), available at <https://wcd.coe.int/ViewDoc.jsp?id=828587>.

14. The Convention was not only open to signature by member states and by the European Community, but to those nonmember states that participated in the elaboration process. In addition, the Convention is open for accession by other nonmember states. *See id.* arts. 42-43.

15. Coe.int, Council of Europe Convention on Action Against Trafficking in Human Beings CETS No.: 197, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=17/01/2006&CL=ENG> (showing the signature status of the Convention as of January 1, 2006) (last visited Apr. 12, 2006).

Community.<sup>16</sup> These low ratification numbers may be a bad omen for the speedy implementation of this promising instrument.

The Convention offers a new dimension to the Council of Europe's legal efforts to combat human trafficking. The Convention also complements previous instruments adopted by the Council of Europe aimed at protecting human rights, promoting fundamental freedoms and human dignity, and prosecuting violations of these rights. The Council of Europe thus sees it as embedded in the framework of previously enacted instruments regarding human rights.<sup>17</sup> Most importantly, the Convention provides a new and comprehensive instrument that gives hope to victims of human trafficking and counteracts the fact that some of the Council of Europe member states are known as notorious countries for either or both the origin and transit of human beings.<sup>18</sup>

### III. THE CONVENTION

An analysis of the Convention begins with a consideration of its title: "Council of Europe Convention on Action Against Trafficking in Human Beings." The word "Action" indicates that trafficking should be targeted throughout the market chain in countries of origin, transit, and destination. In the Explanatory Report to the Convention, the Council of Europe explicitly states that legislative activities alone are not sufficient and that "prevention and assistance to victims"<sup>19</sup> *must* be included.

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16. *Id.*

17. *See* Convention on Cyber Crime, Nov. 23, 2001, Europ. T.S. No. 185; The Civil Law Convention on Corruption, Nov. 4, 1999, Europ. T.S. No. 174; The Revised European Social Charter, May 3, 1996, Europ. T.S. No. 163; The European Convention on the Exercise of Children's Rights, Jan. 25, 1996, Europ. T.S. No. 173; The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, Europ. T.S. No. 141; The European Convention on the Compensation of Victims of Violent Crimes, Nov. 23, 1983, Europ. T.S. No. 116; The European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35; The European Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, Europ. T.S. No. 30; The European Convention on Extradition, Dec. 13, 1957, Europ. T.S. No. 24; The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5; *see also* Explanatory Report on the Council of Europe Convention on Action Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197, [hereinafter Explanatory Report].

18. There are two major routes of trafficking in Europe. One leads from Moldova, Romania, and Bulgaria to the West via Romania, Serbia, Bosnia-Herzegovina, and sometimes Croatia. Another leads from the same countries along a southern route via Kosovo, Albania, Macedonia, and Montenegro to Italy and other countries of the European Union. Chris Corrin, *Traffic in Women in War and Peace: Mapping Experiences in Southeast Europe*, 12 J. CONTEMP. EUR. STUD. 177, 181 (2004).

19. *See* Explanatory Report, *supra* note 17, ¶ 39.

### A. *The Preamble*

Human trafficking affects many lives and undermines a basic commitment to human rights. The preamble of the Convention pays tribute to those who have fallen, are falling, or will fall victim to human trafficking by stating that such conduct is a violation of human rights and offends the dignity and integrity of every human being.<sup>20</sup> The preamble goes on to discuss that in addition to having to endure trafficking, victims may also end up in slavery.<sup>21</sup> Many early instruments dealing with human trafficking have mentioned slavery in this context.<sup>22</sup> Use of this particular language is recognition of the significant link between the danger of slavery and exploitation. Recent reports have found that the majority of victims are trafficked for commercial sexual exploitation or labor exploitation in various fields such as domestic chores, agriculture, or construction.<sup>23</sup>

Naturally, the preamble also refers to documents that preceded it or were essential for its elaboration, including the United Nations Convention Against Transnational Organized Crime (Transnational Crime Convention) and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (U.N. Protocol).<sup>24</sup> In so doing, the preamble summarizes the Convention's broader approach to human trafficking through the improvement of the protections afforded the victims and by developing the standards established by these prior documents.<sup>25</sup>

### B. *The Purpose of the Convention*

Article 1, "Purposes of the Convention," encompasses the broad and comprehensive approach to counter trafficking in human beings in all its aspects.<sup>26</sup> Article 1(a) provides that preventing and combating human trafficking is a purpose of the Convention, signaling that

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20. Convention, *supra* note 5, pmb1.

21. *Id.*

22. *Id.*

23. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children* ¶ 8, U.N. Doc. E/CN.4/2005/71 (Dec. 22, 2004).

24. Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/383 (Nov. 15, 2000) [hereinafter U.N. Protocol].

25. Convention, *supra* note 5, pmb1.

26. *Id.* art. 1.

trafficking will actively be opposed.<sup>27</sup> Included in section 1(a) is the phrase “while guaranteeing gender equality,”<sup>28</sup> which indicates that the drafters of the Convention were aware that women and girls are not the only victims of human trafficking. Men and boys are also affected by human trafficking, only these victims are often not included in statistics as a result of overnarrow definitions by some states.<sup>29</sup> Article 1(b) also focuses on victims’ assistance and protection by proposing to ensure effective investigations and prosecutions.<sup>30</sup> Finally, article 1, paragraph 2, establishes the monitoring mechanism for the Convention, which is intended to ensure the effectiveness of the Convention and is regulated in chapter VII.<sup>31</sup>

### C. *The Scope of the Convention*

At first glance, the scope of the Convention appears to be very broad and general. Nevertheless, it is necessary to see the Convention in relation to the U.N. Protocol, which is very narrow in scope, and applicable only to transnational human trafficking involving a criminal organization.<sup>32</sup> Indeed, criticism of the narrow scope of the U.N. Protocol prompted the Council of Europe to broaden the scope of the Convention.<sup>33</sup>

Consequently, the Convention omits the requirements of both a transnational component and an organized criminal group, thereby enhancing the protection afforded to victims. Article 2 explicitly states that the Convention applies to all forms of trafficking, “whether national or transnational, whether or not connected with organised crime.”<sup>34</sup> Furthermore, although organized crime plays a major role in both narcotics and human trafficking in Europe, the enlargement of the Convention’s scope beyond organized crime will provide a higher quality of protection for those affected.

The personal scope of the Convention is determined in article 3. This article applies the principle of nondiscrimination and prohibits, *inter*

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27. *Id.* art. 1(a).

28. *Id.*

29. *See, e.g.*, David A. Feingold, *Human Trafficking*, 150 FOREIGN POL’Y 26, 26 (2005).

30. Convention, *supra* note 5, art. 1(b).

31. *Id.* art. 1, ¶ 2.

32. *See* U.N. Protocol, *supra* note 24, art. 4.

33. *See* Feingold, *supra* note 29, at 28.

34. Convention, *supra* note 5, art. 2.

*alia*, any distinction between sex, race, language, religion, social origin, association with a national minority, or property.<sup>35</sup>

#### D. Definitions

The Convention maintains its close ties to the U.N. Protocol by assuming the Protocol's definitions. Consequently, article 4(a) of the Convention defines trafficking in human beings as

“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 exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>36</sup>

This wording is taken from article 3(a) of the U.N. Protocol.<sup>37</sup> Only adopted after a lengthy battle over its parameters, the conduct of human trafficking fortunately received a recognized definition in the Convention.

In particular, to give emphasis to the element of “exploitation” is of the utmost importance because it is the distinguishing element between human trafficking and the smuggling of migrants. Article 3 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime defines migrant smuggling as transporting migrants to a country of which they are not a national or of which they do not hold a residence permit.<sup>38</sup> In contrast, conduct which constitutes trafficking in

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35. *Id.* art. 3. It is interesting to note that Protocol Number 12 to the Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), which contains a comprehensive version of the prohibition of discrimination that goes beyond article 14 of the ECHR enjoyed a similar lack of enthusiasm by the Council of Europe member states during its ratification. It was adopted in 2000 and entered into force April 1, 2005. *See* Coe.int, Protocol No. 12 to the Convention For the Protection of Human rights and Fundamental Freedoms CETS No.: 177, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=17/01/2006&CL=ENG> (showing the Signature Status of Protocol No. 12 as of Apr. 12, 2006) (last visited Apr. 12, 2006).

36. Convention, *supra* note 5, art. 4(a).

37. U.N. Protocol, *supra* note 24, art. 3(a).

38. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/55/383 (Nov. 15, 2000). This Protocol was adopted by the United Nations General Assembly together with the United Nations Convention Against Transnational Organized Crime,

human beings requires that a person be subjected to one of the conducts mentioned in the definition of article 4(a) of the Convention because “[t]rafficking in human beings is consequently present before the victim’s actual exploitation.”<sup>39</sup>

Another aspect of the definition in article 4(a) of the Convention that deserves closer examination is the part focusing on forced labor, slavery, and servitude.<sup>40</sup> Although the Explanatory Report cites instruments which prohibit slavery, forced labor, and servitude, neither the Convention nor the Explanatory Report define any of these three terms.<sup>41</sup> As indicated above, human trafficking fosters violations of human rights,<sup>42</sup> and the Convention has taken a dynamic approach to protecting such rights so that newly emerging conduct may fit within these definitions. Otherwise, too narrow of definitions might cabin the actions subject to these provisions and allow human rights violations to continue with impunity.

Additionally, article 4(b) of the Convention clearly states that the defense of consent is irrelevant in human trafficking cases.<sup>43</sup> Moreover, the Convention affords child victims expanded protection. The definition of human trafficking is even broader when a child is affected. Namely, “[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation,” is considered trafficking, even if none of the means detailed above were used.<sup>44</sup> Article 4(d) defines “child” as anyone under eighteen years of age.<sup>45</sup> These factors are each indicators of the heightened protection that the Convention intends to provide.

### *E. Prevention*

Among the Three P’s, prevention has proven to be the most neglected. Only in a few isolated cases have projects been dedicated to preventive measures, and very often they were initiated by international organizations (IOs) such as the United Nations Office on Drugs and

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G.A. Res. 55/25, Annex I, U.N. Doc A/RES/55/383 (Nov. 15, 2000) and the U.N. Protocol, *supra* note 24.

39. Explanatory Report, *supra* note 17, ¶ 87.

40. Convention, *supra* note 5, art.4(a).

41. Explanatory Report, *supra* note 17, ¶¶ 89-95.

42. See Ndioro Ndiaye, *Trafficking and Sexual Exploitation of Women: Global Trends and Responses*, in *WOMEN IN AN INSECURE WORLD: VIOLENCE AGAINST WOMEN. FACTS, FIGURES AND ANALYSIS* 79-89 (Marie Vlachova & Lea Biason eds., 2005).

43. Convention, *supra* note 5, art. 4(b).

44. *Id.* art. 4(c).

45. *Id.* art. 4(d).



Crime (UNODC) or nongovernmental organizations (NGOs) such as the German *Terre des Femmes*. Both of these institutions have supported programs in countries of origin to inform people about the practices of human trafficking,<sup>46</sup> as well as training persons to earn a living in their residence country.<sup>47</sup> The Convention, however, takes a multipronged approach to prevention: providing for classical prevention, as well as prevention from the side of security personnel.

### 1. Prevention and Measures To Discourage the Demand

Article 5(1) of the Convention obliges the member states to establish coordination between the institutions responsible for combating human trafficking.<sup>48</sup> This step intends to ensure that some degree of uniformity is reached at both the regional and international levels. This approach can be defined as classic prevention through enforcement personnel. Article 5(2) takes a ground-breaking approach to prevention because it foresees the need for preventive measures on the side of the victims.<sup>49</sup> Not only does article 5(2) set out the need for basic information, training, and education, but it also endorses research.<sup>50</sup> Moreover, it intends that these measures should be provided to both individuals who are vulnerable to trafficking and groups of professionals who work to combat human trafficking.<sup>51</sup>

The root of trafficking in persons is often a socioeconomic cause such as unemployment, poverty, or violent oppression.<sup>52</sup> Thus, preventive measures such as social and economic initiatives and training programs, which are set forth in article 5(2), have the greatest potential to eradicate

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46. This is one part of the U.N. Global Programme To Combat Trafficking in Human Beings, a program initiated by the UNODC and the United Nations Interregional Crime and Justice Research Institute, launched in 1999. U.N. Office on Drugs & Crime, *Trafficking in Human Beings*, [http://www.unodc.org/unodc/en/trafficking\\_human\\_beings.html](http://www.unodc.org/unodc/en/trafficking_human_beings.html) (last visited Apr. 12, 2006).

47. Through its actions against trafficking in women and forced prostitution, the German organization, *Terre des Femmes*, has supported a Belarusian women's organization, which provides assistance and counselling for women driven into poverty after the Chernobyl accident and women who often fall victim to human trafficking in the hope of being able to support their families (who are often sick). Often, they travel into the West and end up in brothels. The assistance project Malinowka informs them about the threats and dangers of human trafficking. *Terre des Femmes, Projektkooperation: Das Frauenprojekt "Malinowka" in Minsk*, [http://www.frauenrechte.de/tdf/index.php?option=com\\_content&task=view&id=122&Itemid=120](http://www.frauenrechte.de/tdf/index.php?option=com_content&task=view&id=122&Itemid=120) (last visited Apr. 12, 2006).

48. Convention, *supra* note 5, art. 5, ¶ 1.

49. Convention, *supra* note 5, art. 5, ¶ 2.

50. *Id.*

51. *Id.*

52. Ndiaye, *supra* note 42, at 85.

the root causes of human trafficking.<sup>53</sup> These measures go hand-in-hand with article 5(4), which calls upon member states to “enable migration to take place legally.”<sup>54</sup> Relaxed migration and visa policies play an important role in this respect.<sup>55</sup> The preventive measures of article 5 also refer to children and regulate the creation of a protective environment based upon their special vulnerability.<sup>56</sup>

The Convention not only calls for the implementation of a human rights based approach and gender mainstreaming, but also recognizes the important role of civil society in combating human trafficking, as neither state nor nonstate actors can handle the problem of human trafficking alone.<sup>57</sup> The goal of creating a comprehensive framework is achieved by article 6 of the Convention, which calls for measures to discourage the demand for trafficked persons; information campaigns, emphasizing the role of the media, and educational programs are only three of the proposed measures.<sup>58</sup> Moreover, the Explanatory Report makes clear that these proposed measures are only a bare minimum of what is necessary and thus leave this area open to future expansion.<sup>59</sup>

## 2. Border Measures, Controls, and Documents

The methods of transporting trafficked persons from their countries of origin vary widely and traffickers continuously find new ways to bring victims to their final destination.<sup>60</sup> Because of the passage of the Schengen acquis<sup>61</sup> and the larger size of the Council of Europe, effective border controls and safe documents can contribute significantly to combating human trafficking. However, to be effective, guards must

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53. Convention, *supra* note 5, art. 5, ¶ 5.

54. *Id.* art. 5, ¶ 4.

55. Ndiaye, *supra* note 42, at 82.

56. Convention, *supra* note 5, art. 5, ¶ 5.

57. *Id.* art. 5, ¶ 6; *see also* OSCE OFFICE OF DEMOCRATIC INSTS. & HUMAN RIGHTS, NATIONAL REFERRAL MECHANISMS: JOINING EFFORTS TO PROTECT THE RIGHTS OF TRAFFICKED PERSONS: A PRACTICAL HANDBOOK 47 (2004), *available at* [http://www.osce.org/documents/odihhr/2004/05/2903\\_en.pdf](http://www.osce.org/documents/odihhr/2004/05/2903_en.pdf).

58. Convention, *supra* note 5, art. 6.

59. Explanatory Report, *supra* note 17, ¶ 109.

60. Michele Anne Clark, *Trafficking in Persons: An Issue of Human Security*, 4 J. OF HUM. DEV. 247, 256-57 (2003).

61. The Schengen acquis comprises those norms regulating the abolishment of border control within the European Union. An almost comprehensive list was published in Council Decision 1999/435, Concerning the Definition of the Schengen Acquis for the Purpose of Determining, in Conformity with the Relevant Provision of the Treaty Establishing the European Community and the Treaty on European Union, the Legal Basis for Each of the Provisions or Decisions which Constitute the Acquis, 1999 O.J. (L 176/1) (EC).

receive appropriate training<sup>62</sup> and border control agencies, as noted in article 7(6) of the Convention, must cooperate and exchange information.<sup>63</sup> This cooperation is also demanded in article 9 of the Convention, which concerns the verification of controlled travel documents and requires that they be difficult to falsify or alter under article 8 of the Convention.<sup>64</sup>

In addition, money plays an important role in trafficking. All these measures should be considered in the context that a border guard who is underpaid might consider accepting bribes. Bribery is a perennially popular method used by traffickers to bring victims across borders.<sup>65</sup>

Successful prevention procedures must also monitor how victims are trafficked. In their operations, traffickers use a variety of commercial carriers to transport victims, not just automobiles. Therefore, the Convention in article 7(3) obliges states to demand that such commercial carriers carefully control the documents of their passengers.<sup>66</sup>

#### *F. Protection*

Even after trafficking victims are eventually rescued, a lot of things can, and have gone wrong for such persons. The Convention, therefore, promulgates a series of norms regulating the treatment of and assistance to victims, an aspect of protection that is often neglected in regard to human trafficking.

##### 1. Protection of Victims

It is of utmost importance to identify victims of human trafficking who have been saved from their exploitive situations.<sup>67</sup> Because perpetrators have often tampered with their identities, ensuring that these persons have proper identification is essential to providing these victims with protection. Article 10(1) of the Convention states that identification and assistance should ideally be provided and executed by persons

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62. Such training should enable guards to recognize the typical profiles in trafficking, which include forged documents. Such profiles may otherwise seem insignificant to the outsider, such as one man traveling with several girls or with little luggage. See Clark, *supra* note 60, at 257.

63. Convention, *supra* note 5, art. 7, ¶ 6.

64. *Id.* art. 8.

65. Clark, *supra* note 60, at 257.

66. Convention, *supra* note 5, art. 7, ¶ 3.

67. All measures mentioned in this chapter of the Convention aim to promote gender equality as set forth explicitly in article 17 of the Convention, a norm which also pays tribute to the fact that both women and men can be victims of trafficking. *Id.* art. 17.

familiar with all aspects of human trafficking and its effects on victims.<sup>68</sup> Collaboration of the respective authorities and cooperation between public institutions and support organizations is also emphasized in article 10(1).<sup>69</sup> This leads to the conclusion that human trafficking can be combated when its multidimensional character is recognized and the methods to combat it are correspondingly multidisciplinary.

Because responding to identification issues is common already, attention needs to be given to the methods employed to assist victims. Too often, authorities treat victims as criminals.<sup>70</sup> While transnational cooperation is emphasized repeatedly in the part on protection, it only corresponds with the obligation to cooperate under prevention.<sup>71</sup> This is especially true when it comes to the verification of documents and the award of the minimum protection to victims, as put forth in article 10(2) of the Convention.<sup>72</sup> States must recognize that according to the Convention, it is their initial responsibility to provide victims with assistance.

Article 10(3) of the Convention also accords special protection to stipulating that every person whose age is unknown and seems to be a child must be given special protection until his or her age can be verified.<sup>73</sup> Furthermore, article 10(4) provides that an unaccompanied child will be given a legal guardian, his or her identity and nationality will be verified, and, if it is in the best interest of the child, his or her family shall be located.<sup>74</sup>

The Explanatory Report notes also that there is a risk that victims under protection will be identified.<sup>75</sup> Therefore, protection of victims' privacy must be guaranteed as well. The approach to this protection should be three-fold. First, member states should treat the private data of each victim in accordance with the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data,<sup>76</sup> as required by article 11(1) of the Convention.<sup>77</sup> Second,

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68. *Id.* art. 10, ¶ 1.

69. *Id.*

70. Clark, *supra* note 60, at 257.

71. Convention, *supra* note 5, art. 6.

72. *Id.* art 10, ¶ 2.

73. *Id.* art. 10, ¶ 3.

74. *Id.* art. 10, ¶ 4. As the Explanatory Report explains, the clause "when it is in the best interests of the child" evolved out of the fact that it is often the family who sells a child into trafficking. Explanatory Report, *supra* note 17, ¶ 137.

75. Explanatory Report, *supra* note 17, ¶ 138.

76. The Convention for the Protection of Individuals with Regards to Automatic Processing of Personal Data, Oct. 24, 1995, Europ.T.S. No. 108.

77. Convention, *supra* note 5, art. 11, ¶ 1.

children's privacy should enjoy special protection as set forth in article 11(2) of the Convention.<sup>78</sup> Finally, member states have to consider regulating and cooperating with the media, which plays an exceptional role in the protection of one's private life, in accordance with article 11(3).<sup>79</sup>

## 2. Assistance to Victims

An identified trafficking victim needs more than just protection of one's private life. The effects of trafficking in human beings and the exploitation experienced are numerous. Victims often suffer from physical and psychological harms and are often stigmatized by both their original community and the society into which they are trafficked. Assistance to them wherever they remain is absolutely necessary to enable them to lead a normal life again, and to give them a realistic chance of not becoming a victim again.<sup>80</sup>

Article 12 of the Convention stipulates the minimum framework<sup>81</sup> of assistance to be given to all those persons identified as victims of human trafficking. The procedure set out in article 10 of the Convention is used even if they have not been granted a residence permit.<sup>82</sup> The measures foreseen in article 12(1) of the Convention include:

- (a) standards of living capable of ensuring their subsistence . . . ;
- (b) access to emergency medical treatment;
- (c) translation and interpretation services . . . ;
- (d) counselling and information . . . ;
- (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.<sup>83</sup>

The standard of living put forth in article 12(1) of the Convention should ensure at least the subsistence of the victims.<sup>84</sup> Also, if a careful investigation and comprehensive prosecution of the perpetrators is

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78. *Id.* art. 11, ¶ 2.

79. *Id.* art. 11, ¶ 3. Article 11 of the Convention gives due consideration to article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, for both freedom of speech and media.

80. Ndiaye, *supra* note 42, at 87.

81. *See* Convention, *supra* note 5, art. 12. The Explanatory Report states that it is up to the parties to the Convention to grant measures going beyond this minimum set. Explanatory Report, *supra* note 17, ¶ 151.

82. Convention, *supra* note 5, arts. 10, 12.

83. *Id.* art. 12, ¶ 1.

84. *Id.* art. 12, ¶ 1(a).

conducted in accordance with the Convention, this should enable victims to feel safe from traffickers. Moreover, material assistance that goes beyond financial aid should help keep the victims safe, because many return directly into the arms of their traffickers if they do not have any means to support themselves.<sup>85</sup>

In addition, the Explanatory Report mentions special shelters where both psychological and social help can be provided.<sup>86</sup> Combined with the standards discussed above, these measures can help a victim stabilize one's life again, which can be the first step back toward a normal life.<sup>87</sup> In particular, special attention must be given to psychological assistance, which is a key component in preventing re-traumatization and treating posttraumatic stress disorder.<sup>88</sup> The medical treatment provided for under article 12(1)(b) of the Convention is a minimum treatment, which sets out a procedure aimed at gathering possible evidence of violence against the victim.<sup>89</sup> However, under article 12(3) victims are provided with comprehensive medical services only if holding a valid residence permit for the respective country.<sup>90</sup>

Understanding these procedures and knowing one's rights is essential for a victim to have access to justice. As put forth in paragraph 158 of the Explanatory Report, the translation and interpretation regulated by article 12(1)(c) of the Convention go beyond the usual service of an interpreter in court hearings.<sup>91</sup> As mentioned previously, lack of information for victims on both sides of being trafficked is dangerous. This lack of knowledge is often realized only after being freed. However, under article 12(1)(d) and (e), member states now bear the initial responsibility to provide critical information to victims.<sup>92</sup> To better understand their choices, victims need to be informed about their rights, the possible services they are entitled to, and the legal jurisdiction where their case will be prosecuted.<sup>93</sup> Special emphasis should be given to article 12(1)(e) of the Convention, which ensures a minimum representation in any criminal proceedings.<sup>94</sup> However, article 15(2) leaves it to the member states to provide legal assistance and free legal

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85. *Id.*

86. Explanatory Report, *supra* note 17, ¶¶ 152-155.

87. *Id.* ¶¶ 152-155.

88. *Id.* ¶ 156.

89. *Id.* ¶ 157.

90. Convention, *supra* note 5, art. 12, ¶ 13.

91. *Id.* art. 12, ¶ 1; Explanatory Report, *supra* note 17, ¶ 158.

92. Convention, *supra* note 5, art. 12, ¶ 1(d)-(e).

93. Explanatory Report, *supra* note 17, ¶¶ 159-160.

94. Convention, *supra* note 5, art. 12, ¶ 1(e).

aid to victims within their respective domestic legal systems.<sup>95</sup> In addition, article 15 lays out the framework for possible compensation for the victims.<sup>96</sup>

As mentioned above, comprehensive medical services can only be accorded to those victims lawfully residing in the country. Article 12(4) of the Convention goes even further and demands that states enable victims who are lawful residents to have full access to both the labor market and vocational training and education.<sup>97</sup> Presumably, this will not be applicable to a large number of victims, given the fact that many of them are trafficked into foreign countries with falsified documents.<sup>98</sup> Nonetheless, for those who fulfill the prerequisite of a valid residence permit, this may serve as the key to regaining a normal life.

The member states are also encouraged to cooperate with the civil society active in their territory, such as NGOs and IOs, as set forth in article 12(5) of the Convention.<sup>99</sup> In accordance with article 12(6), assistance must be accorded to all victims unconditionally, whether they are witnesses or not.<sup>100</sup>

### 3. Recovery and Reflection Period and the Right To Reside in a Country

This Article has mentioned that despite being victims, persons exploited after being trafficked are often treated as criminals.<sup>101</sup> The Convention directly addresses this problem by promulgating a set of rules to prevent such treatment.

Article 13 of the Convention provides for a minimum thirty-day recovery and reflection period, during which an alleged victim cannot be expelled.<sup>102</sup> This protective measure distances the victim from the influence of the trafficker. It also allows the victim to settle and stabilize, which in turn helps ensure that the victim's testimony is of good quality. The victim also has access to the assistance put forth in article 12 of the Convention during this time and the respective country has to issue a document verifying the legal status of the victim.<sup>103</sup>

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95. *Id.* art. 15.

96. *Id.* art. 15.

97. *Id.* art. 12, ¶ 4.

98. Ndiaye, *supra* note 42, at 82.

99. *See* Convention, *supra* note 5, art. 12, ¶ 5.

100. *Id.* art. 12, ¶ 6.

101. Clark, *supra* note 60, at 257.

102. Convention, *supra* note 5, art. 13.

103. *Id.* art. 12; *see* Explanatory Report, *supra* note 17, ¶¶ 172-179.

Interestingly, the Explanatory Report clearly states that this recovery and reflection period not only applies to those illegally present in a country, but also to those on a short-term residence permit.<sup>104</sup> Possible reasons for establishing this norm are some of the new European laws on resident aliens, such as the new Austrian Niederlassungs-und Aufenthaltsgesetz.<sup>105</sup> Instead of facilitating legal migration, this law applies strict conditions and time frames to permit holders and new applicants, making legal migration more difficult.<sup>106</sup> Nonetheless, regardless of what the member state's domestic law provides, if it ratifies the Convention, there is an exception to the ban on expulsion during the recovery and reflection period in cases of public disorder or alleged misuse of the victim status.<sup>107</sup>

Article 14 deals with residence permits and provides two possible instances where renewable residence permits can be issued to victims.<sup>108</sup> Because only a few countries have a policy that does not automatically deport victims of human trafficking, the Convention greatly enhances the protection offered to such victims.<sup>109</sup> Although article 14 of the Convention acknowledges the domestic regulations of residence law in the respective countries, it also makes very clear that this renewable residence permit does not prejudice the right to seek asylum.<sup>110</sup> However, there is no obligation to grant any other kind of residence permit.<sup>111</sup>

#### 4. Repatriation and Return of Victims

Ideally, a victim of human trafficking should have the choice of whether to return to one's home country or to stay in the destination country. The Convention provides a legal framework for this choice, listing in article 14 the different possibilities of residence in the host country.<sup>112</sup>

Article 16 regulates the repatriation and return of victims to their countries of permanent residence.<sup>113</sup> Specifically, article 16 calls upon both states, host country and country of return, to facilitate the return or

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104. Explanatory Report, *supra* note 17, ¶¶ 172-179.

105. Niederlassungs-und Aufenthaltsgesetz [Federal Settlement and Residence Act], Bundesgesetzblatt Teil I [BGB1 I] No. 157/2005, as amended (Austria).

106. *Id.*

107. Convention, *supra* note 5, art. 13, ¶ 3.

108. *Id.* art. 14, ¶ 1.

109. Clark, *supra* note 60, at 257.

110. Convention, *supra* note 5, art. 14.

111. Explanatory Report, *supra* note 17, ¶ 189.

112. Convention, *supra* note 5, art. 14.

113. *Id.* art. 16.



repatriation of the victim with regard to the security of the person.<sup>114</sup> In addition, the Explanatory Report explicitly enumerates the right not to be subjected to inhumane or degrading treatment, the right to a private sphere and family, and the right to protection of one's identity.<sup>115</sup> The reference to torture and inhumane and degrading treatment is based on the jurisprudence of the European Court of Human Rights.<sup>116</sup>

Moreover, article 16(3) and (4) oblige the member states to cooperate in the actual implementation of a repatriation or return.<sup>117</sup> Member states are required to inform the victims about assistance offers in the country to which they return, including offers of NGOs and public institutions.<sup>118</sup> The Convention's inclusion of both dimensions, governmental and nongovernmental, is a development in this field because it dispels the long-standing notion that assistance to the trafficked person is provided only by NGOs and civil society.<sup>119</sup>

The Convention's chapters on prevention and protection are followed by a chapter in substantive criminal law, which also contains protective measures for victims. First and foremost, article 18 obliges the member states to establish the article 4 determination of a human trafficking offense.<sup>120</sup> Although not an explicitly protective article, article 18 definitely increases the protection of victims by raising the costs for would-be traffickers.<sup>121</sup>

In addition, article 26 of the Convention contains a non-punishment provision for victims of human trafficking, concerning acts to which the trafficker has compelled them to do.<sup>122</sup> In the past, the involvement of victims in illegal acts often rendered them incapable of receiving a residence permit, because of their participation in such acts, even though they were forced to participate.<sup>123</sup> The Convention, however, emphasizes the goal of affording victims the highest protection possible and thus protects them from being subject to criminal liability.<sup>124</sup>

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114. *Id.*

115. Explanatory Report, *supra* note 17, ¶¶ 200-203.

116. *Id.* ¶¶ 200-203.

117. Convention, *supra* note 5, art. 16, ¶¶ 3-4.

118. The list put forth in article 16, paragraph 6, shows examples and can be lengthened, as the structure of assisting entities may vary from country to country. *Id.* art. 16, ¶ 6; *see also* Explanatory Report, *supra* note 17, ¶ 206.

119. Clark, *supra* note 60, at 257.

120. Convention, *supra* note 5, arts. 4, 18.

121. Lax prosecution kept the risk for traffickers relatively low, as they either were not convicted or their sentences were short. Corrin, *supra* note 18, at 181.

122. Convention, *supra* note 5, art. 26.

123. *Id.* art. 4.

124. Explanatory Report, *supra* note 17, ¶ 273.

Furthermore, the protection of victims, witnesses, and collaborators forms a crucial part of the Convention's chapter on investigation, prosecution, and procedure. These norms have been the forefront of European consciousness since the Council of the European Union adopted the Framework Decision of March 15, 2001, on the Standing of Victims in Criminal Proceedings.<sup>125</sup> Although the last phase of the Council's implementation should be concluded by March 22, 2006, this is doubtful because only a handful of member states previously met the first deadline and duty to report.<sup>126</sup> This reluctance or noncompliance could also be interpreted as a bad omen for the implementation of the Convention as a whole.

Article 28 of the Convention provides a minimum outline of factors to consider in the protection of victims, witnesses, and collaborators involved in trafficking cases.<sup>127</sup> These factors help avoid the risk that the witnesses may be found and threatened before being able to give testimony.<sup>128</sup> Also, the special situation of victims, especially children, is considered in article 30, which discusses court proceedings. Under this provision, the protections accorded in article 28 for extrajudicial or prejudicial proceedings is extended into the courtroom.<sup>129</sup> The actual wording of article 28 is relatively short, but the Explanatory Report provides additional information by outlining the reasons for such protection, as well as the extra court security measures, such as the use of bodyguards and, in some cases, "change of identity, employment, and place of residence."<sup>130</sup>

These provisions assume that the state which prosecutes the trafficker has jurisdiction over that person. Thus, article 31 of the Convention demands that member states establish jurisdiction on the basis of territoriality or extraterritoriality.<sup>131</sup> However, this may lead to the possibility that more than one state could have jurisdiction over an offender. Nonetheless, member states can enter a reservation to jurisdiction under extraterritoriality theories set out in article 31(1)(d)

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125. Council Framework Decision 2001/220/JHA, On the Standing of Victims in Criminal Proceedings, 2001 O.J. (L 82/1) (EC), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_082/l\\_08220010322en00010004.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_082/l_08220010322en00010004.pdf).

126. *Commission Report on the Basis of Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings*, COM (2004) 54 final/2 (Feb. 16, 2004), available at [http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004\\_0054en02.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0054en02.pdf).

127. Convention, *supra* note 5, art. 28; Explanatory Report, *supra* note 17, ¶ 291.

128. Convention, *supra* note 5, art. 28; Explanatory Report, *supra* note 17, ¶ 291.

129. Convention, *supra* note 5, arts. 28, 30.

130. Explanatory Report, *supra* note 17, ¶¶ 280-291.

131. Convention, *supra* note 5, art. 31, ¶ 1.

and (e).<sup>132</sup> It must be noted that the other grounds for jurisdiction mentioned in article 31(1)(a) to (c), are not subject to reservation.<sup>133</sup> Furthermore, article 31(3) of the Convention sets forth the principle of *aut dedere aut judicare*.<sup>134</sup> Under this principle, a state that does not want to extradite when asked to do so must prosecute the offender.<sup>135</sup> The Explanatory Report emphasizes the need for states to have the legal ability to conduct these proceedings.<sup>136</sup>

#### IV. CONCLUSION

For a long time, victims of human trafficking have had difficulties prosecuting their captors, even after they managed to escape. Too often, domestic criminal codes did not criminalize human trafficking, armed conflict shattered the country, or there was no incentive to prosecute the crime.

The Council of Europe Convention on Action Against Trafficking in Human Beings is the first comprehensive instrument addressing human trafficking within the framework of the Council of Europe. This instrument was adopted by the forty-six member states of the Council of Europe.<sup>137</sup> Most importantly, countries that primarily serve as points of origin or transit, as well as countries of destination, have adopted this vital initiative. Trafficking in human beings can only be tackled when all countries concerned are bound by the same legal standards. Despite this optimistic beginning, however, the Convention has not been ratified by a single nation, which indicates that it will be some time before the comprehensive protection encompassing all Three P's will be afforded to victims.

There may be different reasons behind the reluctance of states to ratify the Convention. One such reason is the extent to which the Convention demands prevention, protection, and prosecution of its member states. Also, victim protection is relatively new to many countries within the membership of the Council of Europe. Yet, even those nations that are already familiar with advanced techniques, such as video-link testimony, find that the extent of protection demanded by the Convention is high. In addition, some states have been bound by earlier

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132. *Id.* art. 31, ¶ 1(d)-(e).

133. *Id.* art. 31, ¶ 1(a)-(c).

134. *Id.* art. 31, ¶ 3.

135. *See, e.g.,* Int'l Law. Comm., *Summary: Obligation to Extradite or Prosecute*, [http://untreaty.un.org/ilc/summaries/7\\_6.htm](http://untreaty.un.org/ilc/summaries/7_6.htm).

136. Explanatory Report, *supra* note 17, ¶¶ 327-334.

137. *See supra* note 15 and accompanying text.

decisions within different frameworks and have not yet managed to implement them. Now this Convention demands an even higher degree of protection from them, making it virtually impossible for them and other states not familiar with victim protection to ratify this Convention. Notwithstanding these reasons, acceptance of other instruments on victim protection may clear the way for a fast implementation in a few years.

Unfortunately, victims of human trafficking often find themselves in legal limbo. They are victims as well as important witnesses in the prosecution of traffickers. Yet, they are also burdens on their host countries. The cheapest option has been to send such persons back where they came from: out of sight, out of mind. Complicating matters is the fact that an analysis of the reasons behind human trafficking or for the demand of such persons has rarely been conducted. Moreover, taking the victims into consideration only has been done by a small, but very active group of NGOs, who were the first to do so in the countries of origin and to make attempts to change something there.

Despite the costs related with the Three P's of the Convention, it is of utmost importance to realize that any victim has a right to prevention, protection, and prosecution. For these reasons, the Convention is a milestone in the fight action against human trafficking. Yet, the full ratification of the Convention is still a necessary step. This will ultimately lead to better services for victims, more aggressive prosecutions against traffickers, and more affective prevention measures throughout Europe.