IMPROVING ACCESS TO JUSTICE FOR TRAFFICKED PERSONS
Lawyers Networking Meeting, 22 and 23 November 2016
Strasbourg, France

Conclusions and proposals for future action
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1. Introduction

On 22 and 23 November 2016, the Council of Europe, in co-operation with the Netherlands Helsinki Committee, organised a meeting of lawyers and non-governmental organisations (NGOs) providing legal assistance to victims of trafficking in human beings in Strasbourg, France. The aims of the meeting were to bring together experienced lawyers representing trafficking victims as a start for the setting up of a network of such lawyers and to contribute to the improvement of access to legal assistance and representation of trafficked persons, from their first contact with the authorities, as an integral part of national assistance systems.

The meeting brought together 46 lawyers and representatives of NGOs from 26 states parties to the Council of Europe Convention on Action against Trafficking in Human Beings. The topics included an examination of the current challenges in the protection of the rights of trafficked persons, the role of lawyers in preventing secondary victimisation and protecting victims' rights, the need for strategic litigation, and national models of legal aid to trafficked persons. The working groups gave participants the opportunity to actively exchange experiences and discuss barriers trafficked persons face in accessing justice. The participants also discussed what action would be needed to improve access to legal aid for trafficked persons, as well as the possible gains of a European network of lawyers for trafficked persons. The overarching theme was the recognition of access to legal assistance and representation as a key element of access to justice. The meeting concluded with a discussion on the next steps, the main topics of common interest identified and a first set of proposals for future action.

This report presents the main conclusions of the meeting linked to specific challenges identified by the participants, based on the presentations, the panel discussions, the outcomes of the working groups and the plenary discussions. It discusses the current state of affairs and the main challenges in the protection of the rights of trafficked persons, while paying specific attention to the right to compensation and the application of the non-punishment principle. It also discusses the role of lawyers in protecting the rights of trafficked persons, the barriers trafficked persons face in accessing legal assistance and representation, and the need for strategic litigation. Finally, it examines the expected benefits of a European network of lawyers for trafficked persons. The document closes with proposals for future action and thematic bullet points.

Throughout the document several examples of successful cases and good practices are given.

2. Challenges in the protection of the rights of trafficked persons

While several international and European instruments[1] lay down the rights of victims of trafficking in criminal and other relevant legal procedures, the meeting made clear that there is still a considerable gap between theory and practice. Major challenges identified during the meeting include:

- Failure to identify (presumed) victims and prosecute offenders
- Prejudices, misunderstandings of the crime and lack of training
- Re-qualification of the crime

[1] In particular, the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (CoE Anti-Trafficking Convention), Directive 2011/36/EU of the European Parliament and of the Council of the EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims of 5 April 2011 (EU Trafficking Dir.) and Directive 2012/29/EU of the European Parliament and the Council of the EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (EU Victim Dir.).

- Failure to adequately inform victims and to protect their privacy and safety
- Length of proceedings and repetitive interviews
- Inadequate protection of victims and secondary victimisation
- Lack of separate legal provisions on forced labour, slavery and servitude and/or protections for their victims
- Lack of compensation
- Failure to apply the non-punishment principle.

Failure to identify (presumed) victims and prosecute offenders

Many participants reported shortcomings in the identification of victims of trafficking, pointing out that when victims are not properly identified any protection of their rights becomes illusory. 'Identification' refers both to the detection of (presumed) victims and their formal identification as such. Some of the causes for lack of identification relate to factual circumstances, such as the type of trafficking, others to lack of knowledge or understanding of the crime from the side of the police, prosecutors or judges, legal problems, financial matters, political priorities, prejudices or unwillingness to prosecute. Several participants especially mentioned the lack of identification of child victims.

An example of a type of trafficking that makes it harder to detect victims is domestic servitude, as it takes place in private households. A complicating factor is that in some cases victims are trafficked and exploited by their own family members who make use of their dependence or irregular migration status. Some participants noted an absence of will of law enforcement to investigate and prosecute cases of domestic servitude of overseas domestic workers. One of the possible reasons mentioned is because it is a low profit crime, contrary to trafficking for the purpose of prostitution.

A specific problem, mentioned by several participants, constitutes the exploitation of domestic workers in diplomatic households, as diplomatic immunity halts civil and criminal efforts to hold diplomats accountable. Several legal strategies were discussed to overcome this barrier. A promising strategy put forward was to argue that the exploitation of workers is not a diplomatic function but a commercial act which falls outside the scope of diplomatic immunity. This strategy has been successful in the US.[2] Currently a case is pending in the UK which raises the question of how the Vienna Convention on Diplomatic Immunity fits within human rights law and whether servitude qualifies as a commercial activity. If so, then human rights law would apply.

Some specific cultural groups are very closed and difficult to access, like the Chinese community in France or Belgium. The risk of retaliation may also be higher in certain groups, which prevents victims from seeking help, or victims may feel safer to testify abroad than in their own country. This applies especially to small countries, e.g. Bulgaria, where it is almost impossible to hide from the trafficker(s) and their families or associates. In addition, victims from Eastern European countries may have more confidence in the legal systems of Western European countries than in that of their own country.

Legal problems include lack of clarity on (elements of) the definition of trafficking, for example on the concept of exploitation. In various countries courts are still wrestling with this concept. Consequently, the threshold between penal forms of exploitation, on the one hand, and exploitation that constitutes a mere breach of the labour code and social security law, on the other hand, is blurred, which impacts the identification of victims. This applies especially in the transport sector, construction and retail.[3] For victims themselves the concept of trafficking is also not easy to grasp: often they do not recognise themselves as such or do not feel it relates to their reality.

Financial causes include lack of funding to adequately disseminate information among relevant actors for the purpose of identification. Another factor is the shift in political priorities and corresponding financial resources to the fight against terrorism or the refugee crisis. At the same time, insufficient means are dedicated to the identification and dismantling of trafficking rings who exploit the situation of asylum seekers and migrants and

[2] See Martina E. Vandenbergand Alexandra F. Levy (2012), *Human Trafficking and Diplomatic Immunity: Impunity No More?,* Intercultural Human Rights Law Review [Vol. 7, 2012].

[3] See Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation"*, 2010. Available at: https://www.jrf.org.uk/file/40697/download?token=QUC79Y_r&filetype=full-report

only very few trafficking cases are prosecuted. In some countries, political priorities are aimed at combating prostitution, relegating combating trafficking to a secondary position.

Various participants mentioned the lack of proactive investigations: identification is often totally dependent on the declaration of the victim(s). Similarly, the prosecution relies mostly on statements of trafficked persons, which are often not sufficient evidence to obtain convictions.

In some countries the official status of 'victim of trafficking' is conditional upon co-operation with the judicial authorities. Victims who do not meet this condition are not identified as such and are not entitled to assistance and protection, as the attribution of rights to trafficking victims is dependent upon their formal identification within the system.

Finally, it was mentioned that domestic law may fail to fully capture the entire system of exploitation. As a result only intermediaries are sentenced, e.g. the direct employers, while letting the organisers go unpunished.

Prejudices, misunderstandings of the crime and lack of training

Many participants mentioned the lack of training and/or specialisation of prosecutors and judges. Even in countries where trafficking cases are referred to specialised judges and prosecutors, this does not preclude misunderstandings of the phenomenon. One reason for this is that there are prejudices against certain ethnic groups (e.g. Roma) or categories of people (e.g. migrants from developing countries). Situations which legally meet all the elements of the trafficking definition are rather seen as a 'cultural practice' or are considered as an 'improvement' compared to the standards of the country of origin. A similar problem may occur in relation to the trafficking of sex workers where consent to sex work mistakenly is considered as consent to coercion, abuse and exploitation. Various participants mentioned prejudices among prosecutors and judges with respect to prostitution and related forms of exploitation. Such prejudices exclude the above groups from protection against trafficking and exploitation.

Another problem is the delay for judges and prosecutors to adjust their knowledge to the quick evolution of criminal trends and *modi operandi* of traffickers. For example, sexual exploitation has always involved violence, but now with *juju* and *loverboys*, it is based on manipulation, which makes it harder to detect.

Re-qualification of trafficking cases

A related problem is the re-qualification of trafficking to 'easier to prosecute' offences, thus depriving victims of the rights attached to their being identified as trafficked persons. As trafficking cases are generally complex, often require long-term and costly investigations and run a relatively high risk of failure, prosecutors may choose to go for 'easier' crimes, such as pimping or fraud/deception. Trafficking often overlaps with other articles in the Criminal Code, e.g. 'pandering with the use of coercion' or 'unlawful deprivation of freedom to force somebody into prostitution'.

Other reasons mentioned for the re-qualification of trafficking cases are budget cuts which lead prosecutors to decide whether to prosecute based on a cost/benefit assessment, and the pressure on judges to process high numbers of cases per year. In addition, budget cuts deprive investigators of the needed resources for thorough and comprehensive investigations.

It was remarked that the amount of attention to trafficking by public prosecutors and the police varies greatly. Trafficking is one of the more complex crimes to prosecute and in general trafficking cases can be unrewarding. Some participants had the impression that police and prosecutors were therefore not willing to deal with trafficking cases.

Failure to provide information and to protect the privacy and safety of victims

According to the CoE Anti-Trafficking Convention and the applicable EU Directives, victims have the right to information, in a language they understand, about their status, their rights and the relevant judicial and administrative procedures, including information on available remedies.[4] In practice, police officers and prosecutors often fail to properly explain to victims their rights or do not feel it is their duty.

> *A good example is the initiative of a prosecutor, following long-term co-operation with the Bulgarian NGO Animus Foundation, to develop a tailor-made form informing victims of their rights, adding the specific rights that trafficking victims have under Bulgarian legislation, such as the right to a reflection period, free*

[4] Art. 12 and 15 CoE Trafficking Convention; Art. 12(2) EU Trafficking Dir.; Art. 4 and 12 EU Victim Dir.

legal aid, non-cooperation, etc.

Rights that were mentioned which in practice are not respected include the right to a recovery and reflection period and the right to protection of privacy and safety. In many cases victims do not feel protected against the offenders/traffickers, making them feel very unsecure during court proceedings. This may lead victims to withdraw their statements.

Length of proceedings and repetitive interviews

A problem in various countries is the length of proceedings and the number of interrogations. An illustration is the case of *S.Z. v. Bulgaria*.[5] The case lasted in total 15 years, during which the victim was repeatedly interrogated. This put an extremely heavy burden on the victim as related by the lawyer who brought the case to the European Court of Human Rights (ECtHR):

> "The victim would receive summons for each hearing and we would prepare for it. Preparation meant reading the previous statements given by her in front of the police officers, recalling the events, re-visiting the village where the crime took place because in the meantime she had left this village for good, discussing the conduct in the court room, the position of the witness with respect to the defendants, entering inside the court building, all of which was very painful for her. And then the hearing did not take place and the case was adjourned for some procedural issues, for example that the defence lawyers could not come. This happened four times in a row before the victim could actually testify in court. Since every following hearing was scheduled three months after the other, it took one year of real torture for the victim".

The Court found a violation of Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and inhuman or degrading treatment or punishment, noting that:

> "The excessive length of the proceedings had undeniably had negative repercussions on the applicant, who had clearly been in a very vulnerable psychological condition following the assault. She had been left in a state of uncertainty regarding the possibility of securing the trial and punishment of her assailants, had had to return to the court repeatedly and been obliged to relive the events during the many examinations by the court".

Inadequate protection of victims and secondary victimisation

It was stressed that victims should not be used as a means to an end: first by the trafficker to produce money and then for a second time by the justice system to get the trafficker behind bars. Victims of trafficking in human beings are victims of severe human rights violations and should be treated accordingly. It should be prevented that trafficked persons are re-victimised at the hands of the state.

This is recognised in Article 12 of the EU Trafficking Directive, which obliges Member States to take measures aimed at preventing secondary victimisation by avoiding as far as possible unnecessary repetition of interviews; visual contact between victims and defendants; giving of evidence in open court; and unnecessary questioning concerning the victim's private life. The 2012 EU Victim Directive holds similar provisions.[6]

Yet, cross-examination of victims and direct face-to-face confrontation with the suspect(s), giving evidence in public court sessions, repeated questioning and references to the victim's private life to disqualify the victim, particularly her sexual life in the case of women, are still common practice. Often such practices are defended with an appeal on the right to a fair trial, as laid down in art. 6 of the ECHR. However, while the presentation of all evidence in open court in the presence of the court may be the rule, the Convention and the case law of the ECtHR do provide space to balance the rights of the suspect and the protection of the victim, as long as the defendant has the effective opportunity to challenge the evidence.[7]

Victim lawyers have a crucial role in protecting the rights of trafficked persons and the prevention of secondary victimisation. The latter can be defined as the aggravation of the suffering or harm to the victim caused by the initial crime as a result of the criminal process. Research shows that key elements in the

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[5] *S.Z. v. Bulgaria*, Appl. no. 29263/12, 3 March 2015. Available at: http://hudoc.echr.coe.int/eng#{"itemid":["001-152630"]}

[6] Art. 20 and 23 of the EU Victim Directive.

[7] See e.g. *Doorson v. The Netherlands,* Appl. no. 20524/92, 26 March 1996; *Scheper v. Nederland,* Appl. no. 39209/02, 5 April 2005; *S.N. v. Sweden*, Appl. no. 34209/96, 2 July 2002; *Sarkizov v. Bulgaria*, 17 April 2012, Appl. nos. 37981/06. 38022/06, and 44278/06; *W. v. Slovenia*, 23 January 2014, Appl. no. 24125/06.

prevention of secondary victimisation are predictability, security, control and justice.[8] This means that the risk on secondary victimisation is smaller if the victim/witness knows what he or she can expect throughout the criminal proceedings, has a sense of control over what is happening (the feeling that they 'matter'), feels secure and protected, and is satisfied with the outcomes of the criminal process.

Victim lawyers play a key role in this respect. Prevention of secondary victimisation is also closely connected to other rights of victims, such as the right to information, the right to protection of privacy and identity, the right to protection of safety and to be treated with respect and dignity, the right to compensation, and, of course, the issue of non-punishment.

Lack of separate legal provisions on forced labour, slavery and servitude and/or protections for their victims

A distinctive problem is the lack of protection of victims of forced labour or slavery-like exploitation who were not trafficked into that situation. All countries have trafficking laws, relating to the way people arrive in a situation of exploitation. Many countries, however, do not have separate provisions on forced labour, servitude or slavery-like practices, or limit the right to assistance and protection only to those victims who can prove they came into that situation through trafficking. This creates a difficult to defend hierarchy between victims, dependent of how they arrived in the situation of exploitation (through trafficking or other ways).

Lack of compensation

According to European and international law, trafficked persons have a right to an adequate and effective remedy. States should ensure that there is a legislative and practical possibility for trafficked persons to obtain compensation for material and non-material damages suffered. A priority option is to use confiscated assets to compensate victims. Where such compensation cannot be obtained from the trafficker there should be a provision for payment of compensation from the State. Victims have a right to be paid for the work they have performed, independent of the lawfulness of their stay.[9]

Even if there is a possibility to seize or confiscate assets of the suspect(s) to guarantee compensation of the victims, this rarely happens. Moreover, if criminal assets are confiscated, they go to the State and are not used to compensate victims. An example was given of the UK, where a request on the basis of the Freedom of Information Act in 2007 revealed that a total of 110.000 pounds was confiscated of which, however, none had gone to the victims.

Other obstacles mentioned are the lack of awareness, knowledge and skills among relevant actors (police, judiciary, lawyers, service providers, NGOs, trade unions); the fact that victims are seen only as witnesses, are not allowed to remain in the country to seek compensation or are deported as irregular migrants; limited or missing mechanisms of co-operation between law enforcement, judiciary and civil society in the area of redress and asset seizure; lack of cross-border co-operation between public prosecutors; and lack of resources to ensure psychological and legal support for victims, which is indispensable for compensation claims. All these barriers effectively make the right to compensation illusory.

In many countries, criminal courts as a rule refer compensation claims to civil proceedings, which are complicated, expensive and time consuming, while the chances of *de facto* receiving compensation are negligible. This is justified by legal provisions such as that the compensation claim 'should not prolong the criminal case' or 'should not pose a disproportionate burden on the criminal process'.

> *A good practice is the recent UK Modern Slavery Act, which contains a ground-breaking provision: instead of arguing why a victim is granted compensation, the convicting judges must make a statement why they do not grant compensation to the victim.*

In various countries, it is not possible for victims of trafficking for the purpose of prostitution to claim compensation for the (often considerable amounts of) money they were forced to earn and hand over to the trafficker, as these are considered 'immoral earnings'. This does not, however, prevent the state from

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[8] Marjan Wijers and Margreet de Boer, *Een keer is genoeg. Verkennend onderzoek naar secundaire victimisatie van slachtoffers als getuigen in het strafproces* (*One time is enough. Exploratory research into secondary victimisation of victims as witnesses in the criminal process*). The Hague: WODC 2010.

[9] Art. 15(3) and (4) of the CoE Anti-Trafficking Convention; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims; 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**;** ILO Conventions 97 and 143.

confiscating the criminal assets of the traffickers. In practice, this means that only the state can profit from such earnings, while leaving the victims with empty hands. An exception is the Netherlands where over the last years lawyers have been successful in claiming compensation by calculating the number of days the victim worked in the sex industry and the amount of money earned by the victim per day.[10]

A general problem in several countries is the assessment of material damages when the victim is exploited in illegal work. A successful strategy in the UK in cases of trafficking for the purpose of labour exploitation has been to calculate material damages based on the loss of hours of work and the UK minimum standard of wages. However, damages are calculated on minimum wages per hour, but the costs of lawyers are higher. In practice this means that even if the victim wins the compensation claim, they risk having to use the entire amount to pay the lawyers fee, which makes it quite fruitless (in financial terms) to claim compensation.

The effective enforcement of awarded compensation claims is a recurring problem in almost all countries. Even if the court awards compensation, in most countries it is the responsibility of the victim to enforce the order. In practice, this is either very expensive and time consuming or impossible because by that time the suspects have made sure that there is nothing to be gained from them. It may also be dangerous because of intimidation and threats on the part of the offenders and/or their associates or family. An example was given from Belgium, where a victim's attorney has engaged in a 6-year legal battle to obtain the seizure of the required deposit paid by the trafficker in order to guarantee his/her future court appearances.

> *A good practice exists in the Netherlands where since 2011 victims of violent crimes and sexual offences, including trafficking in human beings, can seek an advance payment from the State if 1) the offender was convicted and ordered to pay damages to the victim as part of the criminal sentence, and 2) he/she fails to pay these damages for a period of eight months after the sentence has become final. It is then up to the state to recover the money from the offender/ trafficker.*

Many countries lack a law on State compensation if compensation from the offender is not possible. However, even when there is a State compensate scheme, procedures are often complicated, the kind of damages that can be claimed are limited or claims can only be made after the verdict has become final, which can take years.

It was stressed that the recognition by the ECtHR of human trafficking as a violation of Article 4 in the *Rantsev* case implies that according to Article 13 of the ECHR states have a positive obligation to provide victims with an *effective* remedy in case of violation (emphasis added).[11] This includes compensation and legal assistance.

An example of international action to overcome the obstacles and barriers for trafficked persons to obtain compensation is the COMP.ACT project, initiated by La Strada International (LSI) and Anti-Slavery International (ASI).[12]

Failure to apply the non-punishment principle

Although the law in many countries contains a provision that victims of trafficking are not to be prosecuted and punished for their involvement in unlawful activities, to the extent that they were compelled to do so, it is not rare that trafficked persons are prosecuted and/or punished for offences committed under compulsion. Trafficked persons may also be punished for not having identity documents or possessing false documents, for illegal border-crossing and irregular or unauthorised work. This also applies to trafficked children who may end

[10] A strategy lawyers in the Netherlands have successfully used to counter arguments that the claim for compensation should not be too complicated and/or prolong the case is to make a calculation that avoids any discussion. For instance, if the victim told that she earned about € 500 to € 1000 a day, the lawyer asks the courts to grant her compensation for € 100 a day, 5 days a week and 4 weeks per month (i.e. € 2000 per month). This avoids dispute of whether the victim was allowed to keep any money for herself, whether she had to buy food, clothes, rent, etc., since the amount of money that she gave to the trafficker was much more that this minimum this estimation. The courts have accepted this and are now awarding compensation for amounts from € 100 to € 500 per day on a regular basis.

[11] *Rantsev v Cyprus & Russia*, application no. 25965/04, 7 January 2010.

[12] The project was carried out by a coalition of partners in 14 European countries, consisting of NGOs that offer direct assistance to trafficked people, the legal community, labour unions, migrant rights organisations and academics, and supported by *pro bono* law firms. The project put compensation firmly on the political agenda and developed practical tools for professionals to facilitate trafficked persons' claims to compensation, such as a Research Template for NGOs to conduct a country-level study on compensation; posters adapted to the national situation for lawyers on possibilities for compensation and guidance on representing trafficked persons in compensation claims. See for more information: http://www.compactproject.org/.

up in immigration detention or may be prosecuted for begging, prostitution or criminal activities.

The core argument of the non-punishment principle is the fact that trafficking constitutes a violation of the free will of the person, which excludes prosecution as if the person acted out of his or her free will. As stated in the OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking:

> "The rationale for non-punishment of victims of trafficking is that, whilst on the face of it a victim may have committed an offence, such as irregular crossing of a State frontier or theft, the reality is that the trafficked person acts without real autonomy. They have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, consequently they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed. The same applies where the victim has escaped from their trafficker and the crime they have committed arises as a direct consequence of their trafficked status".[13]

Some of the legal concepts in applying the non-punishment provision and understanding compulsion[14] that were discussed are:

1. Under Art 4 (b) of the CoE Anti-Trafficking Convention an adult victim's consent to their exploitation is irrelevant where any of the 'means' have been used to obtain their exploitation.
2. In the case of a child victim of trafficking no 'means' need to be established. A child cannot consent in law to their trafficking or their exploitation.
3. 'Exploitation' can include the use of a person in criminal activities by those who traffic them, such as drugs cultivation, theft, benefit fraud or any other unlawful activity that their trafficker intends to use them for in order to profit or obtain a profit.
4. It follows that a person who at first glance might look like an offender could be a trafficking victim. If he/she was compelled to commit a crime or other offence as a direct consequence of their trafficking, they are entitled to receive the benefit of the non-punishment provision and to be protected against prosecution and punishment.
5. If law enforcement officers, legal professionals and the judiciary are not trained in detecting human trafficking, such victims will go unidentified and will be left unprotected and denied their rights to be recognised and treated as victims of a crime, while the traffickers will go unpunished.
6. It is important to interpret 'compulsion' in light of the definition of trafficking in human beings. As stated in the OSCE Recommendations, a comprehensive understanding of compulsion includes all the means of trafficking: threat/use of force, other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability.[15]

3. Role of lawyers and access to legal assistance and representation

Access to legal assistance from the first contact with the authorities is not only important to avoid secondary victimisation, to ensure adequate identification and to inform victims about their rights and the relevant procedures so they can make an informed decision, but also in relation to a future compensation claim, for example to request the freezing of assets of the trafficker(s). Lawyers are also key as watchdogs in balancing the rights of the victim and the suspect(s) and ensuring that trafficked persons are treated in a respectful and sensitive manner.

Yet, while considerable steps have been made in the provision of social, psychological and medical assistance to trafficked persons, access to legal assistance and representation is still lacking behind. This constitutes a serious barrier for trafficked persons to access justice. When it comes to the improvement of access to justice for victims of human trafficking, the effectiveness of free legal aid is a crucial point.

In many countries, a legal aid system which ensures that victims are informed about the relevant judicial proceedings from their very first contact with the authorities and that their rights and interests are defended

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[13] OSCE (2013), *Policy and Legislative Recommendations. Towards the Effective Implementation of the Non-Punishment Provision with regard to victims of trafficking*, published in consultation with the *Alliance against Trafficking in Persons* Expert Co-ordination Team, http://www.osce.org/secretariat/101002, para 5.

[14] See Annex II for a number of interesting UK judgements on non-punishment. Annex 2 also contains a number of Czech judgements on the right to an effective investigation and the Tree Planters Case.

[15] Ibid., para 12.

during criminal and other legal proceedings, is missing. Even if a system of free legal aid exists, participants pointed out a range of problems for trafficked persons to *de facto* access qualified legal assistance and representation:

- Lack of proper identification of (presumed) victims.
- Police officers do not inform victims on their rights, including the right to legal aid, and do not refer victims to NGOs who can provide legal assistance.
- If victims are informed about their rights, it is usually through a form that they have to sign, without necessarily reading or understanding it.
- When trafficking cases are qualified as other offences, such as pimping or fraud, victims are excluded from the rights attached to victims of trafficking.
- The bureaucratic procedures to access free legal aid and representation are so complicated that in practice they form an insurmountable barrier.
- Access to free legal aid is linked to the level of income. In some countries, victims of trafficking may not qualify for free legal aid if according to the rules the joint income of the victim and their families or partners must be taken into account.
- The appointment of free legal aid lawyers is done at random, so the appointed lawyer can represent the victim today and the offender tomorrow.
- There is a lack of trained/specialised lawyers who can provide qualified legal assistance and representation through the legal aid system.
- Even if there are specialised lawyers, there is no system in place that ensures the appointment of a trained lawyer to victims.
- Lawyers are only appointed at a late stage rather than from the first contact with the authorities.
- Whether a victim gets appointed a (specialised) lawyer depends on how they enter the system, as a suspect in a criminal case (e.g. for working illegally), as an asylum seeker or through a specialised centre working with victims of trafficking.

A widespread problem is the low rate of the legal aid remuneration to attorneys, which is disproportionate to the amount of work that is to be performed. The result is that lawyers providing free legal aid are often young and inexperienced and have to take so many clients that they cannot deliver the necessary quality.

It was also noted that decisions on referral to NGOs are within the discretion of police officers. NGOs therefore need to maintain a good working relationship with the police in order to be able to provide support to trafficking victims. This makes it difficult to be critical towards the police or submit complaints, e.g. for failure to apply the reflection period or to investigate a case.

In several countries, such as Serbia, Bulgaria, Romania and the Slovak Republic, NGOs have developed their own network of trained and experienced victim lawyers.

> *In Serbia, an informal network of lawyers was established in 2009 by the NGO ASTRA. In co-operation with the Netherland Helsinki Committee a group of 31 lawyers across the country was selected and trained over a period of three years for representing victims of human trafficking. Lawyers were selected on their personal and professional background, territorial coverage and that they did not represent traffickers. That is still a rule: if you defend victims, you cannot defend traffickers. The list of trained lawyers has been distributed to all agencies, institutions and civil society organisations that may provide legal assistance to trafficking victims. The network is maintained through the referral of clients, but also by expert meetings and by enlisting their expertise for studies, researches, reports, etc. There are joint meetings of lawyers and prosecutors and lawyers from this group also participate in different working groups, for example the working group on amending the Criminal Code of Serbia and the proposal for a law on compensation of victims of violence. Further, law students were trained to monitor trials on the basis of an observation list with a special focus on the position of the victims. The findings of the monitoring of court proceedings together with an analysis of judgements are published annually.*[16]

However, even when such a network exists, there is a problem to link trained lawyers to the State-funded system of legal aid. Generally legal aid lawyers are appointed on the basis of a random system and many Bar Associations consider any form of selection, including any requirement of specialisation, to be a form of unfair

[16] See for the 2015 analysis of the judicial practice in Serbia: http://www.astra.rs/wp-content/uploads/2016/07/ASTRA-legal-analysis-2015.pdf.

competition. This division between non-specialised legal aid lawyers and specialised private lawyers who are paid through projects run by NGOs is one of the obstacles to integrate qualified legal aid in the national assistance systems.

In practice, this means that victims are largely dependent on NGOs for the provision of specialised legal aid, whereas NGOs are dependent on donors who are willing to fund legal assistance or lawyers who are willing to work pro bono. As stated by several participants "the legal aid system works for offender, but not for victims".

Good examples were given of the legal aid systems in the Netherlands, Austria and Switzerland.

> *In the Netherlands, the Legal Aid Board (LAB) is entrusted with the implementation of the legal aid system. Clients have to pay an income-related contribution, but in the case of violent crimes and sexual offences, including trafficking, they are exempted from an individual contribution. Trafficking victims are entitled to a free lawyer from the first contact with the authorities until the end of the proceedings. They can choose their own lawyer. The lawyer submits an application to the LAB on behalf of his or her client. To be entitled to accept legal aid cases, private lawyers need to be registered with the LAB and comply with a set of quality standards, which are set by the Bar. For some fields of law, like criminal, mental health, asylum and immigration law and human trafficking, additional terms apply. To be admitted as a legal aid lawyer in these fields, the lawyer must follow specialised training in the given field. Courses, including on trafficking, are organised by the training institute of the Dutch National Bar Association and take place on a regular basis. A website run by the association of legal aid lawyers helps clients to find a specialised legal aid lawyer in their neighbourhood. NGOs and other service providers also know which lawyers are specialised in trafficking and can refer clients to them. Lawyers are paid by the LAB according to a fixed tariff.*
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> *In Austria, the NGO LEFÖ-IBF offers psychosocial and legal assistance during court procedures. According to the Criminal Procedure Code, victims of violence of 'dangerous threats of violence or of a violation of their sexual integrity or of exploitation of their personal dependency by intentional crime' are eligible for psychosocial assistance before, during and after police and judicial questioning, as well as legal assistance, i.e. legal advice and representation in court by a trained lawyer. Legal advice and representation is given by specially trained lawyers. Services include support during procedures, assistance in translating the logic of the court and legal procedures into everyday language to esnure better understanding, and legal counsel to ensure the person's rights are upheld, including claims for compensation.*
>
> *In Switzerland, an appraisal as to a possible trafficking history is made by a psychologist (or any trained member of the staff of a dedicated centre) at the very beginning of the identification process. A federal law has created dedicated centres referred to as 'LAVI' (Loi fédérale sur l'Aide aux Victimes d'Infractions)) in several cantons, and any potential victim of trafficking on the Swiss territory must be referred to one of those centres for a first assessment. If the staff member concludes positively, an initial amount is paid by the centre that is aimed to cover between four and 10 work hours of qualified legal counseling. This is done concomitantly with the granting of a recovery and reflection period and the application of other assistance measures. Later on, if the victim has chosen to lodge a complaint/co-operate in the criminal proceedings, the ordinary legal aid system takes over from this specific funding mechanism.*

In addition, there is a widespread understanding that lawyers are only needed when the case is brought to court. At that point, however, essential rights of the victim may not have been employed during the criminal investigation, for example the possibilities to protect the privacy and safety of the victim, to minimise the number of interrogations and to prepare the victim for interrogations so that he/she knows what to expect.

Other challenges mentioned are the need to have access to professional interpreters in the case of foreign victims and the representation of foreign victims when they have returned - either voluntarily or by force - to their country of citizenship. Representing victims in such circumstances is highly complicated. While judicial proceedings take their course, geographical remoteness makes it very difficult for victims to have their version of events heard or to submit a claim for compensation. When judges are summoning victims, it is left to lawyers and NGOs to deal with the immigration authorities in order to make the victims' physical attendance possible.

4. The need for strategic litigation

The field of human trafficking is still in development. The number of human trafficking cases in which the

ECtHR has issued a judgment is still limited. There are cases in which the ECtHR explains the concepts of forced labour and servitude, e.g. *Siliadin v. France* and *C.N. and V. v. France*[17], but only two cases which the court qualified as trafficking: *Rantsev v. Cypress and Russia* and recently *L.E. v Greece*.[18] It is therefore important to build up case law before the ECtHR.

It was discussed that in litigating before the ECtHR lawyers should not be afraid to challenge earlier positions of the Court.[19] Participants noted that on some issues the position of the Court is also not yet clear. Article 4, for example, puts a positive obligation on states to take protective measures when the authorities are aware, or ought to have been aware, that an individual has been, or is at a real and immediate risk of being trafficked or exploited.[20] In the case of *C.N. and V. v. France*, however, the Court argued that if the victim does not immediately reveal her/his being a victim of trafficking, there is no state obligation.[21] This goes against the inherent logic of trafficking which rests on coercion and intimidation, the rationale behind the reflection period which has been introduced precisely because victims need time to reflect, and the need for proactive identification as stated by the Group of Experts on Action against Trafficking in Human Beings (GRETA).[22]

5. Proposals for future action

During the meeting various proposals were made to improve the current situation.

Identification and prosecution:

- Given the complexity of the crime of human trafficking, participants stressed the need for specialised judges, prosecutors and lawyers. Several participants advocated for joint trainings of judges, prosecutors, social workers and other relevant front-line professionals. This would also benefit the identification of trafficked persons.
- Participants stressed the need to increase financial investigations targeting the flows of proceeds from trafficking, since, as it was remarked, trafficking is always about money so going after the money is key. This would act as an effective deterrent to traffickers, while the proceeds could be used to benefit the victims.
- Existing protections of trafficked persons should be extended to all victims of forced labour, servitude or slavery-like practices, independent of whether the victim came into that situation through trafficking or other ways.

Compensation:

- Police and prosecutors should systematically inform victims about the possibilities for compensation and the steps they need to take in a way that is understandable for victims, both orally and in written form.
- The collection of evidence about the damages the victim suffered, including the financial gain from the exploitation of the victim, should make part of the criminal investigations to support compensation claims in court.
- Prosecutors and judges should use the possibilities to freeze or confiscate assets of the suspect in an as early as possible stage to secure compensation claims of the victim.
- The responsibility for the execution of compensation orders should be shifted from the victim to the state. Confiscated assets should be used to compensate victims.
- Prosecutors should systematically request compensation and judges should use all the possibilities the law offers them to award compensation claims.

Improving access to legal aid:

- The police should inform victims about their right to free legal aid and representation at the very first contact and before any official statement is taken.
- Victims should get appointed a lawyer as soon as there are reasonable grounds for believing a person is a

[17] *Siliadin v. France, Appl. No. 25965/04, 7 January 2010*; *C.N. et V. v. France*, Appl. No. 67724/09, 11 October 2012.
[18] *Rantsev c. Cyprus and Russia*, Appl. No. 25965/04; *L.E. v. Greece*, Appl. No. 71545/12, 21 Jan. 2016, § 58.
[19] See for an overview of the relevant judgments of the ECtHR annex 1.
[20] *Rantsev c. Cyprus and Russia*, § 286-287.
[21] *C.N. and V. v. France*, § 110.
[22] See, for example, GRETA's 4th General Report, pp. 40-41.
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805aa45f

victim of trafficking and before they have to decide whether or not they want to co-operate with the authorities and/or before they make an official statement, for example through the police, the shelter or NGOs. This is also a key condition to be able to secure claims for compensation.

- Procedures to access free legal aid and representation should be simple and accessible.
- Training should be provided to lawyers to represent victims of trafficking and only lawyers who are trained in trafficking cases and the rights of victims should be qualified to represent victims of trafficking.
- A system should be put in place through the bar associations or the bureaus of legal aid to certify lawyers who are qualified to provide legal aid to trafficking victims and to ensure that trafficking victims are appointed a specialised lawyer.

6. A European network of victim lawyers for trafficked persons

Participants much appreciated the conference and responded enthusiastically to the idea of a European network of trafficking victim lawyers. The opportunity to meet colleagues, exchange experiences and discuss cases and legal strategies was valued highly and provided new inspiration. As one of the lawyers put it: "It is great to be surrounded by lawyers who defend the rights of victims every day, as sometimes you feel like fighting against a brick wall".

Or, as another participant expressed: "Creating a lawyers' network that works on trafficking cases is a great idea that needs to be continued with the aim to influence access to justice of victims in every country in Europe. The network will help us to share our experiences and to help each other to better represent victims in the court or other institutions. The expertise will help all lawyers to increase access to justice of victims".

It was stressed that such a network should be extended to all qualified lawyers, including those who provide legal counselling to victims in NGOs. Its setting up and functioning might be inspired by already existing networks, for example the Odysseus Network on immigration matters (http://odysseus-network.eu/). At the same time, one should learn from other initiatives that failed, such as the website set up by a LexisNexis/Ecpat partnership in 2013, which failed partly as the result of neglecting to create a process to involve all its potential users (www.droitcontrelatraite.com). Another source of inspiration and support might be PILnet, the global network for public interest law. In relation to the latter, it was stressed that it would be important to evaluate the potential of corporate lawyers/big law firms to get involved in trafficking cases, compensation etc. as these firms have the means to do or support trafficking cases.

Benefits of a European network of victim lawyers that participants mentioned include:

- Strengthen advocacy to ensure access to specialised legal aid for victims of trafficking and better protection of their rights. The network could provide an opportunity for sharing experiences on various issues related to access to justice of trafficked persons, adopting common recommendations and coordinating national lobbying efforts aimed to implement these recommendations.

  One issue to be addressed by the network would be the development of common recommendations to improve access to legal aid. Such discussion might be based on an overview of the existing legal aid systems in various European countries. Other topics mentioned are the legal implications and the involvement of lawyers in the process of identification of trafficked persons, the application of the non-punishment provision and the protection of victims who testify. A special group to focus on would be undocumented migrants because of their being particularly vulnerable to becoming victims of trafficking. Gaps identified in national legislation and practice could also feed into national and European monitoring bodies.

- Facilitate the exchange of experience, legal strategies and good practices among victim lawyers across Europe.

  Various participants mentioned that it was very useful to hear about practices and experiences in other countries as an inspiration to improve their domestic systems and bring them in accordance with international standards and as input for formulating recommendations for national law reform processes. To compare information on national situations, legislations and practices, a questionnaire might be set up and periodically communicated to the participants, and the answers shared to all of the members.

- Support and encourage strategic litigation on national and European level.

  The network could be useful to co-ordinate domestic strategic litigation on the rights embodied in the CoE Anti-Trafficking Convention. Similarly, a European lawyers network can be useful in cases before the

ECtHR to provide documents on the characteristics of trafficking and how it works to guide the court; to submit third party interventions, and to develop critical analyses.[23] Co-operation could be sought with large law firms to balance the workload, as this is often too much work for individual lawyers.

- Facilitate access to relevant case law of other European countries.

  The network could have an important role in the exchange of relevant national and European case law, e.g. through a dedicated website. National case law is currently not or hardly accessible while the legal issues in the different countries are very similar despite different legal systems.

- Facilitate transnational referral of trafficked persons and co-operation of lawyers in cross-border cases.

  On a practical level the network can provide access to lawyers and other national contacts including NGOs, bars, etc. which enable cross-border referral. Access to such information is also relevant for asylum cases or in the framework of applications for a humanitarian residence permit.

- Improve one's own representation of victims.

  The network will help to improve the own practice of the participating lawyers by exchanging cases, experiences, legal strategies and ideas and learning from each other.

- Support and encourage training.

  The network could have a role as a training forum for lawyers, other legal professionals and other stakeholders. The online training course on trafficking for legal practitioners which the CoE is currently developing and will pilot in 2017 may be very helpful in this respect.[24]

- Help to establish and expand national networks of trained lawyers.

7. Outcomes as to the role of the Council of Europe

As to the Council of Europe and the Group of Experts on Action against Trafficking in Human Beings (GRETA), it was suggested to have periodic meetings with GRETA (outside the assessment procedure of member states).

Participants also wondered whether it would be possible for the CoE to look into the existing explanatory report to the Convention and provide additional guidance in the light of the monitoring work and findings provided by GRETA.

In her closing remarks the Executive Secretary of the Council of Europe Convention on Action against Trafficking in Human Beings proposed some concrete steps for an increased exchange of views and information:

- During country visits GRETA should aim to systematically meet lawyers representing victims of trafficking. In this context, she stressed the importance of lawyers and NGOs providing feedback on the reports of GRETA, the reply of the government to GRETA's questionnaire (published on the website), and to provide information in response to GRETA's questionnaire and/or during the country visits.
- On the political level, it would be worth thinking if it is possible to address some of the issues discussed at the meeting by the Committee of the Parties.
- The Council of Europe might think of developing some kind of guidance based on the experiences of monitoring of the Convention by GRETA, e.g. minimum standards on steps to take when there is a suspicion of trafficking. This might be in the form of models or guidelines and could perhaps be done together with other organisations.

[23] See e.g. J. Allain, *Rantsev v Cyprus and Russia: the ECtHR and Trafficking as Slavery,* Human Rights Law Review, Vol. 3, N°10, 2010, p. 546-557 ; V. Stoyanova, *Dancing on the Borders of Article 4: Human Trafficking and the ECtHR in the Rantsev case*, Netherlands Quarterly of Human Rights, Vol. 30/2, 163-194, 2012.

[24] European Programme for **H**uman Rights **E**ducation for **L**egal **P**rofessionals. See: www.coe.int/HELP.

Annex I

European Court of Human Rights

Qualification as trafficking

Rantsev v Cyprus and Russia, n° 25965/04, 7 January 2010 (First section)

§ 279: "(…) In light of the proliferation of both trafficking itself and of measures taken to combat it, the Court considers it appropriate in the present case to examine the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered by that Article without the need to assess which of the three types of proscribed conduct are engaged by the particular treatment in the case in question."

§ 281: "The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (…). It implies close surveillance of the activities of victims, whose movements are often circumscribed (…). It involves the use of violence and threats against victims, who live and work under poor conditions (…). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (…)."

§ 282: "(…) In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention."

L.E. v Greece, n° 71545/12, 21 January 2016 (First section)

§ 58: "(…) La Cour renvoie à sa jurisprudence pertinente ayant déjà admis que la traite des êtres humains relève de la portée de l'article 4 de la Convention (…). Elle note aussi que le Gouvernement ne conteste pas le fait que la requérante a été victime de la traite des êtres humains. Il s'ensuit donc que l'article 4 trouve à s'appliquer en l'espèce. "

C.N. and V. v France, n° 67724/12, 11 October 2012 (Fifth section)

§ 88: "The Court notes at the outset that the applicants alleged that they were victims of treatment that amounted to human trafficking, referring in that connection to the Council of Europe Convention on action against trafficking in human beings. It is true that in the case of *Rantsev v. Cyprus and Russia*(cited above, § 279) the Court affirmed that human trafficking itself falls within the scope of Article 4 of the Convention in so far as it is without doubt a phenomenon that runs counter to the spirit and purpose of that provision. However, it considers that, above all, the facts of the present case concern activities related to "forced labour" and "servitude", legal concepts specifically provided for in the Convention. Indeed, the Court considers that the present case has more in common with the *Siliadin* case than with the *Rantsev* case."

Positive obligation to take protective measures

Rantsev v Cyprus and Russia, n° 25965/04, 7 January 2010 (First section)

§ 286: "As with Articles 2 and 3 of the Convention, Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking (…). 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 Anti-Trafficking Convention. In the case of an answer in the affirmative, 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 (…)."

§ 287: "Bearing in mind the difficulties involved in policing modern societies and the operational choices which must be made in terms of priorities and resources, the obligation to take operational measures must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the

authorities (…). It is relevant to the consideration of the proportionality of any positive obligation arising in the present case that the Palermo Protocol, (…), requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking (…). States are also required to provide relevant training for law enforcement and immigration officials (…)."

C.N. and V. v France, n° 67724/12, 11 October 2012 (Fifth section)

As to the procedural obligation to investigate situations of potential exploitation:

§ 110: "The Court notes that an investigation was carried out in 1995 by the police child protection services. Following that investigation the public prosecutor found that there was not enough evidence that an offence had been committed; the Court will not question that assessment of the facts in the absence of any evidence of a lack of diligence on his part. Furthermore, the Court points out that the applicants admitted to the investigating judge that their situation at the home of Mr and Mrs M. at the time had not yet deteriorated to the point that it was unbearable (…). The second applicant also admitted that she had not fully explained her situation to the police in 1995 (…). In these circumstances the Court sees no evidence of unwillingness on the part of the authorities to identify and prosecute the offenders, particularly considering that in 1999 a new investigation had taken place, which led to the criminal proceedings now before the Court."

(NB: This 1999 new investigation took place once the applicants had been removed from the place by NGOs, and following a complaint lodged by the applicants.)

L.E. v Greece, n° 71545/12, 21 January 2016 (First section)

§ 73 : "La date cruciale à retenir quant à l'obligation pesant sur les autorités de prendre des mesures concrètes pour la protection de la requérante en tant que victime de la traite à des fins d'exploitation sexuelle est le 29 novembre 2006. À cette date, et durant sa détention en vue de son expulsion, la requérante a explicitement affirmé aux autorités qu'elle était victime de la traite des êtres humains."

§ 74 : " Il revient donc à la Cour d'examiner si, avant le 29 novembre 2006, les autorités compétentes pouvaient raisonnablement connaître ou soupçonner que la requérante était victime de la traite des êtres humains. En outre, à partir de cette date la Cour examinera si les autorités policières et judiciaires ont pris les mesures nécessaires relevant de leurs pouvoirs pour offrir une protection adéquate à la requérante. "

§75 : " En ce qui concerne la période antérieure au 29 novembre 2006, la requérante n'affirme pas avoir appelé l'attention des autorités sur sa situation de victime de traite. En effet, il ressort du dossier que malgré des contacts à plusieurs reprises et sous différents contextes avec les autorités internes, celles-ci n'ont pas été alertées sur la situation particulière de la requérante. Tel a par exemple été le cas lorsque la requérante a déposé des demandes d'asile auprès des autorités compétentes. La Cour prend aussi à cet égard note du fait que, même sans avoir connaissance de sa situation spéciale, les autorités ont offert à la requérante une place dans un centre d'accueil mais celle-ci ne s'est pas par la suite présentée pour la revendiquer."

(NB : la place offerte dans un centre d'accueil s'inscrivait dans la procédure de droit commun de traitement des demandes d'asile, la requérante ayant déposé à son arrivée sur le territoire grec, sur instruction de du trafiquant, une demande d'asile – dans un tel contexte, l'impossibilité de la requérante de donner suite à une telle proposition aurait dû être analysée comme un indicateur d'une possible situation de traite – Cf exposés des faits, §§ 6-9 de l'arrêt)

V .F. c France, n° 7196/10, 29 novembre 2011 (décision d'irrecevabilité – 5ème section)

p. 13 : "Concernant l'obligation pour l'Etat de prendre toute mesure de protection de la requérante en tant que victime de la traite, la Cour constate qu'elle ne peut être imposée que si les autorités savaient ou auraient dû savoir que l'intéressée avait été enrôlée dans le réseau (*Rantsev*, précité). A ce propos**,** il ressort des éléments de l'espèce que la requérante n'a mentionné le trafic ni dans sa demande d'asile, ni lors de l'entretien avec l'officier de protection de l'OFPRA. Elle évoqua le réseau en cause devant la CNDA mais dans des termes qualifiés " d'extrêmement vagues " par cette juridiction. La Cour note que la requérante pointe la difficulté pour les victimes de la traite de dénoncer les réseaux dans leur demande d'asile quand elles sont toujours sous l'emprise de leurs membres. Toutefois, il ne ressort pas des éléments au dossier que telle était la situation de la requérante lorsqu'elle a été interrogée par les officiers de l'OFPRA puis à la CNDA**.** De plus, la Cour note que la CNDA a accordé la protection subsidiaire à de nombreuses reprises à des femmes nigérianes invoquant leur enrôlement dans un réseau et leur soumission par le rituel du " juju ". La question de la traite

des femmes et encore plus spécifiquement des réseaux de prostitution entre la France et le Nigeria est un phénomène que la juridiction française statuant sur les demandes d'asile prend particulièrement au sérieux, l'appréhension de la situation par la CNDA peut donc difficilement être contestée (voir le droit pertinent ci-dessus et, à titre d'exemple, la décision de comité de trois juges du 17 mai 2011, *B.L. c. France*, no 25037/09). Enfin, la Cour constate que la requérante ne fit pas non plus mention du réseau de prostitution lors de son interrogatoire alors qu'elle était placée en garde à vue pour racolage, le 7 janvier 2010. Lorsque les officiers de police l'interrogèrent au sujet d'un potentiel réseau, elle déclara qu'elle n'avait " payé personne pour faire le trajet " depuis le Nigeria et qu'elle se prostituait à son compte depuis février 2008."

J. A. c France, n° 45310/11, 27 mai 2014 (décision d'irrecevabilité – 5ème section)

§ 36: "Concernant l'obligation pour l'Etat de prendre toute mesure de protection de la requérante en tant que victime de la traite, la Cour constate qu'elle ne peut être imposée que si les autorités savaient ou auraient dû savoir que l'intéressée avait été enrôlée dans le réseau (*Rantsev c. Chypre et Russie*, n° 25965/04, § 286, CEDH 2010 (extraits)). À ce propos, il ressort des éléments de l'espèce que la requérante n'a mentionné cet aspect ni dans sa demande d'asile, ni lors de l'entretien avec l'officier de protection de l'OFPRA. Elle n'évoqua le réseau en cause que devant le magistrat qui instruisit sa plainte pour viol en réunion. Les auteurs de ces viols ont d'ailleurs ultérieurement fait l'objet de condamnations à des peines de prison. S'agissant toutefois de son appartenance à un réseau de traite d'êtres humains, elle indiqua également lors de cette instruction pénale, qu'elle s'était soustraite à l'emprise de son souteneur à la fin de l'année 2009 et qu'à partir de ce moment, elle se prostituait désormais de manière occasionnelle et pour son compte. Elle soumit le même récit à la CNDA dans sa demande de réexamen de sa demande d'asile qui fit l'objet d'un rejet le 12 août 2013".

§ 37: "La Cour, bien que consciente de l'importance du phénomène de la traite des femmes nigérianes en France, ne peut donc que constater, dans le cas d'espèce, qu'il est établi que la requérante n'était plus soumise à l'influence d'un réseau de traite d'êtres humains depuis 2009, soit bien avant le déroulement de la procédure judiciaire initiée le 25 juin 2010 par un dépôt de plainte pour viol. Elle note d'ailleurs que lors de l'audition menée par le juge d'instruction dans ce cadre, ce dernier a pris soin de poser des questions à la requérante afin de dissiper tout soupçon raisonnable à cet égard et de s'assurer qu'elle n'était plus soumise à la traite ou à l'exploitation, ou ne se trouvait pas en danger de l'être (voir paragraphes 14 et 15 ci-dessus). La Cour relève également que la requérante n'a pas tenté d'alerter les autorités sur sa situation lorsqu'elle était sous l'emprise du réseau de prostitution. Dès lors, il ne peut être reproché aux autorités de ne pas avoir mis en œuvre des mesures efficaces et adéquates pour protéger la requérante alors qu'elle n'était plus ou ne risquait pas de manière réelle et immédiate d'être victime de traite ou d'exploitation (voir, *a contrario*, *Rantsev,* précité, §§ 296 et 297)."

L.O. c France, n° 4455/14, 26 mai 2015 (décision d'irrecevabilité, 5ème section)

(assessment outside the framework of the obligation to take protective measures)

§ 31: "La Cour constate que le récit de la requérante, quant aux conditions dans lesquelles elle a été amenée à se prostituer en France, est circonstancié et compatible avec de nombreux rapports émanant de sources fiables et concordantes faisant état de l'ampleur des réseaux de traite des êtres humains au Nigéria. Elle observe, par ailleurs, que le fait que la requérante ait menti à l'occasion de sa première demande d'asile et lors de son audition par les services de police est une constante dans les récits de victimes de réseaux de prostitution et, partant, elle estime que cette circonstance, en tant que telle, ne prive pas de force probante les dires de cette dernière."

§ 34: "La Cour relève ensuite qu'il ne résulte pas des déclarations de la requérante qu'elle demeure soumise à l'influence de son proxénète. Si ce dernier continue à la menacer, la requérante dit, en effet, avoir cessé de lui remettre de l'argent."

Annex II

United Kingdom

Asylum

SB (Moldova) (2007): Asylum precedent for victims of trafficking. SB (PSG, Protection Regulations, Reg 6) Moldova CG [2008] UKAIT 00002. (http://www.bailii.org/uk/cases/UKIAT/2008/00002.html)

Non-punishment

R v O (2008): Non-punishment precedent, documents offence. R v O [2008] EWCA Crim 2835 (02 September 2008) (http://www.bailii.org/ew/cases/EWCA/Crim/2008/2835.html)

R v N [2012]: non-punishment trafficking criminal appeal, drugs, Vietnamese child, cannabis, appeal failed – now pending before European Court of Human Rights - still awaiting decision to communicate, R v N [2012] EWCA Crim 189, http://www.bailii.org/ew/cases/EWCA/Crim/2012/189.html

R v L and others [2013]: non-punishment trafficking criminal appeals, Vietnamese children (Appellant T, cannabis, drugs) and highly vulnerable Ugandan female (Appellant L, documents), succeeded. R v L & Others [2013] EWCA Crim 991 (21 June 2013), http://www.bailii.org/ew/cases/EWCA/Crim/2013/991.html. The Lord Chief Justice of England and Wales, giving the judgment of the Court of Appeal (Criminal Division) in the landmark trafficking appeal cases of *R v L and others* [2013] EWCA Crim 991:

> "13…The reasoning [for the non-prosecution of victims of trafficking] is not always spelled out, and perhaps we should do so now. The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals."

Czech Republic

Right of a Person Reporting a Crime to an Effective Investigation (Art. 4 of the ECtHR)

Constitutional Court Decision, II.ÚS 3626/13 of 16 December 2015
http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/2-3626-13-en.pdf

Constitutional Court Decision, II. ÚS 3436/14 as of 2016
http://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/2016/II._US_3436_14_an.pdf

The Tree Workers Case, Constitutional Court Decisions (2015 and 2016)

The "Tree Workers Case" is the biggest case of labour exploitation to have been exposed in Europe in the last twenty years. Since 2009, at least 2,000 workers, mainly from Vietnam, but also from Romania, Bulgaria, Hungary, Slovakia and Ukraine have been forced to work under very harsh conditions in the state forest of the Czech Republic.

More than 60 applicants (nationals of Slovakia, Romania and Vietnam) filed a criminal complaint alleging they had been victims of human trafficking and had been forced to work in a forest in remote areas where they lived in poor conditions without ever being paid. The applicants stated that the conduct of the investigation was chaotic and that the legal reasoning of the police was limited to a single paragraph.

The Court held that the State organs have in fact refused to deal with the allegations of the applicants even though they had been demanding protection as victims of a serious criminal conduct. The Court also stated that the police violated principles of criminal law by focusing only on investigating a criminal offence of fraud while leaving behind much more serious crimes which were in question. Considering the international obligations of the Czech Republic, the Court considered that where there is a possibility that serious crimes against personal liberty and human dignity such as human trafficking have been committed, the events in question must be subject to effective investigation. The Court further emphasised that the duty of effective investigation is "only" a procedural obligation unrelated to the outcome of the investigation. It is not an

obligation of result, but of means.

Abstract Constitutional Court Decision, II.ÚS 3626/13 of 16 December 2015

"In cases of suspicion of the especially serious crime of human trafficking or other serious crimes against liberty and human dignity, which the Czech Republic is bound to prosecute under its international obligations, at a constitutional law level one can conclude that there is a positive obligation on state bodies to effectively clarify the criminal matter. Breach of this obligation is interference in the constitutionally guaranteed rights of persons who declare themselves to be victims of such crimes and seek protection and satisfaction by reporting the crime to state bodies.

We must begin with the assumption that for the victims of human trafficking the protection provided in a criminal proceeding is the direct and most effective way to ensure their fundamental rights arising from Art. 8 par. 1, Art. 9 and Art. 10 par. 1 of the Charter of Fundamental Rights and Freedoms and from Art. 4 par. 1 and 2 and Art. 5 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, purely formal, or grossly incorrect and ineffective procedures by law enforcement bodies will not survive constitutional law review, and establish the need to annul the decision that ended the criminal proceeding by suspending the matter.

In the present matter, we also cannot overlook the significant obligations arising for the Czech Republic from European Union law at the time of the contested decisions, in particular European Parliament and European Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

The obligations in this area arising for the state from international law were recently expanded, as the United Nations Convention on Transnational Organized Crime (no. 75/2013 Coll. of International Treaties) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the Convention (no. 18/2015 Coll. of International Treaties) went into effect for the Czech Republic."

Constitutional Court Decision, II. ÚS 3436/14 as of 2016

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