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Protecting the victims of trafficking: problems and prospects

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****E.H.R.L.R. 106** This article examines the current international and European framework to combat the crime of trafficking and to protect its victims. It demonstrates that while states have placed considerable priority on criminalising the practice and on prosecuting the traffickers, they have been reluctant to undertake legally binding obligations in the matter of protecting victims. Despite the fact that the essence of trafficking is the savage violation of individual human rights, victims stand in a twilight zone of international, and in most cases, national legal protection. To this end, the article considers whether a code of rights for victims of trafficking can be gleaned from the obligations undertaken by states in the ECHR which could ultimately be translated into national law and practice.*

Introduction

Trafficking in human beings involves the recruitment, transportation, harbouring or receipt of people, without their consent, for the purposes of exploitation. It is a global phenomenon that has impinged on practically every country in the world, either as a country of origin, transit or destination. Trafficking constitutes one of the most severe violations of human rights and has been aptly described as a contemporary form of slavery.¹ It is commonly acknowledged that the main victims of trafficking are women and children. It is women and children who are most often trafficked for the purposes of sexual exploitation,² though they can also end up being forced into other situations of forced labour, begging, adoption, false marriage, or as victims of trade in human organs. Because of the clandestine nature of the activities in question, it is very difficult to find reliable statistics on the scale of trafficking anywhere in the world.³ It has however been estimated that approximately 800,000 men, women and children are moved across ***E.H.R.L.R. 107** international boundaries every year. This figure does not include the millions of people trafficked within their own countries.⁴ And with estimates running as high as \$44 billion dollars a year,⁵ trafficking is ranked just behind the drugs trade and the arms industry as one of the most lucrative forms of international crime.⁶ It is a phenomenon that seems to be on the increase rather than in decline.

Despite the scale of this phenomenon and the devastating impact on its victims, trafficking is still a crime that remains relatively invisible in the public consciousness and also in political and legal circles in many countries. There are many reasons that can be put forward to explain this lack of visibility: First, the lack of concrete information on the extent of the phenomenon at national and international levels; secondly, the fact that unlike most other crimes, the victims remain largely hidden from public view, at the mercy of the traffickers or criminal gangs who control them; and thirdly, legislative responses to the phenomenon in many states prioritise law enforcement to the exclusion of protection of its victims and preventative strategies which are more likely to raise the profile of the phenomenon in the public mind.

The purpose of this article is to examine the current international and European framework to combat the crime of trafficking and to protect its victims. It demonstrates that while states have prioritised the goal of criminalising the practice and prosecuting the traffickers, they have been reluctant to undertake legally binding obligations in the matter of protecting victims. Despite the fact that the essence of trafficking is the savage violation of individual human rights, victims stand in a twilight zone of international, and in most cases, national legal protection. To this end, therefore, the article considers whether a code of rights for victims of trafficking can be gleaned from the obligations undertaken by states in the European Convention on Human Rights (ECHR) which could ultimately be translated into national law and practice.

Defining “trafficking”

The nucleus of international law on the issue of trafficking is the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children 2000 (the Palermo Protocol).⁷ This

Protocol supplements the United Nations Convention Against Transnational Organized Crime.⁸ The Protocol is aimed at preventing and combating trafficking, with particular emphasis on the protection of women and children and the promotion and facilitation of co-operation amongst contracting states in order to meet this objective. The Protocol defines trafficking in persons⁹ as:

***E.H.R.L.R. 108** "... [T]he 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."

This definition of trafficking has been welcomed on the one hand for its comprehensiveness,¹⁰ and criticised on the other, for its undue complexity.¹¹ The primary emphasis in the definition is on the crucial element of exploitation which itself is defined as including "..., at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".¹² The definition makes clear that the use of coercive tactics, deception, or abuse of a position of authority, will vitiate any alleged consent to the subsequent exploitation.

The element of exploitation is the factor that distinguishes trafficking from the practice of "smuggling" with which it is often confused. The problem of "smuggling" of persons is dealt with in a separate Protocol to the Convention on Organised Crime called the Protocol Against the Smuggling of Migrants by Land, Sea and Air.¹³ This Protocol defines "smuggling of migrants" as:

"... [T]he procurement, in order to obtain *directly or indirectly*, a financial or other material benefit of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."¹⁴

Thus, smuggling occurs where one or more persons facilitate the illegal entry into a state of a foreign national for financial gain. At face value, it does not involve any element of exploitation, as it is presumed that the smuggled person necessarily consents to the practice. Trafficking victims, on the other hand, have either never consented or, if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive actions of the traffickers. In effect, the essence of smuggling is that it is a crime against the state, whereas trafficking is a crime inflicted on individuals.¹⁵ This neat division of form is not always so simple to identify in substance. The practices of trafficking and smuggling are often interlinked. What may start out as a process of ***E.H.R.L.R. 109** smuggling can in fact end up as one of trafficking. A person who is smuggled willingly into a country can often be in an extremely vulnerable situation. She may be unable to pay for the cost of the smuggling and may thus end up being exploited in exactly the same ways as a victim of trafficking. Thus, while it is important to distinguish between smuggling and trafficking in the gathering of accurate information on the phenomenon of trafficking, the fluidity that exists between both practices must also be borne in mind.¹⁶

International legal framework

The purpose of the Palermo Protocol is set out in Art.2 as that of preventing and combating trafficking (with particular attention to women and children); the protection and assistance of victims of trafficking; and the promotion of inter-state cooperation to achieve these objectives. To this end, the Protocol sets out a strategic framework through which states parties are obliged to tackle the phenomenon of trafficking. This framework includes the adoption of legislative measures to make trafficking an offence under criminal law, under which individuals may be prosecuted and convicted for attempting to traffic a person, for participating as an accomplice in any such activity, or for organising or directing others to commit the offence of trafficking.¹⁷ The Protocol also sets forth measures of prevention that must be taken by states, including requirements to establish comprehensive policies, programmes and other measures to prevent and combat trafficking in persons.

The aim of protecting the victims of trafficking is provided for in Art.6 of the Protocol which obliges states parties in appropriate cases and to the extent possible under its domestic law to protect as far as possible the privacy and identity of victims of trafficking, including by making legal proceedings relating to such trafficking confidential.¹⁸ States are also required to consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking, including, in appropriate cases, in co-operation with non-governmental organisations, other relevant organisations

and other elements of civil society, the provision of: appropriate housing; counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; medical, psychological and material assistance; and employment, educational and training opportunities.¹⁹ States are further required to endeavour to provide for the physical safety of victims of trafficking in persons while they are within the territory²⁰; and to ensure that the domestic legal system contains measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.²¹ While it is undoubtedly important that the Protocol includes such detailed measures in regard to the protection of victims, it is ***E.H.R.L.R. 110** regrettable that these measures are framed quite weakly, with little or no firm obligations being imposed on states in the vital matter of protection. While the measures in question are professed to be aimed at protecting the human rights of the victims, there can be little doubt that the emphasis in the Protocol is primarily on the issue of crime control and prevention.

The European Union

The European Union has also moved to introduce measures on trafficking. The European Union's Framework Decision on Trafficking of 2002 is intended to complement the work of the United Nations in this area and to "... harmonize at European level the definitions and methods for punishment of offences related to trafficking for the purpose of labour and sexual exploitation".²² The Framework Decision defines trafficking in very similar terms to the Palermo Protocol²³ and enjoins Member States to take the necessary measures to ensure that trafficking is a criminal offence in their respective jurisdictions, punishable by "effective, proportionate and dissuasive" penalties.²⁴ There can be little doubt that the emphasis in this instrument is prosecutorial, with very little attention paid to the inclusion of measures for the protection of victims.²⁵

This emphasis on the primacy of state security over the protection needs of victims is amplified by the terms of the subsequent EU Directive on Short Term Residence Permits.²⁶ The Directive aims to facilitate the prosecution of traffickers by assisting victims of trafficking who co-operate with national authorities in the prosecution of traffickers. Article 6 of the Directive provides for a "reflection period", during which victims of trafficking must be allowed "to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to ***E.H.R.L.R. 111** whether to cooperate with the competent authorities".²⁷ The Directive goes on to provide that where victims of trafficking do agree to co-operate with the authorities, they may be issued with a short-term residence permit in a state for a period of at least six months, during which states are obliged to provide them with assistance and care.²⁸ It obliges States to ensure that victims have suitable accommodation, emergency medical and psychological treatment and necessary support in the form of social welfare and means of subsistence. Free legal aid, translation and interpretation services are also to be provided. During the life of the permit, victims should also be allowed to work or to undertake training.²⁹ At first blush, these measures may appear to offer a fairly comprehensive package of protection to trafficking victims. In human rights terms, however, they are of dubious worth, tied as they are to the co-operation of the victim in the first place with the prosecution.³⁰ The propriety of incentivising victims in this manner has been appropriately queried on the basis that it may raise questions as to the reliability of their evidence in subsequent criminal proceedings.³¹

Council of Europe

Taking the Palermo Protocol and other international legal instruments as its starting point, in 2005 the Council of Europe promulgated a Convention on Action Against Trafficking in Human Beings 2005 which "seeks to strengthen the protection afforded ***E.H.R.L.R. 112** by those instruments and to raise the standards which they lay down"³² in regard to trafficking.³³ In particular, the aim of this Convention was to develop existing international standards in regard to the protection of the human rights of the victims of trafficking.³⁴ In this regard, therefore, the Convention adopts for the first time in international law a "human rights centred" approach³⁵ to the phenomenon of trafficking.³⁶

Thus, in addition to imposing obligations on contracting states in the matter of prosecution of traffickers³⁷ and methods of prevention,³⁸ the Convention also ***E.H.R.L.R. 113** obliges them to adopt such legislative or other measures as may be necessary to assist victims³⁹ in their physical, psychological and social recovery.⁴⁰ These include obligations to provide appropriate and secure accommodation, psychological and material assistance⁴¹; access to emergency medical treatment⁴²; translation and interpretive services⁴³; counselling and information;⁴⁴ and access to education for children.⁴⁵ It may be noted that in contrast to the EU Directive, states must also legislate or take other measures to ensure that assistance to a victim is not made conditional on his or her willingness to act

as a witness.⁴⁶ The Convention also makes provision for a recovery and reflection period of 30 days for persons who have been trafficked into a state⁴⁷; and for the issuing of residence permits to them where their stay is necessary due either to their “personal situation” or because such stay is necessary for the purposes of co-operation in a criminal investigation.⁴⁸ Other provisions provide for compensation and legal redress⁴⁹ and the repatriation and return of the victims.⁵⁰

These victim-centred measures are further strengthened by the establishment of an expert committee to monitor the implementation of the Convention by the parties. The function of this Group of Experts on Action against Trafficking in Human Beings (GRETA)⁵¹ shall be to evaluate periodically the performance of each state in implementing its obligations under the Convention.⁵² The reports of the Committee will be publicly accessible and hence have the same practical impact as those of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which monitors the Council of Europe Torture Convention. The addition of this implementation technique to the substantive provisions of the Convention is thus a highly novel and practically useful approach to the phenomenon of trafficking.

Encouraging as the elaboration of this Convention may be, a measure of the reluctance of European States to accede to such a comprehensive code of measures to protect the victims of trafficking is demonstrated by the fact that, to date, only 10 states ***E.H.R.L.R. 114** have ratified the Convention.⁵³ The Convention will become binding only on these few states in February 2008. In the meantime, it appears that victims of trafficking generally are bereft of concrete human rights protection at the international level. Closer analysis, however, reveals that while the specific requirements of the Council of Europe Convention may await broader implementation, a more generic duty on states to protect trafficking victims could, by means of tactical advocacy, be located in other international human rights instruments, and specifically the ECHR.

International human rights law and trafficking

The main corpus of international law on trafficking, as we have seen, is not built squarely on human rights foundations. Nonetheless, certain core human rights instruments allude to it and the committees responsible for their enforcement have increasingly focused their work in its direction.

Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women, for example, commits states to pursue “all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has interpreted this provision broadly in that the phrase “appropriate measures” should include measures of protection for victims. In its Concluding Observations on Ireland's fourth and fifth periodic reports under the Convention, for example, CEDAW expressed concern about trafficking of women and girls in Ireland, the lack of information on the extent of the problem and on specific legislation in this area, and the lack of a comprehensive strategy to combat it.⁵⁴ Specifically the Committee recommended “... the adoption and implementation of a comprehensive strategy to combat trafficking in women and girls, which should include preventive measures, the prosecution and punishment of offenders and the enactment of specific legislation in the area”.⁵⁵ The Committee also recommended that “measures be put in place to provide for the physical, psychological and social recovery of women and girls who have been victims of trafficking, including the provision of shelter, counselling and medical care”.⁵⁶ Recommendations concerning the protection of victims of trafficking are now a routine feature of the Committee's Concluding Observations on states' reports.⁵⁷

***E.H.R.L.R. 115** The United Nations Convention on the Rights of the Child⁵⁸ obliges states in a variety of ways to combat the exploitation of children for labour or sexual purposes, and specifically enjoins states to “combat the illicit transfer and non-return of children abroad”⁵⁹ and to take measures with a view to preventing the abduction of, sale of, or trafficking in children, regardless of the purpose thereof.⁶⁰ Crucially, Art.39 places emphasis on the establishment of appropriate measures to secure the recovery (physical and psychological) and reintegration of victims who have suffered exploitation or abuse. Like CEDAW, the Committee on the Rights of the Child (CRC), which monitors implementation of the Convention, has laid emphasis in its recommendations to states in recent years on the need for comprehensive measures to combat trafficking in children and to protect child victims of trafficking.⁶¹

The European Convention on Human Rights

It is well-rehearsed that the decision of the European Court of Human Rights in the case of *Soering v*

*United Kingdom*⁶² was the foundation for a trail of decisions by the Court articulating rights for asylum seekers under the Convention that could hardly have been foreseen by the drafters of the Convention.⁶³ The decisions in *Cruz-Varas v Sweden*,⁶⁴ *Chahal v United Kingdom*,⁶⁵ *HLR v France*⁶⁶ and *D v United Kingdom*⁶⁷ provide the basis for many national schemes for complementary protection in states parties to the Convention, as well as informing aspects of their asylum procedures. While the concept of trafficking has barely surfaced in Convention jurisprudence to date, a focused analysis of pertinent articles of the Convention discloses that the instrument could be of considerable practical value to victims in a similar fashion to the asylum jurisprudence.

Freedom from slavery, forced labour and servitude

The prohibition on slavery and forced or compulsory labour in Art.4 ECHR is the most obvious starting point for any analysis of the value of the Convention in regard to *E.H.R.L.R. 116* trafficking victims. This article was successfully pleaded by the applicant in the case of *Siliadin v France*⁶⁸ which concerned an alleged incident of trafficking of a child for the purposes of labour exploitation. The facts reveal that the applicant, a 15-year-old Togolese national, had been taken to France by a French national on the pretext that her immigration status would be regularised and that she would be educated. In fact, she was subsequently “lent”, by the woman who had accompanied her to France, to a family as a domestic servant, in circumstances where she had worked fifteen hours a day, seven days a week, for no pay. Although the arrangement had persisted for over three years in total, the French courts had held that her situation did not breach the French Penal Code. The applicant complained that the exploitation to which she had been subjected in a private household amounted to a failure by the state to comply with its positive obligation under Arts 1 and 4 ECHR, taken together, to put in place adequate criminal law provisions to prevent and effectively punish the perpetrators of those acts. This argument by the applicant involved a novel extension of the “positive obligations” doctrine, previously recognised by the Court principally in regard to Arts 2, 3 and 8 ECHR,⁶⁹ to the terms of Art.4. The Court agreed, holding that limiting compliance with Art.4 only to direct action by the state authorities would be inconsistent with international instruments specifically concerned with slavery and forced labour and would amount to rendering it ineffective.⁷⁰ Accordingly, it necessarily followed that governments indeed have positive obligations to adopt criminal law provisions which penalise the practices referred to in Art.4 and to apply them in practice.⁷¹ While the circumstances to which the applicant had been subjected did not, in the view of the Court, amount to “slavery”, she had been subjected to “forced labour” and “servitude” within the meaning of Art.4 at a time when she was a minor.⁷² The violation was established in this case because the provisions of French criminal law had not offered her adequate protection against her situation and not made it possible for the culprits to be punished.⁷³

While the decision is obviously of huge significance in so far as it establishes a clear duty on states parties to the Convention to criminalise “trafficking” and other forms of “forced labour”, it has been obliquely criticised for failing to stretch the positive obligations in Art.4 beyond the duty to provide an adequate criminal law response and further in the direction of victim protection.⁷⁴ The text of Art.4, however, is limited to a straight-forward prohibition on “slavery” and “forced or compulsory labour”. It would seem unlikely that even the broadest interpretation of Art.4 could give rise to a duty to provide measures of protection to persons subjected to such treatment. Rather, it would *E.H.R.L.R. 117* seem that the more appropriate nexus to victim protection can be located in Arts 8 and 3 ECHR.

Right to respect for physical and moral integrity

The Court has recognised in a number of different contexts that the right to respect for private life in Art.8 ECHR includes the right of every person to respect for his or her physical and moral integrity.⁷⁵ One step below the more demanding standard of establishing that a state has inflicted or otherwise allowed an individual to be subjected to “degrading” treatment in violation of Art.3, this obligation positively obliges states to take concrete measures, whether legislative or otherwise, to protect a person's physical and moral integrity. The Court has recognised the existence of this aspect of the right in cases involving deportation,⁷⁶ treatment of disabled persons⁷⁷ and failure to make adequate criminal law provision in cases of assault.⁷⁸ Given that the rights in the Convention apply to all persons within the jurisdiction of the contracting states, it could well be argued that a failure by any contracting state to provide adequate shelter to a trafficked person, to fail to meet his or her psychological or physical needs or to supply emergency medical assistance would be a failure to respect that person's physical or moral integrity. Again, the essence of such an argument would have to be based on the failure by the state to fulfil its positive obligations in regard to this aspect of the right. There can be little doubt but that such an argument would require the Court to stray into the

contentious area of social and economic rights where it is usually quite uncomfortable.⁷⁹ However, arguments in this direction could be bolstered by reliance on the standards for victim protection set forth in the Palermo Protocol and a fortiori in the Council of Europe Convention Against Trafficking.⁸⁰ This would be so particularly given the Court's repeated mantra in cases such as *Siliadin* that the Convention is a living instrument which must be interpreted in the light of present day conditions and in accordance with the increasingly high standards required in the area of human rights and fundamental liberties.⁸¹ The emphasis in this and other judgments on the duty of the state to protect children and other vulnerable individuals would also be of similarly persuasive value.⁸²

***E.H.R.L.R. 118 Protection against return to country of origin**

On the issue of return to the state of origin, where this arises, the case law on Art.3 ECHR in regard to asylum is of direct relevance to a victim of trafficking who fears return and possible revictimisation in her country of origin by her traffickers. The decision of the Court in the case of *HLR v France* provides the appropriate principle that individuals should not be sent back to a state where they are at risk of ill-treatment, even at the hands of non-state agents, whom the state cannot or will not control.⁸³ However, it must be acknowledged that it has become increasingly difficult for applicants before the Court to reach the high threshold of proof demanded by the Court in practice.⁸⁴ Moreover, Art.3 would seem to provide little grounds for relief in circumstances where victims do wish to be repatriated, or where their wishes are unclear. The Council of Europe's Convention on Trafficking does provide for a reflection period and provision of a residence order so as to allow the victim to come to terms with the situation, to be protected from the trafficker(s), to assess the risks, if any, involved in return, and to decide whether or not to co-operate with any potential prosecution. Unfortunately, pending implementation of that Convention and widespread ratification by Council of Europe states, the ECHR would seem incapable of supplying the deficiency.

Duty of investigation

A persistent difficulty in combating the phenomenon of trafficking has been the low rates of identification by states of situations of trafficking. Given the incapacity of many victims to self-identify or to come forward physically, it is hugely important that the state puts in place trained personnel who can evaluate circumstances that will not immediately present to an untrained eye as a situation of trafficking. In this respect, it may be recalled that the Court has previously held that states are under a duty to investigate situations where there is an arguable claim that persons have been treated in violation of Art.3,⁸⁵ even at the hands of private parties.⁸⁶ Thus, failure by police to investigate the circumstances of any situation which might reasonably be believed to amount to a situation of trafficking, which of its very essence at least amounts to inhuman and degrading treatment, might also ground liability on Art.3 grounds. Similar arguments may also emerge in regard to a duty of investigation as an inherent aspect of Art.4.

Conclusion

Despite the devastating impact which the crime of trafficking has on its victims, states are still reluctant to commit to binding legal obligations in the matter of protection. The national interest has always taken priority in the fight against trafficking. This ***E.H.R.L.R. 119** reluctance to commit to binding legal obligations in regard to protection is evidenced by the widespread failure of European states to ratify the Council of Europe's Convention Against Trafficking. In such a climate, human rights advocates have increasingly resorted to core human rights treaties as a means of articulating concrete rights for victims. There is evidence that this approach is garnering certain success. The above analysis reveals that the European Convention on Human Rights, in particular, could provide useful weaponry in the armoury of lawyers representing victims of trafficking, both at the national level where the Convention is incorporated into domestic law, and ultimately before the European Court of Human Rights in the years ahead. While the dividends in individual cases may not be widespread, such a course of strategic litigation could help place the spotlight on the needs of victims of this most egregious of crimes.

E.H.R.L.R. 2008, 1, 106-119

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1. UN Fact Sheet No.14: Contemporary Forms of Slavery: <http://www.unhcr.ch/html/menu6/2/fs14.htm> [Accessed January 16, 2008]; P. Mac Redmond, "Human Trafficking in Europe: The New Slave Trade", unpublished LL.M. Thesis (UCD, 2003).
 2. It has been estimated that of the 800,000 persons trafficked across international boundaries every year, 70% are female and 50% are

- children: US State Department, *Trafficking in Persons* report (2007), p.8.
3. The International Labour Organisation has estimated that there are 12.3 million people in forced labour, bonded labour, forced child labour and sexual servitude at any given time. According to the recent *Trafficking in Persons* report, other estimates run between 4 and 27 million.
 4. *Trafficking in Persons* report.
 5. P. Belser, "Forced Labour and Human Trafficking: Estimating the Profits" (ILO, 2005): <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1016&context=forcedlabor> [Accessed January 16, 2008].
 6. *Trafficking in Persons* report, p.2.
 7. Resolution 55/25 (2000). Entry into force December 25, 2003: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_traff_eng.pdf [Accessed December 21, 2007].
 8. Resolution 55/25 (2001). Entry into force September 29, 2003: http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf [Accessed December 21, 2007].
 9. Palermo Protocol Art.3(a).
 10. Coalition Against Trafficking in Women, *Guide to the New UN Trafficking Protocol* (2001), p.4: http://action.web.ca/home/catw/attach/un_protocol.pdf [Accessed December 21, 2007].
 11. A. Jordan, *The Annotated Guide to the Trafficking Protocol* (International Human Rights Law Group, 2003), p.3: http://www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723 [Accessed December 21, 2007].
 12. Palermo Protocol Art.3(a).
 13. Resolution 55/25 (2000), Annex 111: (not in force).
 14. Resolution 55/25 (2000), Art.3(a).
 15. "In principle, the smuggling of persons constitutes an illegal border crossing and is therefore a violation against the State. In contrast, trafficking in human beings is a violation of the rights of the individual, so that the victims of the crime are the trafficked persons themselves": B. Limanowska, *Trafficking in Human Beings in Southeastern Europe* (Unicef, 2002), p.3: <http://www.unicef.de/download/trafficking-see.pdf> [Accessed December 21, 2007].
 16. See generally, J. Bhabha, *Trafficking, Smuggling and Human Rights* (Migration Policy Institute, 2005): <http://www.migrationinformation.org/Feature/print.cfm?ID=294> [Accessed December 21, 2007].
 17. It should be noted that the offence of trafficking in persons is criminalised under the Protocol only to the extent that the offence is transnational in nature and if it involves an organized criminal group: Art.5.
 18. Palermo Protocol Art.6(1).
 19. Palermo Protocol Art.6(3).
 20. Palermo Protocol Art.6(5).
 21. Palermo Protocol Art.6(6).
 22. A Framework Decision, as a matter of EU law, is used as a means of harmonising the laws and regulations of the Member States in particular areas. Framework Decisions are binding on states as to the results that must be achieved in the particular area--though the choice of means in implementing the obligations are left to the discretion of the Member States.
 23. Framework Decision Art.1 defines trafficking as involving "... the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where: (a) use is made of coercion, force or threat, including abduction, or(b) use is made of deceit or fraud, or(c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or(d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person's labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography".
 24. Framework Decision Art.5.
 25. Framework Decision Art.7. A more robust approach to the protection of child victims of sexual exploitation, however, can be found in the EU Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography 2003 which is designed to forge a common response to such offences which very often involve trafficking in children.
 26. Directive 2004/81 on the residence permit issued to third country nationals who are victims of trafficking in human persons or who have been the subject of an action to facilitate illegal immigration, who co-operate with the competent authorities [2004] OJ L261/19.
 27. The length of the proposed reflection period shall be determined according to national law: Directive 2004/81 Art.6(1). Article 7 of the Directive details the measures of protection and care to be granted to persons during this reflection period.
 28. Directive 2004/81 Art.8.
 29. Directive 2004/81 Chapter III.
 30. Directive 2004/81 Art.8(2) explicitly requires that before issuing a residence permit, the Member State must consider (a) the opportunity presented by prolonging a person's stay for the investigation of trafficking or for the purposes of judicial proceedings; (b) whether the person has shown a clear intention to co-operate; and (c) whether the person concerned has severed all relations with persons suspected of trafficking. Articles 13 and 14 of the Directive provide that the permit may not be renewed or may be withdrawn if these conditions cease to be satisfied. The linkage between protection and prosecution has been specifically rejected by the EU's Experts Group on Trafficking in Human Beings which has elsewhere recommended that: "in order to effectively address trafficking and to prevent re-trafficking, as well as meeting the State's obligation under international human rights law, Member States should ensure that trafficked persons have access to adequate remedies, including assistance, protection and compensation, regardless of their willingness or capacity to testify against the traffickers": Report of the EU Experts Group on Trafficking in Human Beings, December 22, 2004, Recommendation 89, http://ec.europa.eu/justice_home/doc_centre/crime/trafficking/doc/report_expert_group_1204_en.pdf [Accessed December 21, 2007].
 31. Irish Human Rights Commission, *Observations on the Scheme of the Criminal Justice (Trafficking in Persons and Sexual Offences) Bill 2007* : "Such direct linkage may have the effect of incentivising the giving of evidence against he accused and thus possibly contaminating or tainting such evidence" (para.3.3): http://www.ihrcc.ie/fileupload/banners/Observations_on_the_scheme_of_the_Criminal

JusticeTPSOBill.doc [Accessed December 21, 2007].

32. *Council of Europe Convention Against Trafficking in Human Beings: Explanatory Report* (CETS No.197), para.6, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> [Accessed December 21, 2007].
33. "Trafficking" is defined in Art.4(a) of the Convention in substantially the same terms as Art.1 of the Palermo Protocol 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 sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". The definition explicitly provides that the consent of a victim shall be irrelevant where any of the means set forth in the definition have been used (Art.4(b)). Moreover, in regard to child victims under the age of 18 years, the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be deemed sufficient to constitute "trafficking" even if this does not involve any of the means set forth in the definition (Art.4(c)).
34. *Council of Europe Convention Against Trafficking in Human Beings: Explanatory Report*, para.30.
35. It should be noted that the approach of the Convention is based in this respect on the United Nations High Commissioner for Human Rights' *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, para.1 of which provides that: "The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims": UN Doc. E/2002/68/Add.1: <http://www1.umn.edu/humanrts/instreet/traffickingGuidelinesHCHR.html> [Accessed December 21, 2007]
36. "The added value provided by the Council of Europe Convention lies firstly in the affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity, and that greater protection is therefore needed for all of its victims. Secondly, the Convention's scope takes in all forms of trafficking (national, transnational, linked or not to organised crime, and for purposes of exploitation) in particular with a view to victim protection measures and international cooperation": *Council of Europe Convention Against Trafficking in Human Beings: Explanatory Report*, para.36.
37. See Chapter IV of the Convention which requires, inter alia, contracting states to criminalise as offences the intentional trafficking of human beings, as well as attempts at aiding or abetting of trafficking, or of acts relating to travel or identity documents. Chapter V sets forth further measure in regard to investigation, prosecution and procedural law.
38. See Chapter II of the Convention, which sets out detailed obligations on states, inter alia, to establish and/or strengthen "effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings" (Art.5(2)); measures to discourage demand (Art.6); and in regard to border controls (Art.7).
39. Article 4(e) of the Convention defines the term "victim" as any natural person who is subject to trafficking in human beings as defined in Art.4(a).
40. Council of Europe Convention Against Trafficking in Human Beings c.III.
41. Council of Europe Convention Against Trafficking in Human Beings Art.12(1)(a).
42. Council of Europe Convention Against Trafficking in Human Beings Art.12(1)(b).
43. Council of Europe Convention Against Trafficking in Human Beings Art.12(1)(c).
44. Council of Europe Convention Against Trafficking in Human Beings Art.12(1)(d).
45. Council of Europe Convention Against Trafficking in Human Beings Art.12(1)(f).
46. Council of Europe Convention Against Trafficking in Human Beings Art.12(6).
47. Council of Europe Convention Against Trafficking in Human Beings Art.13.
48. Council of Europe Convention Against Trafficking in Human Beings Art.14.
49. Council of Europe Convention Against Trafficking in Human Beings Art.15.
50. Council of Europe Convention Against Trafficking in Human Beings Art.16.
51. Council of Europe Convention Against Trafficking in Human Beings Art.36 provides for the establishment of GRETA. It shall be composed of a minimum of 10 members and a maximum of 15, taking into account gender and geographical balance, as well as multi-disciplinary expertise, chosen from the nationals of the states parties to the Convention.
52. Council of Europe Convention Against Trafficking in Human Beings Art.38 sets out the procedure.
53. The Convention has been ratified by Albania, Austria, Bulgaria, Croatia, Cyprus, Denmark, Georgia, Moldova, Romania and Slovakia. 27 states have signed the Convention, thus evincing at least an intention to ratify in the future: <http://conventions.coe.int>.
54. UN Doc. CEDAW/C/IRL/CO/4-5, July 22, 2005, para.30: <http://www.un.org/womenwatch/daw/cedaw/cedaw33/conclude/ireland/0545060E.pdf> [Accessed December 21, 2007].
55. UN Doc. CEDAW/C/IRL/CO/4-5, para.31.
56. UN Doc. CEDAW/C/IRL/CO/4-5, para.31.
57. For most recent examples, see Concluding Observations on Greece (UN Doc. CEDAW/C/GRC/CO/6, February 2, 2007, paras 21 and 22, <http://daccessdds.un.org/doc/UNDOC/GEN/N07/243/74/PDF/N0724374.pdf?OpenElement> ; and on Serbia (UN Doc. CEDAW/C/SCG/CO/1, June 11, 2007, paras 25 and 26, <http://daccessdds.un.org/doc/UNDOC/GEN/N07/375/72/PDF/N0737572.pdf?OpenElement>).
58. UNTS vol. 1577, p.3, entry into force September 2, 1990: <http://www.unicef.org/crc/> [Accessed December 21, 2007].
59. UN Convention on the Rights of the Child Art.11.
60. UN Convention on the Rights of the Child Art.35.
61. See, e.g. Concluding Observations on Uruguay, UN Doc. CRC/C/URY/CO/2, July 5, 2007, paras 65 and 66; the Maldives, UN Doc. CRC/C/MDV/CO/3, June 8, 2007, paras 95 and 96; and Ireland, UN Doc. CRC/C/IRL/CO/2, September 29, 2006, paras 76 and 77: <http://www2.ohchr.org/english/bodies/crc/sessions.htm>.

- [62.](#) (1989) 11 E.H.R.R. 439.
- [63.](#) See, e.g. K. O'Boyle, "Extradition and Expulsion under the European Convention on Human Rights: Reflection on the Soering Case" in O'Reilly (ed.), *Human Rights and Constitutional Law* (Roundhall Press, 1992), p.93; R. Lillich, "The Soering Case" (1991) 85 A.J.I.L. 128; and S. Egan, "Human Rights Considerations in Extradition and Expulsion Cases: The European Convention on Human Rights Revisited" (1998) 2 *Contemporary Issues in Irish Law and Politics* 188.
- [64.](#) (1992) 14 E.H.R.R. 1. See also, *Vilvarajah v United Kingdom* (1992) 14 E.H.R.R. 248.
- [65.](#) (1997) 23 E.H.R.R. 413.
- [66.](#) (1998) 26 E.H.R.R. 29. See also *Ahmed v Austria* (1997) 24 E.H.R.R. 278.
- [67.](#) (1997) 24 E.H.R.R. 423.
- [68.](#) (2006) 43 E.H.R.R. 16.
- [69.](#) A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights* (Oxford: Hart, 2004); and "The Creativity of the European Court of Human Rights" [2005] E.H.R.L.R. 59.
- [70.](#) (2006) 43 E.H.R.R. 16 at [89].
- [71.](#) (2006) 43 E.H.R.R. 16 at [89].
- [72.](#) (2006) 43 E.H.R.R. 16 at [109]-[129].
- [73.](#) (2006) 43 E.H.R.R. 16 at [148].
- [74.](#) H. Cullen, "Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights" (2006) 6 H.R.L. Rev. 585, 590.
- [75.](#) See *X and Y v Netherlands* (1986) 8 E.H.R.R. 235; and *Costello-Roberts v United Kingdom* (1995) 19 E.H.R.R. 112.
- [76.](#) *Bensaid v United Kingdom* (2001) 33 E.H.R.R. 10.
- [77.](#) *Glass v United Kingdom* (2004) 39 E.H.R.R. 15.
- [78.](#) *X and Y* (1986) 8 E.H.R.R. 235 and *A v United Kingdom* (1999) 27 E.H.R.R. 611.
- [79.](#) Certainly, the view expressed by the Court in the case of *August v United Kingdom* (2003) 36 E.H.R.R. CD115 is not very encouraging in this respect.
- [80.](#) It should be noted here that in reaching its decision on the existence of positive obligations in Art.4 ECHR, the Court drew on the standards elaborated in the International Labour Organisation's Forced Labour Convention 1930, the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956 and the United Nations Convention on the Rights of the Child 1989: see (2006) 43 E.H.R.R. 16 at [85]-[87].
- [81.](#) (2006) 43 E.H.R.R. 16 at [121]. See also, *Selmouni v France* (2000) 29 E.H.R.R. 403 at [101].
- [82.](#) (2006) 43 E.H.R.R. 16 at [143], citing inter alia, *X and Y* (1986) 8 E.H.R.R. 235 and *A v United Kingdom* (1999) 27 E.H.R.R. 611.
- [83.](#) *HLR v France* (1998) 26 E.H.R.R. 29.
- [84.](#) Egan, "Human Rights Considerations in Extradition and Expulsion Cases" (1998) 2 *Contemporary Issues in Irish Law and Politics* 188.
- [85.](#) *Assenov v Bulgaria* (1999) 28 E.H.R.R. 652 at [102].
- [86.](#) *Pantea v Romania* (2005) 40 E.H.R.R. 26.