

Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments

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Introduction

Each year, an unknown number of individuals enter the international migration process only to be tricked, sold, coerced or otherwise procured into situations of exploitation from which they cannot escape. Many are physically detained. Others are intimidated in less direct but no less effective ways including through debt-servicing agreements that amount to little more than bondage. These individuals are the commodities of a multi-billion dollar global industry that, in many parts of the world, is dominated by highly organised criminal groups who operate with impunity. Increasing economic hardship, onerous obstacles to legal migration and internal conflict have coincided with a reported rise in the number of cases of trafficking in all regions of the world. Trafficking has often been described as the perfect crime. The profits are enormous and on-going; risks of apprehension are very low; and prosecutions for trafficking are extremely rare. Few countries have escaped the effects of this increasingly sophisticated and invariably brutal phenomenon.

Over the past few years, human trafficking has moved from the margins to the mainstream of international political discourse. Trafficking is now widely recognised by Governments as a major revenue earner for transnational organised criminal groups and a source of political, social and economic insecurity for States as well as for individuals. In terms of responses to trafficking, it is in the legal area that the most significant and rapid changes have occurred. Just a decade ago the international legal framework consisted of a single, long-forgotten treaty dating back to 1949 and a few vague provisions in a couple of human rights treaties. Today, trafficking is the subject of a vast array of international legal rules and national laws and a plethora of “soft” standards ranging from policy directives to regional commitments. The breadth and depth of this legal shift is truly remarkable. It took just two short years for the international community to negotiate a global agreement on fighting trafficking and only a further three years for that treaty to gain enough ratifications for it to enter into force. In Africa, Asia and particularly Europe, regional groupings of States have moved to support or even strengthen the internationally agreed standards. It would be unthinkable, in 2006, for a government to

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argue that it does not have to do anything to fight trafficking. Even countries traditionally distrustful of the international legal and political process have had no trouble in joining – or in some cases even leading – this unprecedented international movement.

The focus of the present article is on the 2005 Council of Europe Convention on Action against Trafficking and on the various legal and policy developments that led up to or otherwise intersect with this watershed agreement. Of particular interest to the author is the issue of international obligation and responsibility around trafficking, particularly in relation to its important human rights dimensions. What exactly is required of States under the new European treaty in terms of specific actions and responses? How do these obligations compare to those contained in the Trafficking Protocol, developed under U.N. auspices and adopted by the General Assembly five years earlier? How do they relate to other agreements developed within the European institutions? To what extent has the new European Convention remedied weaknesses in the international legal regime especially those related to protection of victims of trafficking? What are the main challenges ahead and is the Convention and its various implementing mechanisms up to meeting these challenges and thereby contributing to a more effective international law around trafficking?

1. The Impetus: Overview of International and Regional Legal Developments in Trafficking 2000–2005

The European Convention did not develop in a vacuum. Its existence can be traced back to a number of key international and regional initiatives during the five years leading up to its adoption. The first and most important of these was the negotiation and finalisation of an international treaty on trafficking: an instrument that provided, for the first time, a clear definition of this phenomenon and that also set out minimum obligations for States.¹ The European countries were also extremely active on the issue of trafficking during this period and two regional developments were especially important in paving the way for the European Convention and shaping many of its most critical provisions: a Framework Decision on trafficking, adopted by the Council of the European Union in 2002;² and an EU Council Directive on residence permits for victims of trafficking adopted in 2004.³ The present section provides a brief overview of these three instruments with a special focus on their contribution to and relation with the 2005 Convention.

¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, adopted 15 November 2000, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force 25 December 2003 [hereafter: Trafficking Protocol].

² Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [Official Journal L 203, 01.08.2002] [hereafter: EU Framework Decision (2002)].

³ EU Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with authorities, <http://www2.europarl.eu.int/oeil/FindByProcnum.do?lang=2&procnum=CNS020043> [hereafter: EU Council Directive (2004)].

1.1. *The U.N. Trafficking Protocol*

The U.N. Trafficking Protocol, which entered into force on 29 November 2003, is the single most important international legal instrument on trafficking.⁴ It contains the first-ever internationally agreed definition of trafficking: a definition that is now widely accepted by States, intergovernmental organisations and the non-governmental community.⁵ The Protocol's purposes are fairly general: to prevent and combat trafficking, to assist victims and to promote and facilitate cooperation among States.⁶ In terms of substance however, its emphasis is squarely on criminal justice aspects of trafficking. Mandatory obligations are few and relate only to criminalisation; investigation and prosecution; cooperation between national law enforcement agencies; border controls; and sanctions on commercial carriers. In relation to victims, the Protocol contains several important provisions but very little in the way of hard obligation. States Parties are enjoined to provide victims with protection, support and remedies but are not required to do so. States Parties are encouraged to avoid involuntary repatriation of victims but, once again, are under no legal obligation in this regard.

In the five short years since its adoption, the Protocol has become a common standard of achievement for all States seeking to deal with the crime and human rights violation that is trafficking. Its entry into force was amazingly rapid – particularly when compared to the pace at which most human rights treaties are ratified. Its reach and influence has been equally astounding. Most, if not all of the many national laws on trafficking developed since 2000 have taken the Protocol as their starting point and framework of reference. Subsequent international and regional agreements and treaties, including the European Convention, have used the Protocol in a similar way.

Understanding of human trafficking is advancing quickly and, in several important respects, the Protocol is already appearing a little old-fashioned. For example, its reluctance to recognise a link between prosecution of perpetrators and protection

⁴ One of the most important resources for understanding the Protocol is an implementation guide produced by the U.N. in 2004. United Nations Office for Drugs and Crime (UNODC), *Legislative Guide to the Protocol for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime*, (Vienna: UNODC, 2004). On the drafting history of the Protocol and for a detailed overview of its main provisions, see Anne Gallagher, 'Human Rights and the New U.N. Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', *Human Rights Quarterly*, November, 2001 [hereafter: Gallagher].

⁵ The Protocol's definition of trafficking (Article 3(a)), contains three separate elements: 1. *An action*: consisting of recruitment, transportation, transfer, harbouring or receipt of persons; 2. *By means of*: threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another; 3. *For the purpose of*: exploitation (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). All three elements must be present for the Convention to become operational within a given fact-situation. The only exception is for children for whom the requirements relating to means are waived (Article 3(c)).

⁶ Trafficking Protocol, *supra* note 1, Article 2.

of victims now seems a touch unreasonable. The work of national law enforcement agencies and regional bodies in coming up with genuine incentives for victims to cooperate is already moving far ahead of the carefully worded, ungenerous provisions of the Protocol on this point. Few countries today dispute the right of victims to receive immediate protection and support from the State in which they find themselves.

Another lesson of the past five years relates to the issue of victim identification. The Trafficking Protocol (together with its sister instrument, the Migrant Smuggling Protocol)⁷ created, for the first time, a distinction between “innocent” and “complicit” victims of illegal migration practices. Implementation of the new distinction between trafficked persons and smuggled migrants has proved to be both difficult and controversial. The failure of either Protocol to provide guidance on the identification issue is a significant weakness. Experience is now showing that failings in the critical identification process inevitably compromise the object and purpose of any agreement on trafficking. Section 2 below recounts how the drafters of the European Convention learned from the mistake of the Protocol on this point in developing detailed requirements aimed at ensuring that victims of trafficking can be rapidly and accurately identified.

1.2. *The European Union’s Work Against Trafficking: 2002–2004*

The opening up of Europe after the fall of communism created a natural market that brought traffickers and smugglers together with huge numbers of individuals who sought to move for a better life. European countries and their institutions were amongst the first to recognise the threat that traffickers represented to both individual rights and to the wider public order. While many initiatives deserve mention, of special relevance to the present study are the 2002 Framework Decision and the 2004 Council Directive, each of which are considered briefly below.

On 12 June 2002, eighteen months after it was first proposed, the Council of the European Union adopted the Framework Decision on Combating Trafficking in Human Beings.⁸ The Framework Decision built on a range of initiatives and developments including the Council’s 1997 Joint Action on trafficking and child sexual exploitation⁹ which had sought to promote common action in the areas of

⁷ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, adopted 15 November 2000, G.A. Res. 55/25, Annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force Jan. 28, 2004. Annex III.

⁸ EU Framework Decision (2002), *supra* note 2. While not a treaty in the usual sense, the adoption of the Framework Decision imposes specific obligations on Member States of the European Union as well as Candidate Countries to ensure that their laws and practices conform to its substantive provisions. For an explanation of the legal nature, scope and function of a framework decision, see European Council on Refugees and Exiles, *Analysis of the Treaty of Amsterdam in so far as it relates to Asylum Policy* (ECRE, 1997), 197. Available online: <http://www.ecre.org/research/Analysis.doc>. Accessed 28/06/05.

⁹ Joint Action of 24 February concerning action to combat trafficking in human beings and the sexual exploitation of children [*Official Journal* L 063, 4.3.1997]. Through the (non-binding) Joint Action, EU member States agreed to review existing laws and practices with a view to improving judicial coopera-

definitions, jurisdiction, criminal procedure, assistance to victims and police/judicial cooperation.

The Framework Decision adopted a definition of trafficking in keeping with that of the Protocol: thereby laying the foundation for effective cooperation strategies – not just within the EU but also between EU Member States and third countries. It also retained and significantly expanded the Protocol's criminal justice focus. EU countries are required to criminalise and penalise a full range of trafficking-related offences whether committed by natural or legal persons. The inclusion of precise rules on penalties and jurisdiction as well as their broad application to legal persons has meant that at least in these respects, the EU countries will be under greater legal obligation than other Parties to the Trafficking Protocol. The imposition of a higher and more precise standard on EU countries is in keeping with the minimalist approach adopted by the Protocol and the capacity of the EU countries to take these minimum standards forward.

The greatest criticisms of the Framework Decision can be made in respect of what was left out. For many within and outside the EU, the initiative of a Framework Decision provided the perfect opportunity for the EU to demonstrate its oft-stated commitment to protecting the rights of trafficked persons and their families as well as to addressing the root causes behind the movement and the demand which feeds it. Despite great encouragement from a diverse range of agencies and organisations, the EU decided not to take up this challenge. The result is an instrument that, on the positive side, has already proved to be enormously influential in ensuring maximum uniformity between Member States with respect to their criminal law approaches to trafficking. However, in terms of victims' rights and prevention of trafficking, the Framework Decision offers very little and in fact can be seen to represent a substantial retreat from previous commitments of the EU, for example, those contained in the 1997 Joint Action on Trafficking which, as a result of the Framework Decision, has now been repealed.¹⁰

The retreat on victims' rights was made possible, at least in part, by vague promises from the EU, recounted further below, that such matters would be dealt with in a subsequent instrument concerning the question of short-term stays or residency for victims of trafficking. Unfortunately, the EU Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with authorities, which entered into force almost two years

tion and ensuring appropriate penalties (including confiscation of the proceeds of trafficking). Member States were also to ensure protection for witnesses, and assistance for victims and their families. The Joint Action made extensive provision for strengthening cooperation between Member States in all relevant areas including judicial processes and information exchange. Other important antecedents included various actions on trafficking by the European Parliament and the specific reference in the Amsterdam Treaty to trafficking in human beings (Article 29) as well as the resulting references to trafficking in the 1999 Vienna Action Plan (Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, Text adopted by the Justice and Home Affairs Council of 3 December 1998, Official Journal of the European Communities C 19, 23.1.1999) and the conclusions of the Tampere European Council (Tampere European Council, *Tampere Summit Presidency Conclusions*, 15, 16 October 1999, points 23 and 48).

¹⁰ In accordance with Article 9 of the EU Framework Decision (2002), *supra* note 2.

later,¹¹ did not fulfil this promise. The Directive seeks to prevent illegal migration and trafficking by providing victims of such practices with incentives to come forward and cooperate with authorities in the detection and prosecution of smugglers and traffickers. It was prompted by a growing realisation within the European countries of the inherent obstacles in obtaining and sustaining the cooperation of individuals who fear for their safety and wellbeing and who have little to gain in complaining to the police or otherwise assisting in investigations.¹²

The directive adopts a “minimum-standard” version of the national regimes already established in a number of European countries to enable victims of trafficking to cooperate with law enforcement authorities by providing them with assistance and temporary residence permits.¹³ It applies to victims of trafficking and may also apply to victims of illegal migration if Member States wish to extend its application in this way.¹⁴ Victims will be informed, at the discretion of national authorities, of the possibility of being granted temporary residence permits in exchange for cooperation with police or judicial authorities.¹⁵ Victims are to be granted a period of grace (a “reflection period”, the duration of which is to be fixed by Member States) allowing them to escape the influence of traffickers so they can make an informed decision as to whether to cooperate with criminal justice agencies in the investigation and prosecution of these persons. During that period, identified victims will not be expelled and will be entitled to emergency medical and psychological care and material assistance.¹⁶ In order to secure optimum cooperation from victims, Member States are also to provide them with free legal aid,

¹¹ EU Council Directive (2004), *supra* note 3. All EU States, with the exception of Denmark and the UK, who have both negotiated an opting-out clause, are required to bring their national law in line with the directive before 6 August 2006.

¹² This dilemma, and its obvious solution, had already been acknowledged by the EU itself on a number of different occasions (see European Parliament Resolution A2–52/89 of 14 April 1989 [*Official Journal* C 120, 16.05.89], 352 ff.; European Parliament Resolution B3–1264, 1283 and 1309/93 of 16 September 1993 [*Official Journal* C 268, 04.10.93], 141 ff., points 2 and 10; and European Parliament Resolution A4–0326/95 of 18 January 1996 [*Official Journal* C 032, 05.02.96], 88 ff., point 25.

¹³ Belgium (1994); Italy (1998); the Netherlands (2000); Spain (2000), France (2002); and Greece (2002).

¹⁴ EU Council Directive (2004), *supra* note 3, Article 3. The initial proposal covered both victims of trafficking and victims of illegally facilitated migration. It was noted, at the time, that: “. . . the concept of “victim of action to facilitate illegal immigration” has a very specific meaning, in that it does not cover all those who seek assistance in illegal immigration, only those who might be reasonably regarded as victims . . . who have suffered harm, for example having their lives endangered or physical injury”. Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities, COM (2002) 71 final, 2002/0043 (CNS, Brussels, 11.02.2002), 2.1. The proposal includes both the draft Directive, as well as a detailed Explanatory Memorandum [hereafter: Explanatory Memorandum]. This clarification was subsequently dropped in favour of granting States a full discretion to decide whether or not to grant residence permits to victims of illegal migration.

¹⁵ EU Council Directive, *supra* note 3, Article 5. There appears no obligation on Member States to inform *all* victims of trafficking of the possibility of obtaining a temporary residence permit and Member States further retain the right to decide whether NGOs can also have a role to play providing such information. *Ibid.*

¹⁶ EU Council Directive, *supra* note 3, Article 7.

translation and interpretation services.¹⁷ The reflection period can be terminated on grounds of public policy and national security.¹⁸ It can also be terminated if the victim actively, voluntarily and on her/his own initiative renews contact with the trafficker.¹⁹ A temporary residence permit may be issued during or following expiration of the ‘reflection period’ on the basis of various requirements, each decided by authorities of the receiving State.²⁰

Despite indications from the European Union that this instrument would be used to supplement the meagre victim protection provisions of the Council Framework Decision on Trafficking,²¹ this is not the case. The explanatory memorandum accompanying the initial proposal explicitly stated that it is not concerned with either victim protection or witness protection and that such protection is neither its aim nor its legal basis. Clearly, the overwhelming concern of the Commission was to ensure that the proposed visa regime was not open to opportunistic abuse or to aggravating the problem of illegal migration into the Union.²² From that perspective, the highly restrictive approach adopted by the Directive is entirely understandable. However, the trade-off is most likely to be felt by victims of trafficking: those who for one reason or another are not required to give testimony or otherwise cooperate in investigations; and those who have cooperated, benefited from the regime and are then repatriated against their will. For the former category, the absence of substantive victim protection provisions in the EU Framework Decision will ultimately mean little or no entitlement to basic assistance and support and inevitable deportation – at least until the relevant State ratifies the new European Trafficking Convention discussed below. For beneficiaries of the new visa regime, important protection

¹⁷ EU Council Directive (2004), *supra* note 3, Article 7. See Explanatory Memorandum, *supra* note 14, on this point.

¹⁸ EU Council Directive (2004), *supra* note 3, Article 6.

¹⁹ EU Council Directive (2004), *supra* note 3, Article 6.

²⁰ EU Council Directive (2004), *supra* note 3, Article 8.

²¹ Such assurances were given informally to the Office of the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees as well as to various NGO groups lobbying the EU for greater victim protection in the Framework Decision. (Personal information, see also an undated briefing paper released by Anti-Slavery International and ECPAT (UK), *Briefing on a proposal for: European Union Council Directive (COM(2000) 71 Final), On the Short-term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings Who Co-operate with the Competent Authorities* [hereafter: ASI-ECPAT Briefing Paper], which noted that: “Protection mechanisms for victims of trafficking were omitted from the [Council Framework Decision on Trafficking], despite recommendation for their inclusion by the European Parliament, the United Nations High Commissioner for Human Rights and numerous non-governmental organisations (NGOs). Indeed, during discussion of the Framework Decision it was implied that protection measures would be dealt with in the current directive”.

²² This was confirmed at the September 2002 European Conference on Trafficking by the outcome document which noted that: “[t]he implementation of such a residence permit must be carefully monitored and evaluated to prevent the incidence of ‘procedure shopping’ whereby the capacity to accommodate and support genuine trafficked victims is eroded by the claims of fraudulent victims”. Brussels Declaration on Preventing and Combating Trafficking in Human Beings, adopted by the European Conference on Preventing and Combating Trafficking in Human Beings – Global Challenge for the 21st Century, Brussels, 18–20 September 2002. Annex: Recommendations, Standards and Best practices, Point 14.

concerns will remain. As others have pointed out,²³ the risk to trafficked persons does not end with criminal proceedings and trafficked persons who have cooperated in a prosecution are much more likely than others to compromise the safety of themselves and their families. The failure of the proposal to prohibit or at least warn against return in cases where the victim is likely to be subjected to grave human rights violations is a potentially serious omission that brings into question the commitment of the Union to protecting the basic rights of victims of serious crimes such as trafficking.²⁴

2. The 2005 Council of Europe Convention on Action against Trafficking²⁵

The Council of Europe, currently with 45 member States, including all 25 members of the European Union, is one of the main European institutions for safeguarding and protecting human rights. Since the early 1990s, the Council of Europe has played a leading role in terms of regional policy development around trafficking. It has been particularly influential in promoting, through workshops, seminars, expert groups, policy directives and soft-law instruments, a rights-based and victim-centred approach to trafficking. In 2005, its Committee of Ministers completed work on a comprehensive European agreement on trafficking. This instrument is examined in detail below.

2.1. *Background and Context*

The Council of Europe's work on trafficking can be traced back to the early 1990s when the issue was still one of marginal relevance for international organisations and national governments.²⁶ The first high-level political statement on trafficking

²³ ASI-ECPAT Briefing Paper, *supra* note 21.

²⁴ A more generous approach on this has been taken by a number of EU Member Countries in their own national laws. Italy, for example, provides special permits to stay when: "situations of violence or grave exploitation to a foreigner have been identified and concrete dangers for his or her safety emerged as a result of the intent to withdraw from the circle". It is initially valid for six months and may be renewed for a year with the possibility of victims being allowed to remain permanently in the country. Source: ASI-ECPAT Briefing Paper, *supra* note 21. The permit is not issued contingent on cooperation with the criminal justice process, though the applicant must make a "simple statement to police which reports that a crime has occurred" (Elaine Pearson, *Human Rights, Human Traffic: Redefining Victim Protection*, (London: Anti-Slavery International, 2002), p. 141). The permit is contingent upon participation in a social assistance and integration program (*ibid.*, p. 140).

²⁵ Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Council of Europe Treaty Series, No. 197, 16.V.2005 [hereafter: European Convention].

²⁶ In 1991, the Council of Europe adopted a recommendation dealing with sexual exploitation and trafficking of children and young adults. That same year, the Committee of Ministers Committee for Equality between Women and Men (CDEG) organised a seminar on the subject – already identifying trafficking as a violation of human rights and already delimiting the scope of action and concern to women and children. Following the seminar, CDEG set up a Group of Experts on Traffic in Women which identified, for the Council, the key elements of an action plan including recommendations regarding both criminal justice action against trafficking and measures to protect and support victims.

came at the 1997 Strasbourg Summit. The Final Declaration from this event refers specifically to violence against women and makes a direct link between exploitation of women and threats to security and democracy in Europe.²⁷

Since 1997, much Council of Europe activity in this area has been directed towards encouraging and supporting comprehensive national and sub-regional responses to trafficking which identify and assign responsibility to key players including legislators, criminal justice officials, consular officials, educators and the media.²⁸ Increasingly, attention of the Council focused on countries of origin and transit in South and South-eastern Europe with particular attention to legislative reform.²⁹ By involving these countries, the Council was able to make and foster important connections with the major destination points in Western Europe.

The Council of Europe's promotional and policy work in the area of trafficking took a new turn in the first years of the twenty-first century with the development of two legal instruments by the Committee of Ministers. The first instrument, adopted in 2000, related to trafficking for sexual exploitation.³⁰ The second instrument, adopted the following year, outlined measures to protect children against sexual exploitation, including through trafficking.³¹ Together, these instruments proposed a comprehensive strategy to deal with trafficking throughout and beyond Europe, focusing on harmonisation of definitions, research, criminal justice measures, assistance to victims and international cooperation. Already, the influence of the Trafficking Protocol negotiations could be seen although it is relevant to note that the Council of Europe continued, for much longer than many others, an attachment to a much narrower view of trafficking which was confined to sexual exploitation and thereby, (in terms of both perception and reality) to women and girls.³²

The proposal for a convention on trafficking first emerged in 2002 through a recommendation of the Parliamentary Assembly.³³ At that stage it appeared likely that the future convention would be limited to trafficking of women for sexual exploitation. At a meeting to discuss this initiative, organised by OHCHR and the Council of Europe during the 2002 session of the U.N. Commission on Human Rights, the High Commissioner for Human Rights urged the Council of Europe to consider

²⁷ Council of Europe, Strasbourg Summit Final Declaration, *adopted* 11 October 1997. <http://www.coe.int/T/E/human_rights/Ecri/5-Archives/2-Other_texts/1-Strasbourg_Summit/Declaration/Declaration_Strasbourg_Summit.asp#TopOfPage> (27 Jun. 2005).

²⁸ See Explanatory Report in European Convention, *supra* note 25, 12–22 [hereafter: European Convention Explanatory Report].

²⁹ European Convention Explanatory Report, *supra* note 28, 12–22.

³⁰ Council of Europe, Committee of Ministers, Recommendation No. R(2000)11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation, adopted on 19 May 2000.

³¹ Council of Europe, Committee of Ministers, Recommendation No.(2001)16 of the Committee of Ministers to member states on the protection of children against sexual exploitation, adopted on 31 October 2001.

³² This was not an accidental position but one, the author found during her various interactions with the Secretariat during the period 1999–2002, held very strongly by key Council of Europe staff and their relevant national counterparts.

³³ Council of Europe, Parliamentary Assembly, Recommendation 1545 (2002) on a campaign against trafficking in women, adopted on 21 January 2002.

using this instrument to further the consensus developed through the Trafficking Protocols and not to strike out in a different direction.³⁴

That same year, the Parliamentary Assembly developed a much more specific recommendation on the subject of a future convention which referred specifically to the need to ensure that this instrument “will bring added value to other international instruments”.³⁵ The Recommendation contained explicit instructions on what the Assembly considered to be important provisions. Interestingly, these instructions focused heavily on criminalisation, harmonisation of penalties and introduction of the “extradite or prosecute” rule to ensure prosecutions.³⁶ Several additional recommendations, issued during 2003 and 2004, reaffirmed the need for a European treaty against trafficking.³⁷ These activities took place during a period of heightened activity in the Council’s Steering Committee for Equality between Women and Men. The CDEG commissioned a study on a possible convention which confirmed the desirability of developing a legally binding instrument: “geared towards the protection of victim’s rights and the respect of human rights, and aiming at a proper balance between matters concerning human rights and prosecution”.³⁸ In its explanation accompanying the Convention, the Committee of Ministers explains, in detail, the benefits of a regional instrument in an area already covered by an international treaty. These include the possibility of more precisely defined and even stricter standards. The commentary notes that the treaty:

[D]oes not aim at competing with other instruments adopted at a global or regional level but at improving the protection afforded by them and developing the standards contained therein, in particular in relation to the protection of the human rights of the victims of trafficking.³⁹

The legislative process began in April 2003 with the formal establishment, by the Committee of Ministers, of an Ad Hoc Committee on Action against Trafficking in Human Beings (CAHTEH), specifically tasked with preparing a European convention on trafficking. CAHTEH commenced actual drafting in September 2003 and its

³⁴ Office of the High Commissioner for Human Rights, Council of Europe, *Panel Discussion on Combating Trafficking in Human Beings: A European Convention*, Palais des Nations, 9 April, 2002, Address by the United Nations High Commissioner for Human Rights (copy on file with the author), [hereafter: High Commissioner for Human Rights: CoE Statement].

³⁵ Council of Europe, Parliamentary Assembly, Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution, adopted 25 June, 2003.

³⁶ In particular, Recommendation 1610 (2003) section 3(ii) calls for the Council to ensure the following provisions: *a.* introducing the offence of trafficking in the criminal law of Council of Europe member states; *b.* harmonising the penalties applicable to trafficking; *c.* ensuring the effective establishment of jurisdiction over traffickers or alleged traffickers, particularly by facilitating extradition and the application of the principle *aut dedere aut iudicare* in all cases concerning trafficking.

³⁷ Council of Europe, Parliamentary Assembly, Recommendation 1611 (2003) on trafficking in organs in Europe, adopted on 25 June 2003; Council of Europe, Parliamentary Assembly of the Council of Europe, Recommendation 1663 (2004) on domestic slavery: servitude, au pairs and mail order brides, adopted on 22 June, 2004.

³⁸ European Convention Explanatory Report, *supra* note 28, 29. See also Council of Europe Steering Committee for Equality between Women and Men (CEDG), *Feasibility Study for a Convention of the Council of Europe on Trafficking in Human Beings*, Doc. DG-11 (2002) 5.

³⁹ European Convention Explanatory Report, *supra* note 28, 30.

work was finalised in a little over a year. The finalised text was transmitted through the Committee of Ministers to the Parliamentary Assembly for its opinion in late 2004. The Assembly's opinion was delivered in January 2005 and considered by CAHTEH at its final meeting the following month.⁴⁰ A tense period followed in which the draft Convention, along with several others, was left in limbo while EU States pushed for a "disconnection" clause which would permit them to apply existing and future EC or EU rules rather than those set out in the CoE treaties. NGOs and others rightly pointed out that such a clause risked dilution of the human rights protections contained in the draft.⁴¹ The EU bloc eventually withdrew this request and the Council of Europe Convention on Action against Trafficking in Human Beings was formally adopted by the Council of Ministers at its 925th meeting, on 3 and 4 May 2005.

How did the drafting process of the Convention compare to that of the Protocol? Leaving aside institutional and procedural differences, it can be said, surprisingly, that the Council of Europe process was, in many respects, a more private affair, with significantly greater internal control than that surrounding development and finalisation of the Trafficking Protocol.⁴² The meetings of the CAHTEH were closed to those without observer status and attempts by some international non-governmental organisations to gain access failed. Reports of CAHTEH's meetings were restricted and, in the early stages, even the drafts of the Convention were not publicly available. This only changed after concerted pressure from NGOs including Amnesty International and Anti-Slavery International. While the CAHTEH accepted (and took some account of) external submissions and even permitted some NGO representatives to address later meetings, it held no public hearings.⁴³ The inability of outsiders to follow negotiations certainly made it much harder to ascertain motivations once the drafting process was completed. The following analysis relies on the author's own observations in her role as legal adviser to a coalition of NGOs working to strengthen the human rights provisions of the Convention; from the drafts which emerged throughout the process,⁴⁴ and from the various public submissions made to the drafting committee by non-governmental organisations and others.⁴⁵

⁴⁰ European Convention Explanatory Report, *supra* note 28, 33–35.

⁴¹ See Amnesty International, 'Public Statement: European institutions must cooperate to ensure the highest standards of human rights protection', *A.I. Index* IOR 30/008/2005 (London: A.I., 2005).

⁴² See further, Gallagher, *supra* note 4.

⁴³ A request for such a hearing was formally made in a letter to the Chair of CAHTEH from both Anti-Slavery International and Amnesty International on 30 March 2003 (copy of letter on file with the author).

⁴⁴ Ad-Hoc Committee on Action against Trafficking in Human Beings (CAHTEH), *Preliminary Draft: European Convention against Trafficking in Human Beings*, Strasbourg, 29 October, 2003, 7; Ad-Hoc Committee on Action against Trafficking in Human Beings (CAHTEH), *Revised Draft: European Convention against Trafficking in Human Beings*, Strasbourg, 12 February 2004 [hereafter: Preliminary Draft], 8; Ad-Hoc Committee on Action against Trafficking in Human Beings (CAHTEH), *Revised Draft: European Convention against Trafficking in Human Beings*, Strasbourg, 5 July 2004; Ad-Hoc Committee on Action against Trafficking in Human Beings (CAHTEH), *Revised Draft: European Convention against Trafficking in Human Beings*, Strasbourg, 28 October 2004.

⁴⁵ The NGO campaign on the draft Convention was informally coordinated by Amnesty International (AI) and Anti-Slavery International (ASI). Major joint position papers included: Amnesty International,

2.2. *Scope and Purpose*

The timing of the European Convention, coming so soon after the adoption of the first modern international treaty on trafficking, inevitably impacted on its scope and purpose. As noted above, the Convention positions itself as a supplement to the U.N. Protocol. More specifically, it is defined, at least in part, by what the U.N. Protocol is not. The European Convention was seen, by its drafters, as a means of adding value to a regime which it implicitly recognised as an international minimum standard.⁴⁶

The perception of the European Convention being different to the Trafficking Protocol – because of the latter’s emphasis on crime prevention aspects of trafficking and the former’s emphasis on human rights and victim protection – is reinforced in the Convention’s preamble which specifically refers to the need to improve the protections afforded under the Protocol and developing the standards which it establishes.⁴⁷ In a specific provision setting out the relationship between the two instruments, it is further noted that the Convention: “. . . is intended to enhance the protection afforded by [the Protocol] and develop the standards contained therein”.⁴⁸

The stated purposes of the Convention are: to prevent and combat trafficking; to protect the human rights of victims; to ensure effective investigation and prosecution;

Anti-Slavery International, *Memorandum on the Draft European Convention on Action against Trafficking in Human Beings: Protection of the Rights of Trafficked Persons* (A.I. Index: IOR 61/011/2004), [hereafter: AI/ASI May 2004 Submission]; Amnesty International, *Council of Europe: Enhancing the Protection of the Rights of Trafficked Persons: Amnesty International and Anti-Slavery International’s recommendations to strengthen provisions of the July 2004 draft of the European Convention on Action against Trafficking in Human Beings* (A.I. Index: IOR 61/016/2004) [hereafter: AI/ASI August 2004 Submission]; Amnesty International, *Council of Europe: Recommendations to Strengthen the October 2004 Draft of the European Convention on Action against Trafficking in Human Beings* (A.I. Index: IOR 61/024/2004) [hereafter: AI/ASI October 2004 Submission]; Amnesty International, *Council of Europe: Recommendations to Strengthen the December 2004 Draft of the European Convention on Action against Trafficking in Human Beings* (A.I. Index: IOR 61/001/2005) [hereafter: AI/ASI December 2004 Submission]. Other NGO submissions more or less followed the main points being advocated by AI and ASI. See, for example, European Women Lawyers Association (EWLA), *Resolution on Trafficking in Human Beings regarding the future European Convention on Action against Trafficking in Human Beings*, adopted by the EWLA General Assembly, 18 March, 2005 [hereafter: EWLA resolution]; and the *Joint NGO Statement on the draft European Convention on Trafficking in Human Beings*, signed by 179 national and international non-governmental organisations (text reproduced with list of signatories in AI/ASI December 2004 Submission, *supra*) [hereafter: NGO Statement].

⁴⁶ “The added value provided by the . . . 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 . . .) in particular with a view to victim protection measures and international cooperation. Thirdly, the Convention sets up monitoring machinery to ensure that parties implement its provisions effectively. Lastly, the Convention mainstreams gender equality in its provisions”. European Convention Explanatory Report, *supra* note 28, 36. See also 51 which contains a detailed list of the various ways in which the Convention adds value to the pre-existing international legal framework.

⁴⁷ European Convention, *supra* note 25, preamble.

⁴⁸ European Convention, *supra* note 25, Article 39.

and to promote international cooperation.⁴⁹ Reflecting the terms of reference of the drafting committee, (which required it to take gender equality into account), special reference is made to the importance of guaranteeing gender equality in relation to both prevention and protection.⁵⁰ In terms of its scope, Article 2 of the Convention confirms the demise of the Council of Europe's long-standing attachment to trafficking of women for purposes of sexual exploitation. The Convention applies to all forms of trafficking and to trafficking in women, men and children. In addition, and in a clear attempt to widen the scope of the Trafficking Protocol, the Convention applies to trafficking committed within as well as between countries and whether or not related to organised crime.⁵¹ The Convention's status as a human rights instrument is further established by its explicit recognition, in the preamble, of trafficking as a violation of human rights as well as an offence to the dignity and integrity of the human being.⁵²

2.3. *The Definition of Trafficking*

The timing of the Convention proved to be decisive in terms of its definition of trafficking. Following adoption of the Trafficking Protocol it became increasingly unlikely that the Council of Europe's attachment to a more narrow definition of trafficking (women and girls/sexual exploitation) could be sustained. The final definition mirrors, exactly, the corresponding provision of the Trafficking Protocol.⁵³ The Explanatory Report accompanying the Convention gives a number of important insights into several aspects of the definition that can also shed light on the corresponding provisions of the Protocol. These include:

- That trafficking can occur even where a border was crossed legally and presence on national territory is lawful;⁵⁴
- That abuse of a position of vulnerability (one of the "means" by which the action element is secured), encompasses: "any state of hardship in which a human being is impelled to accept being exploited" including: "abusing the economic insecurity or poverty of an adult hoping to better their own and their family's lot";⁵⁵
- There is no need for exploitation to have occurred for trafficking to take place;⁵⁶

⁴⁹ European Convention, *supra* note 25, Art. 1.1.

⁵⁰ European Convention, *supra* note 25, Art. 1.1. For a full explanation of the meaning of gender equality in relation to the work of the Council of Europe in general and the Convention in particular, see European Convention Explanatory Report, *supra* note 28, 54–55.

⁵¹ European Convention, *supra* note 25, Art. 2. See also, European Convention Explanatory Report, *supra* note 28, 60–61.

⁵² An alternative wording, which would have seen the Convention recognizing trafficking as seriously undermining the enjoyment of human rights (rather than being a violation of rights in and of itself) was eventually rejected by the drafters. It is likely that NGO pressure on this point (see, for example, AI/ASI October 2004 Submission, *supra* note 45, 3–4), was influential in securing adoption of the stronger option.

⁵³ *Supra* note 5.

⁵⁴ European Convention Explanatory Report, *supra* note 28, 80.

⁵⁵ European Convention Explanatory Report, *supra* note 28, 83.

⁵⁶ European Convention Explanatory Report, *supra* note 28, 87.

- While the Convention does not refer to illegal adoptions, such practices would fall within its scope if they amounted to a “practice similar to slavery”;⁵⁷
- That the fact an individual is willing to engage in prostitution does not mean that they have consented to exploitation.⁵⁸

The European Convention also defines a “victim” of trafficking, something that is not done in the Trafficking Protocol. This was considered to be an important means of ensuring that the provisions of the Convention, especially those related to protection, were applied correctly.⁵⁹

2.4. *Protection and Assistance for Trafficked Persons*

Even before drafting formally commenced, the U.N. High Commissioner for Human Rights expressed the view that protection and support for victims of trafficking was too important to be made optional and that the relevant provisions of the Trafficking Protocol should be incorporated into the proposed European Convention as basic obligations.⁶⁰ This call was later taken up by NGOs seeking to ensure that the weaknesses of the Protocol in this area could be remedied for at least one significant group of States. While this did not happen completely, the European Convention is, overall, much more generous, considerably broader and more strongly worded in terms of legal obligations to victims of trafficking than is Trafficking Protocol. The victory was not, however, an easy one. While the drafters were, from the outset, determined to ensure that the Convention distinguished itself in terms of its commitment to victims, there was not much agreement on how this could best be done.

Perhaps the most important of all victim protection provisions is the one relating to identification. In a landmark development for the international legal framework related to trafficking, the Convention explicitly acknowledges that correct identification of victims is essential to the provision of protection and assistance, and that failure to correctly identify a victim will likely lead to a denial of that person’s rights as well as problems in the prosecution process.⁶¹ States Parties are therefore required to ensure the necessary legal framework is in place as well as the availability of competent personnel for the identification process. They are also required to cooperate with each other and internally with victim support agencies in this process.⁶²

States Parties to the European Convention are required to provide basic assistance to all victims of trafficking – even if only provisionally identified as such⁶³ – within their territory.⁶⁴ These provisions, cannot be reserved only for those agreeing to act

⁵⁷ As defined in the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, European Convention Explanatory Report, *supra* note 28, 94.

⁵⁸ European Convention Explanatory Report, *supra* note 28, 97.

⁵⁹ European Convention Explanatory Report, *supra* note 28, 99. A victim of trafficking is anyone who is subject to trafficking as it is defined in the Convention. European Convention, *supra* note 25, Article 2.

⁶⁰ High Commissioner for Human Rights: CoE Statement, *supra* note 34.

⁶¹ European Convention Explanatory Report, *supra* note 28, 127.

⁶² European Convention, *supra* note 25, Art. 10 (1), (2).

⁶³ European Convention, *supra* note 25, Article 10.2.

⁶⁴ European Convention, *supra* note 25, Article 12. The explanatory report emphasises that the

as witnesses⁶⁵ or otherwise agreeing to cooperate in investigations or criminal proceedings.⁶⁶ They should aim to assist victims in their physical, psychological and social recovery. They include: standards of living capable of ensuring their subsistence including appropriate and secure accommodation; psychological and material assistance; access to emergency medical treatment; translation and interpretation services; and counselling, information and assistance including in relation to the legal process.⁶⁷ For victims lawfully within the territory of a State party (legal migrants, victims who have been granted a reflection period or residency permit, and victims who have returned home), additional obligations are placed on the State with regard to the provision of full medical and other assistance as well as access to the labour market, vocational training and education.⁶⁸ All protection and support measures are to be provided on a non-discriminatory,⁶⁹ consensual and informed basis.⁷⁰

Protection of victims from further harm, is an important theme of the Convention and “States Parties are required to take due account of the victim’s safety and protection needs”.⁷¹ The Convention recognises that protection needs are likely to increase when victims cooperate with criminal justice authorities. A detailed provision sets out the specific measures that must be implemented to provide “effective and appropriate protection” to victims and others (including families, witnesses and victim support agencies) from potential retaliation and intimidation, in particular, during and after the investigation and prosecution process.⁷² The Explanatory Report (but not the Convention) recognises the potentially intrusive and damaging effect of protection in noting that such measures must not be taken without the consent of the subject.⁷³

Finally, the Convention explicitly recognises the importance of avoiding criminalisation of victims of trafficking. States Parties are required, in accordance with the basic principles of their legal systems, to: “provide for the possibility of not

protection obligations do not fall on “each party” but only on that Party in whose territory the victim is physically located. European Convention Explanatory Report, *supra* note 28, 148.

⁶⁵ European Convention, *supra* note 25, Art. 10(2), Article 12.6.

⁶⁶ European Convention Explanatory Report, *supra* note 28, 168. Note that this provision could not be relied on by a victim in refusing to act as a witness when she or he is legally required to do so. European Convention Explanatory Report, *supra* note 28, 170.

⁶⁷ European Convention, *supra* note 25, Article 12.1.

⁶⁸ European Convention, *supra* note 25, Article 12(3), 12(4). The explanatory report notes that this latter provision does not grant an actual right of access to the labour market, vocational training and education. CATEH Explanatory Report, *supra* note 28, 166. The withholding of certain assistance provisions for those not lawfully within the territory of the State was strongly criticised by NGOs. See, for example, AI/ASI October 2004 Submission, *supra* note 45, 9–10. For a review of this position, see note 45, *supra*, and accompanying text.

⁶⁹ European Convention, *supra* note 25, Article 3.

⁷⁰ European Convention, *supra* note 25, Article 12.7.

⁷¹ European Convention, *supra* note 25, Article 12.2. Note that this provision will also apply to victims who have only been provisionally identified as such. *Ibid*, Art. 10.2.

⁷² European Convention, *supra* note 25, Article 28.

⁷³ European Convention Explanatory Report, *supra* note 28, 289. Note however, that informed consent is required in relation to the provision of general assistance and protection measures. European Convention, *supra* note 25, Article 12.7.

imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so".⁷⁴ The importance of this provision, despite its unfortunate wording,⁷⁵ cannot be overestimated. As in all other parts of the world, trafficked persons in Europe have regularly been detained and then either prosecuted or deported, usually for offences related to their immigration status or their involvement in the sex industry.

2.5. *Special Measures for Children*

The Trafficking Protocol was, overall, a major disappointment when it came to the rights of children and intergovernmental and non-governmental organisations understandably turned to the Council of Europe to extend the rather miserly protections provided in the international treaty.⁷⁶ In comparison with the Protocol, the Convention is indeed extremely detailed when it comes to the protection of child victims of trafficking, despite the fact that NGO requests to make protection of the rights of child victims a specific purpose of the Convention were not successful.⁷⁷ Key provisions relating to children and protection of their rights include the following:

- A victim of trafficking is presumed to be a child where his or her age is uncertain and there are reasons to believe that s/he is a child. Such presumed victims of trafficking are to be accorded special measures of protection pending verification of age (Article 10.3);
- A representative shall be appointed for unaccompanied child (and presumed child) victims of trafficking to act in the best interests of that child (Article 10.4. (a));
- States Parties are required to take the necessary steps to establish the child's identity and nationality (Article 10.4. (b));
- States Parties are required to make every effort to locate the child's family when this is in her/his best interests (Article 10.4. (c));
- Child victims are to have access to education (Article 12.1. (f));
- The right to privacy of child victims is subject to special protection (Article 11.2.);
- Child victims are to be given special protection measures during a trafficking investigation taking into account their best interests (Article 28.3.);

⁷⁴ European Convention, *supra* note 25, Art. 26. See also 272–274 of the European Convention Explanatory Report, *supra* note 28.

⁷⁵ The fact that States Parties remain free to prosecute trafficked victims for compelled involvement in unlawful activities, and only need provide for the *possibility* of non-prosecution for status-related offences considerably weakens its force and likely impact

⁷⁶ The High Commissioner for Human Rights, for example, urged that the Convention: "acknowledge that the problem of child trafficking is a distinct one requiring special attention. The best interests of child victims must be considered paramount at all times. Children should be provided with appropriate assistance and protection. Full account should be taken of their special vulnerabilities, rights and needs". High Commissioner for Human Rights: CoE Statement, *supra* note 34.

⁷⁷ See, for example, AI/ASI October 2004 Submission, *supra* note 45, 5–6.

- Child victims are not to be repatriated if there is an indication, following a risk and security assessment, that such return would not be in their best interests (Article 15.7);
- States Parties are required to take specific measures to reduce children's vulnerability to trafficking;⁷⁸
- States Parties are required to ensure that in the provision of accommodation, education and appropriate health care to child victims of trafficking, due account is taken of their special needs and rights (Article 12.7.);
- Considerations of the best interests of the child victim shall govern the issuing and renewal of residence permits by States Parties (Article 14.2.).

The European Convention establishes a range of victim assistance provisions related to the legal processes which are applicable to children which includes the provision of counseling and information regarding their legal rights in a language they understand.⁷⁹

2.6. *Legal Status, Repatriation and Remedies*

The legal status of victims of trafficking in countries of destination was one of the major points of contention during the drafting process. Countries of the European Union were already leading the world in terms of developing real incentives for victims to cooperate with national criminal justice authorities in the investigation and prosecution of trafficking cases. However, many States remained to be convinced that provision of special treatment to trafficked persons in this way would not seriously compromise national migration regimes. Recognising the danger of a retreat from previously agreed positions, the major lobbying groups, including both Amnesty International and Anti-Slavery International, developed detailed arguments and proposals around this issue and fought hard to have them considered.⁸⁰

While the Convention did not go as far as many observers would have liked, its provisions on legal status and repatriation represent a vast improvement on what is available to victims under the Trafficking Protocol or indeed under the EU's directive on this issue. In brief, victims or presumed victims are to be given a thirty-day period of grace (a "recovery and reflection period") during which time they will be given support and assistance and permitted to decide whether or not to cooperate

⁷⁸ "... notably by creating a protective environment for them". European Convention, *supra* note 25, Art. 5.5.

⁷⁹ European Convention, *supra* note 25, Article 12(d), 12(e). There is however, no provision granting a right to victims of trafficking to be present and have their views heard during criminal proceedings against traffickers. This is one of the few cases where the Palermo Protocol is stronger than the European Convention. However, as most States Parties to the Convention will also be party to be Protocol, the absence of this protective provision is unlikely to have much practical significance.

⁸⁰ See, for example, NGO Statement, *supra* note 45, 15; AI/ASI May 2004 Submission, *supra* note 45, 4; AI/ASI August 2004 Submission, *supra* note 45; AI/ASI October 2004 Submission, *supra* note 45, 13–15; and AI/ASI December 2004 Submission, *supra* note 45, 2, 8–12. The main lobbying point was for inclusion of a provision providing for a minimum three-month recovery and reflection period for all victims and provisionally identified victims during which time they would be given all necessary assistance aimed at enabling their recovery and the ability to make an informed decision on whether or not to cooperate with investigations and/or prosecutions.

with the competent authorities.⁸¹ Victims cannot be repatriated against their will during this period.⁸² Once this thirty-day period is up, States Parties are to issue a renewable residence permit to victims if, in their opinion, an extended stay is necessary owing to the victim's personal situation or for the purposes of their cooperation in an investigation or prosecution.⁸³ This provision has the practical effect of ensuring that States Parties retain the right to grant residence permits only to those victims cooperating with the authorities. There is no obligation to even consider the granting of residence permits to victims to pursue remedies or for the possibility of family reunification during the period of legal residence. Victims have no right, under the Convention, to appeal negative decisions regarding residency applications or provision of further assistance.⁸⁴

For those who wish to go home, or who do not qualify for the residence permit, the Convention sets out a number of provisions aimed at protecting their rights throughout the repatriation process. Countries of destination are obliged to conduct return: "with due regard for the rights, safety and dignity" of the victim and for the status of any related legal proceedings. They must also ensure that such return "shall preferably be voluntary."⁸⁵ Countries of origin have two specific obligations with regard to repatriation. First, they are to facilitate and accept the return of a trafficked national or resident, also "with due regard for the rights safety and dignity" of that person and without undue delay.⁸⁶ Second, they are to cooperate in return including through verification of victim nationality or residence; and issuing of necessary travel documents.⁸⁷ All States Parties have an obligation to provide victims being repatriated with information,⁸⁸ to promote their reintegration and to work to avoid their re-victimisation.⁸⁹ The practical effect of these provisions is that victims of trafficking can indeed be returned against their will. The fact that no risk assessment is required in such cases (except for children) means that States are ultimately not accepting legal or moral authority for the safety and security of returned victims.

⁸¹ European Convention, *supra* note 25, Article 13. Both Amnesty International and Anti-Slavery International were calling for a minimum 90 day reflection period. See, for example, AI/ASI October 2004 Submission, *supra* note 45, 13–15; AI/ASI December 2004 Submission, *supra* note 45, 10–11.

⁸² European Convention, *supra* note 25.

⁸³ European Convention, *supra* note 25, Article 14. Note that this final provision is weaker than that proposed in the preliminary draft which would have seen victims being eligible for such residency visas if they had suffered serious abuse or harm; or if they or their families were in danger *or* if they were assisting the authorities in their investigation. Preliminary Draft, *supra* note 44.

⁸⁴ The lack of any appeal procedure was identified as a major flaw in the draft by NGOs. See, for example, AI/ASI October 2004 Submission, *supra* note 45, 20; AI/ASI December 2004 Submission, *supra* note 45, 14; and EWLA Resolution, *supra* note 45, 14 (vi).

⁸⁵ European Convention, *supra* note 25, Article 16.2. Regarding the "preferably voluntary" provision, the language on this point echoes a call from the High Commissioner for Human Rights when she called for safe, and as far as possible, voluntary return with legal alternatives to repatriation being offered where it is reasonable to conclude that such repatriation would pose a serious risk to the safety of victims and/or that of their families. High Commissioner for Human Rights: CoE Statement, *supra* note 34.

⁸⁶ European Convention, *supra* note 25, Article 16.1.

⁸⁷ European Convention, *supra* note 25, Article 16.3., 16.4.

⁸⁸ European Convention, *supra* note 25, Article 16.6.

⁸⁹ European Convention, *supra* note 25, Article 16.5.

The issue of adequate and appropriate remedies for victims of trafficking was critical for those urging a rights-based and victim-centred Convention.⁹⁰ In its final form, the European Convention takes a comprehensive, if imperfect approach to the issue of victim compensation and legal redress.⁹¹ It requires, first of all, that victims are provided with appropriate information including procedures they can use to obtain compensation⁹² as “people cannot claim their rights if they do not know about them”.⁹³ Victims are also to be given access to legal assistance.⁹⁴ The Convention specifically provides that victims have a right to monetary compensation from traffickers in respect of both material injury and suffering.⁹⁵ Finally, and in recognition of the fact that, in practice, the State will rarely be able to force traffickers to fully compensate victims, the Convention requires Parties to take steps to guarantee compensation of victims. Examples given in the Convention include establishment of a special fund or initiatives aimed at social assistance or reintegration of victims.⁹⁶ The possibility of State compensation schemes being funded by the seized proceeds of trafficking is also noted.⁹⁷

2.7. *Criminalisation, Investigation and Prosecution*

While the Convention pays more attention to the rights and needs of victims than its international equivalent, this is not done at the expense of the criminal justice and immigration aspects of trafficking. In this context, it is important to acknowledge that despite their generosity, the victim protection provisions are geared towards

⁹⁰ In early 2002, well before the formal drafting process had commenced, the High Commissioner for Human Rights stated that the Convention should guarantee, to trafficked persons, the right of access to adequate and appropriate remedies. High Commissioner for Human Rights: CoE Statement, *supra* note 34. See also: AI/ASI October 2004 Submission, *supra* note 45, 16–18; AI/ASI December 2004 Submission, *supra* note 45, 13; NGO Statement, *supra* note 45, 19.

⁹¹ One significant weakness is the lack of any provision enabling States Parties to permit a victim to stay in the country to pursue compensation or other claims. In addition, the Convention does not provide for the possibility of other forms of reparation beyond compensation.

⁹² European Convention, *supra* note 25, Article 15.1. This provision could, however, have been considerably strengthened if it was attached to the minimum assistance standards set out in Article 12 which require States Parties to provide assistance to victims to enable their rights and interested parties to be presented and considered only in relation to criminal proceedings against traffickers.

⁹³ European Convention Explanatory Report, *supra* note 28, 192. The report also notes that provision of information on the possibility of obtaining a residency permit will be very important for victims who are illegally in the country as it would be very difficult for a victim to obtain compensation if she is unable to remain in the country.

⁹⁴ European Convention, *supra* note 25, Art. 15.2. On the extent of required assistance and the much-litigated question of whether it includes a right to free legal aid, see European Convention Explanatory Report, *supra* note 28, 196.

⁹⁵ European Convention, *supra* note 25, Art. 15.3. See also European Convention Explanatory Report, *supra* note 28, paras 197–198.

⁹⁶ European Convention, *supra* note 25, Art. 15.4.

⁹⁷ European Convention, *supra* note 25, Art. 15.4. The final provision on use of seized assets is weaker than in the preliminary draft which called for States to ensure that such assets be used, as a first priority, to pay compensation claims or fund victim support activities. Preliminary Draft, *supra* note 44, Article 11.2.

making sure that criminal justice authorities are given the best possible chance to secure prosecutions and convictions through the cooperation of victims. It is extremely unlikely that provisions such as the recovery and reflection period, and even those related to immediate support and assistance, could have been possible without this understanding of their dual purpose.

The criminal law aspects of trafficking are dealt with in Chapters IV and V of the Convention. The purpose is clearly to ensure maximum harmonisation of legislation within the countries of the European Union – thereby preventing the “push-down, pop-up” effect that can happen when one country has less strict rules than another. Shared definitions, similar laws and common approaches also promote information exchange and cooperation and strengthen the comparability of data.⁹⁸

These key criminalisation provisions of the Convention are almost identical to those contained in the Trafficking Protocol with some important extensions. States Parties are required to criminalise trafficking as well as certain acts committed for the purpose of enabling trafficking such as document fraud.⁹⁹ They are also required to criminalise attempting, aiding and abetting.¹⁰⁰ There is provision for legal persons to be held liable for a criminal offence established under the Convention.¹⁰¹ The compulsory jurisdiction of States Parties is extremely wide – covering territoriality, nationality or passive personality. In other words, a States Party must establish jurisdiction over an offence when committed in its territory; or by one of its nationals or against one of its nationals.¹⁰² States are required to either prosecute or extradite.¹⁰³ Overall, the jurisdictional elements of the Convention are extremely broad and, with one exception, can be expected to cover all cases involving victims or perpetrators who are present in the territory, or citizens of, States Parties.¹⁰⁴

The European Convention is much more explicit than the Protocol when it comes to penalties. All offences established under the Convention are all to be punishable

⁹⁸ European Convention Explanatory Report, *supra* note 28, 216.

⁹⁹ European Convention, *supra* note 25, Article 18, Article 20.

¹⁰⁰ European Convention, *supra* note 25, Article 21.

¹⁰¹ European Convention, *supra* note 25, Article 18. Corporate liability is limited to situations in which the offence was committed for the benefit of the legal person by a natural person in a leading position acting under its authority and/or where lack of supervision and control by a natural person made possible the commission of an offence. This provision echoes a broader trend towards recognition of corporate liability in criminal law.

¹⁰² European Convention, *supra* note 25, Article 31. Note that jurisdiction under the territoriality principle is also to apply when the offence was committed on board a ship flying a State Parties flag or on aircraft registered under its laws (*Ibid.*). States Parties can enter reservation to the jurisdiction grounds relating to both the nationality of the victim and of the perpetrator.

¹⁰³ No reservation can be made against this aspect of the jurisdictional requirement.

¹⁰⁴ This exception relates to the fact that the Convention provides for no specific jurisdiction over persons involved in trafficking while carrying out functions as part of an international military or peace-keeping or related force. Under Article 31, States would only acquire the necessary jurisdiction to prosecute one of their nationals if the offence (trafficking) is punishable under the criminal law where it was committed. Given that European forces are invariably operating in countries with underdeveloped legal frameworks and dysfunctional criminal justice systems, it can be expected that States would *not* be required to exercise jurisdiction in such cases. See further, AI/ASI October 2004 Submission, *supra* note 45, 26–27; AI/ASI December 2004 Submission, *supra* note 45, 16–17; and NGO Statement, *supra* note 45, 23.

by “effective, proportionate and dissuasive” sanctions – to include deprivation of liberty giving rise to extradition.¹⁰⁵ In determining penalties, a number of situations are to be considered “aggravating circumstances”. These include where the offence was committed against a child; by a public official; where it endangered the life of the victim; or where it was committed within the framework of a criminal organisation.¹⁰⁶ The penalties provision of the Convention also includes an obligation on States to ensure an ability to confiscate the instrumentalities and proceeds of trafficking and to close establishments used for trafficking.¹⁰⁷

One innovative provision in Chapter IV relates to recognition of previous convictions in foreign courts. Generally, in Europe and elsewhere, only convictions by a court in the country where a case is being heard can count towards a harsher penalty. The drafters of the European Convention acknowledged that this rule is now out of step with modern criminal practices, especially in the area of transnational organised crime. In recognition of the difficulties in setting clear standards on international recidivism, the Convention does not place a positive obligation on judicial bodies to seek out such information and to include it in their deliberations.¹⁰⁸ Rather, States Parties are required to “provide for the possibility” of taking sentences handed down in the court of another State Party into account when determining penalties.¹⁰⁹

In one of its most ground-breaking provisions, the European Convention requires States Parties to consider criminalisation of those using the services of a victim of trafficking.¹¹⁰ This provision could be used to prosecute owners of establishments using trafficked persons in cases where it is difficult or impossible to prove the required action and means. It could also be used to prosecute someone who knowingly uses the services of a trafficker to procure a sexual service or even an organ.¹¹¹ The uniqueness of this provision can only be fully appreciated with reference to the long and complicated legal history around trafficking which has never even considered the possibility of attaching criminal responsibility to the brothel owners, pimps and clients of trafficked women and children – or the wholesale buyers of products made in factories and sweatshops for prices which could only be possible through the use of exploited labour. Implementation of this provision will undoubtedly prove difficult in practice. A successful prosecution will require establishing both action (use of services) and knowledge (of the fact the services were only made available through trafficking). The educative effect of this provision was clearly uppermost in the minds of the drafters and, on balance, is likely to outweigh these evidentiary concerns.

¹⁰⁵ European Convention, *supra* note 25, Article 23.

¹⁰⁶ European Convention, *supra* note 25, Article 24. Note that while “criminal organisation is not defined in the Convention, the accompanying Explanatory Report makes specific reference to the definition contained in Article 2(a) of the United Nations Convention against Transnational Organised Crime. European Convention Explanatory Report, *supra* note 28, 264.

¹⁰⁷ European Convention Explanatory Report, *supra* note 28, 264.

¹⁰⁸ European Convention Explanatory Report, *supra* note 28, 270.

¹⁰⁹ European Convention, *supra* note 25, Article 25.

¹¹⁰ European Convention, *supra* note 25, Article 19.

¹¹¹ These examples are drawn from the European Convention Explanatory Report, *supra* note 28, 232.

Most law enforcement agencies, anywhere in the world, will only initiate an investigation into trafficking following a complaint from the victim. The problems associated with this approach are numerous. Victims are rarely willing to make complaints against traffickers. Some are intimidated into silence; others are worried about possible repercussions for themselves and their families. Most victims of trafficking, once they have escaped, just want to go home or get a decent job. The European Convention requires States Parties to ensure that investigations or prosecutions are not dependent on victim complaints if the offence has been committed in its territory in whole or in part.¹¹² Victims must also be able to make complaints from outside the country where the offence was committed: for example, after they return home. The State Party to which such a complaint is made must transmit the complaint to the State Party in which the offence was committed, for the latter's action.¹¹³

What about the structure of the criminal justice response to trafficking? The way in which a State's criminal justice response is organised is one measure of whether or not it is meeting the traditional due diligence test with regard to the obligation to investigate and prosecute of trafficking. Europe is home to some of the first and still the best law enforcement units specialising in investigation of human trafficking. It is therefore no surprise that the Convention carves out a role for specialisation at both the individual and organisational levels. States Parties are required to adopt the necessary measures to ensure that specialists are independent and have the necessary training and resources to do their job properly. Coordination of the criminal justice response is another key theme as is the need for comprehensive, rights-based training across key agencies.

2.8. Preventing Trafficking

The European Convention's specific purpose is to prevent and combat trafficking. Prevention, in this context, refers to positive measures to stop future acts of trafficking from occurring. Most trafficking prevention measures focus on two areas: decreasing vulnerability of potential victims; and increasing the risks to traffickers of apprehension and prosecution. In this sense, many of the measures set out in the Convention aimed at combating trafficking (such as strengthening the criminal justice response and border controls, imposing criminal liability on end-users, etc.) can also be expected to have a preventive effect.

In terms of specific preventive strategies, the Convention's approach is fairly orthodox. The general obligations are so broad as to be almost meaningless in terms of measuring compliance. First: States are required to coordinate, internally, their

¹¹² European Convention, *supra* note 25, Article 27(1).

¹¹³ European Convention, *supra* note 25, Article 27(2). Note that this provision was modelled on Article 11(2) of the European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings [*Official Journal* L 82, 22 March 2001]. Note further that the obligation is only to forward the complaint to the competent authority. The State of residence is not obliged to commence an investigation or otherwise institute proceedings. European Convention Explanatory Report, *supra* note 28, 278.

preventive strategies. Second: they are required to either establish or strengthen effective policies and programmes to prevent trafficking. Such policies and programmes are to promote a human rights-based approach as well as use a gender mainstreaming and a child-sensitive approach. States Parties are also required to take specific measures to reduce the vulnerability of children to trafficking through creation of “a protective environment”.

2.9. *International and Internal Cooperation*

As with the Trafficking Protocol, international cooperation is the *raison d'être* of the European Convention. Provisions related to international cooperation are therefore integrated into a range of broader obligations regarding investigation and prosecution, prevention, and protection of victims. In relation to the first category it is relevant to note that the Convention does not establish a complex system of mutual legal assistance applicable to trafficking such as that set up within the organised Crime Convention and the Trafficking Protocol. Sensibly, the drafting committee noted the existence of a comprehensive and relatively effective web of bilateral and multilateral agreements already in existence between States Parties.¹¹⁴ The Convention therefore confines itself to highlighting key areas for cooperation and articulating certain basic principles.

The general obligation is for Parties to cooperate with each other, to the widest extent possible, for purposes of preventing and combating trafficking; protecting and supporting victims; and investigating and prosecuting offences. This general obligation is of course supplementary to specific ones which relate, for example, to: (i) provision of information on risks to victims and the results of any follow up in respect of such persons (Article 32, Article 34.1.); and (ii) provision of information necessary to permit application of the entitlements of victims to a recovery and reflection period, residency, or safe repatriation (Article 16, Article 34.3.). There is no obligation on States Parties to cooperate with civil society, although the frequent references to NGOs and victim support agencies is indicative of a view, on the part of the drafters, that the Convention's objectives can best be achieved through the development of cooperative relationships with these groups.¹¹⁵

¹¹⁴ European Convention Explanatory Report, *supra* note 28, 335–337. A sample list of relevant mutual legal assistance, extradition and related matters, is set out in 343–345 of the Explanatory Report.

¹¹⁵ For example, references to the role of NGOs and civil society in relation to: preventing trafficking (Article 5.6.); repatriation and return (Article 16.6.); assistance and support during criminal proceedings (Article 27.3.); and being protected against retaliation and intimidation (Article 28.4). On a general level, Parties to the Convention are required to *encourage* state authorities and public officials to cooperate with NGOs and other relevant organisations “in establishing strategic partnerships with the aim of achieving the purposes of [the] Convention”. The Explanatory Note to the Convention observes that such partnerships can be achieved through regular dialogue as well as the establishment of more formal mechanisms such as memoranda of understanding between governmental authorities and national NGOs working with victims.

2.10. *Monitoring of the Convention*

The European Convention's monitoring mechanism is stronger than its international equivalent: the Conference of Parties established under the Trafficking Protocol.¹¹⁶ The Convention actually establishes two monitoring bodies: a Group of Experts against trafficking in human beings (GRETA), and a more politically oriented Committee of the Parties which is linked directly to the Council of Europe's Committee of Ministers.

GRETA, the primary monitoring body under the Convention, is to be composed of independent technical experts elected by the Committee of the Parties on the basis of their expertise with attention given to gender balance, geographical balance and the need to ensure representation from the main legal systems. GRETA is responsible for developing its own procedures for evaluating the performance of States. It is envisaged that only certain aspects of the Convention will be scrutinised each monitoring cycle. States are required to provide the information requested by GRETA. Information can also be received through country visits and from civil society. GRETA will be responsible for preparing a report on each party detailing its compliance with the provisions under scrutiny. That report, and its conclusions, is to be prepared in consultation with the relevant State Party. The final report, together with any comments from the State Party, is sent to that Party and to the Committee of the Parties.

The Committee of Parties is composed of one representative from each State Party.¹¹⁷ Its job is to add political weight to the work of GRETA. The Committee of Parties cannot interfere with these reports but may request States Parties to take certain measures to implement GRETA's conclusions. As noted in the Explanatory report, the purpose of this additional procedure was to: "... ensure the respect of the independence of GRETA in its monitoring function, while introducing a "political" dimension into the dialogue between the parties".¹¹⁸

¹¹⁶ There is no formal requirement in the Protocol for States Parties to report on implementation and no mechanism established to monitor such implementation. The only potentially relevant body is a Conference of Parties established under the Convention on Transnational Organised Crime to promote and review implementation of this instrument as well as to more generally improve the capacity of States Parties to combat transnational organised crime. Under the terms of the Protocol, the mandate of the Conference of the Parties was restricted to the Convention and under the terms of the Protocol, it does not have any authority in respect of this instrument except insofar as their respective subject matters can be brought within the provisions of the Convention itself. In a move that could have considerable ramifications for the international legal framework around trafficking, the Conference of Parties decided, at its inaugural session in July 2004, to extend its monitoring, information exchange, cooperation and other functions to the Trafficking Protocol. (Decision 1/5 of the Conference of Parties to the United Nations Convention on Transnational Organized Crime, reproduced in the report of the first session of the Conference of Parties, U.N. Doc. CTOC/COP/2004/6 (23 September 2004). The Conference of Parties is thereby now empowered to request and receive information on States Parties' implementation of the Protocol and to make recommendations to improve the Protocol and its implementation.

¹¹⁷ For those State Parties who are members of the Council of Europe, their representative is to be the national representative within the Committee of Ministers.

¹¹⁸ European Convention Explanatory Report, *supra* note 28, 369.

3. Evaluation of the Convention

How good is the European Convention? The final answer depends on one's point of reference. In comparison with the Trafficking Protocol, the Convention represents a significant improvement in terms of recognition of the rights of victims and of the connection between protection of those rights and improved criminal justice responses to trafficking. When measured against the gold standard, set by the 2002 U.N. Principles and Guidelines on Human Rights and Human Trafficking,¹¹⁹ the Convention falls short but still comes closer than any other international legal instrument in reflecting both the letter and spirit of that document.

In evaluating the "human rights worthiness" and potential of the Convention, it is essential to recognise just how far and how quickly our standards have shifted upwards. Those lobbying at the Trafficking Protocol negotiations would never have even bothered to seriously push for a mandatory recovery and reflection period or for an independent monitoring body. In just a few short years, it has now become accepted that trafficking is a violation of human rights; that governments should give victims assistance; that they should not push them back over the border; that they should ensure compensation; and that they should actually do something to stop trafficking from happening in the first place.

The European Convention embodies this revolutionary way of thinking about trafficking and about victims of trafficking. The Convention explicitly recognises trafficking as a violation of human rights. It requires States to provide minimum standards of assistance and protection to all victims of trafficking irrespective of their willingness to cooperate with criminal justice authorities. No victim or presumed victim can be automatically deported. Cooperating victims and witnesses are entitled to extra help and extra protection as befits their increased need. Child victims of trafficking are also given special help in accordance with the "best interests" principle.

The strengths of the Convention extend beyond its victim protection provisions. States are required to criminalise trafficking and to exercise their jurisdiction in a manner that almost guarantees no safe havens for traffickers within Europe. The Convention recognises the concept of "aggravated offences" and in so doing acknowledges the special dangers associated with violent trafficking, organised trafficking, trafficking in children, and trafficking with official complicity. In a

¹¹⁹ The Recommended Principles and Guidelines on Human Rights and Human Trafficking were developed in 2002 under Mary Robinson, the then United Nations High Commissioner for Human Rights and transmitted by her to the U.N. Economic and Social Council. (Economic and Social Council, *Recommended Principles and Guidelines on Human Right and Human Trafficking*, U.N Doc E/2002/68/Add.1 (Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (20 May 2002)). In her accompanying report, the High Commissioner explained that the Principles and Guidelines were her response to the clear need for practical, rights-based policy guidance on the trafficking issue. Since 2002 the Principles and Guidelines have been used and referred to by Governments, intergovernmental agencies and NGOs on numerous occasions. The European Convention incorporates a number of concepts first articulated in the Principles and Guidelines such as the notion of non-criminalisation of victims for status-related offences and the potential criminal responsibility of those who purchase or otherwise obtain the services provided by victims of trafficking. The Explanatory Report accompanying the Convention draws heavily on language used in the Principles and Guidelines.

world-first, the Convention requires States to criminalise those knowingly using the services of victims of trafficking: thereby sending an important message that beneficiaries of this sad trade are not just third world gangsters and nameless, faceless criminal groups.

The Convention is not, of course, perfect. There is, within the realities of current migration regimes, a natural limit to what States will grant victims of trafficking. It is a common, and not altogether unreasonable, fear of countries of destination that too much recognition, too much assistance will strain resources and capacities and will create a flood of both valid and fraudulent claims – all requiring expensive and time consuming investigation. These fears are reflected in the careful wording of the various assistance and protection clauses. Ultimately, it is likely to be only those who can give something back to the State – a prosecution – who will be substantially supported and allowed to stay. Despite the inclusion of a non-penalty clause, there is still nothing to stop States from treating victims of trafficking as criminals and from arresting and prosecuting them for violations of labour and migration laws.

In evaluating the Convention, it is also useful to cast more widely and consider its potential impact on the broader legal framework around trafficking. A great deal will depend on whether the Convention (which is open to all States and not yet in force) can attract a significant number and range of parties. If this happens then it is likely that GRETA in particular will emerge as a key player in terms of developing, articulating and applying international law to the problem of trafficking. It is also relevant to note the high level of overlap between the U.N. Trafficking Protocol and the European Convention in terms of legal obligations. The work of GRETA could partly offset the weak implementation structure around the Trafficking Protocol by clarifying the meaning and substantive content of certain key norms contained in both instruments. In terms of its methods of work, the Convention envisages a flexible approach on the part of GRETA to the task of reporting which should permit this mechanism to focus attention on several aspects at a time rather than the entire set of obligations contained in the Convention. This will allow for a more detailed and carefully considered approach which should give GRETA both the time and the space to flesh out those norms which are still vague or incomplete. The linking of this technical treaty-monitoring body to a Conference of Parties provides further opportunity for strengthening the legal framework in terms of both content and enforcement.

In summary, the European Convention represents, on balance, a significant development in the international legal framework around trafficking. While the Convention did not deliver all that some hoped for, this fact should not overshadow the revolutionary nature of certain of its provisions. Nor should it take away from the status of the Convention as the first international legal agreement on trafficking to take the human rights of victims as its starting point and primary frame of reference.

Conclusion

In terms of both speed and substance, the development in trafficking related norms and standards over the past several years is almost unprecedented in international law. However, the Trafficking Protocol is still very young, the EU instruments are even younger and the European Convention is yet to enter into force. In short: the new international legal regime around trafficking is still to prove its worth. Much will depend on what happens over the next several years – particularly with regard to the way in which individual States interpret and apply their legal obligations. Certainly there is cause for optimism as States and their representatives continue to reject, through word and deed, the notion that as a matter of law, they do not have to do anything about trafficking. However, in relation to legal obligation and responsibility, the devil is always in the detail. In this regard, the position of the European Convention, vis-à-vis the Trafficking Protocol and various regional instruments, will be especially relevant. Will the relationship between the regional and international be mutually reinforcing? More specifically, will the European countries stick to the Protocol's minimum standards or those set out in the EU Framework Decision – or will they be more generous in seeking to realise the ambitious goals of the 2005 European Convention?