

Symposium organised by KOK on trafficking in human beings and exploitation in Germany, 25-26 October 2018

The perspective of the Council of Europe on developments in Germany

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It is a pleasure and an honour for me to address you today on behalf of the Council of Europe. The symposium, organised by KOK, has provided an excellent opportunity to reflect on what has been achieved and what needs to be done in Germany to strengthen the fight against human trafficking and the protection of the victims' rights.

As the intergovernmental organisation focused on the protection and promotion of human rights, the Council of Europe initiated in 2003 the drafting of a legally binding instrument placing the protection of victims of trafficking at the centre of efforts to combat trafficking in human beings, based on the conviction that this phenomenon is not only a serious crime, but also a human rights violation and an offence to the dignity and the integrity of the human being. The Convention provides a comprehensive, holistic, multidisciplinary framework for tackling human trafficking, encompassing prevention, protection of victims, prosecution of traffickers, and the promotion of partnerships through international co-operation and co-operation with civil society. Ten years after its entry into force, the Council of Europe Convention on Action against Trafficking in Human Beings has 47 States Parties.

The Convention entered into force for Germany in April 2013. The first evaluation of the steps taken by Germany to implement the Convention took place in 2014, with the first report by the Group of Experts on Action against Trafficking in Human Beings (GRETA), which is responsible for monitoring the implementation of the Convention, being published in March 2015. The report made a number of recommendations in the areas of legislation, policy and practice, which I will refer to throughout my presentation. On the basis of GRETA's report, on 15 June 2015 the Committee of the Parties to the Convention adopted a recommendation to the German authorities, requesting them to report back on the measures taken to implement the recommendation by 15 June 2017. The report submitted by the German authorities was considered at the 21st meeting of the Committee of the Parties (13 October 2017) and was subsequently made public.

On 5 September 2017, GRETA launched the second round of evaluation of the Convention in respect of Germany by sending the questionnaire for this round to the German authorities. Germany submitted its reply on 5 February 2018. A second evaluation visit by GRETA took place from 4 to 8 June 2018 in order to hold meetings with relevant governmental and non-governmental actors, collect additional information and examine the practical implementation of measures adopted since 2015. The draft report concerning the second evaluation of Germany will be considered by GRETA at its next plenary meeting in early December 2018 before being sent to the German authorities for comments. The final report will subsequently be adopted by GRETA in March 2019 and published later in the spring of 2019.

Without pre-empting GRETA's analysis of developments in Germany since the first evaluation, I will discuss in my presentation several of the main recommendations made in GRETA's first report linked to obligations under the CoE Convention and the way in which they have been met by the German authorities.

Criminalisation of human trafficking

In its first report on Germany, GRETA urged the German authorities to ensure that the definition of human trafficking in the German Criminal Code (StGB) fully complies with the Convention. Further, GRETA noted that the wording of section 233 StGB (trafficking for the purpose of labour exploitation) made this offence difficult to prove and, as a result, perpetrators tended to be charged with other offences which are easier to prove and carry significantly lower penalties.

Amendments of the StGB were introduced through the Act to Improve Action against Human Trafficking in October 2016. The new Section 232 StGB (human trafficking) includes the three components of the internationally accepted definition of human trafficking (action, means and purpose) and expands the list of forms of exploitation resulting from human trafficking by adding organ removal, begging and committing criminal offences. The development of case law under the new Section 323 as well as the related Sections 232a, 232b, 233 and 233a will take some time before having evidence that the amended legislation has helped improve the criminal justice response to human trafficking and exploitation.

In the meantime, the 2017 statistics of the Federal Criminal Police Office (BKA) on the number of victims of trafficking identified in Germany refer for the first time to two identified victims of trafficking for the purpose of begging (but yet none for the purpose of forced criminality).

The annual number of identified victims, according to BKA data, has oscillated around 600 in the last few years. In 2017, this number 671, with 73% of the identified victims being subjected to sexual exploitation (in earlier years, this percentage was much higher, over 90%).

By way of comparison, in the United Kingdom, the number of presumed victims of trafficking referred to the National Referral Mechanism in 2017 was 5,145 (a 35% increase on the referrals in 2016). 52% of them were men; the majority of the presumed victims were subjected to labour exploitation and domestic servitude.

In the Netherlands, the number of presumed victims of trafficking identified in 2017 was 1,076 (of whom 62% for sexual exploitation, 21% for labour exploitation, including begging, and 5% for forced criminality).

Identification of victims of trafficking

The issue of Victim identification is of fundamental importance. Without trafficked people being identified as such, they cannot benefit from the assistance and protection measures provided for under the Convention. It is therefore vital for State Parties to the Convention to ensure that an effective system for proactive identification of victims of trafficking is put in place, irrespective of their nationality, immigration status and form of exploitation.

Identifying a trafficking victim may take time and effort and therefore Article 10 of the Convention provides that identification shall be performed in collaboration between different authorities and relevant support organisations, and that when the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking, he/she must not be removed from the country until the identification process is completed and must receive the assistance envisaged under Article 12, paragraphs 1 and 2, of the Convention. The Convention also provides that no link should be made between co-operation with the authorities in the investigation and/or criminal proceedings and identification as a victim and provision of assistance.

In order to ensure proper victim identification, it is necessary to put in place a nationwide system of identification and referral of victims to assistance, known as a "National Referral Mechanism" (NRM), defining the roles and responsibilities of different actors and providing clear procedures, guidance and operational indicators. GRETA has highlighted as a good practice the involvement of a variety of stakeholders in the identification of victims of trafficking and/or the setting up of multidisciplinary structures performing identification.

At the time of the first evaluation of Germany by GRETA in 2014, there were no national guidelines or indicators for the identification of victims of human trafficking, nor was there a National Referral Mechanism defining the roles and responsibilities of different actors who may come into contact with victims of trafficking. GRETA urged the German authorities to improve the identification of victims of trafficking by strengthening the multi-agency involvement in the identification process, giving a formal role in the identification to NGOs and labour inspectors, adopting a proactive approach in order to identify victims of trafficking not only for the purpose of sexual exploitation but also for the purpose of labour exploitation, begging and forced criminality, and paying increased attention to detecting victims of trafficking among asylum seekers, irregular migrant workers and persons placed in immigration detention centres.

There are a number of examples of identification mechanisms set up in other countries which could be considered by Germany. In the UK, the National Referral Mechanism set up in 2010 was recently reviewed and multi-agency panels were set up to identify victims of trafficking. In the Netherlands, a pilot project was launched to develop a model of multidisciplinary identification of victims of trafficking through the so-called Victim Identification Board, an independent multidisciplinary board tasked with examining cases of possible victims of trafficking.

When it comes to identifying victims of trafficking among asylum seekers, the important increase in their number in Germany – but also in other European countries – poses new challenges. By way of example, in Italy, UNHCR assisted the authorities in developing Guidelines for the identification of victims of trafficking among applicants for international protection. The Guidelines provide a Standard Operating Procedure including a step-by-step explanation of the process, flowchart, indicators and practical suggestions about how to perform interviews. The identification process involves specialised NGOs. While the identification is on-going, with the person's agreement, the examination of the asylum claim is suspended in order to allow time for establishing a relationship of trust and permit the person to reflect. The two protection procedures can continue in parallel, i.e. a person who is identified and assisted as a victim of THB can obtain international protection.

Assistance to victims of trafficking

Assistance and protection programmes should be implemented in accordance with the needs of victims of trafficking and quality standards, in order to ensure the victims' physical, psychological and social recovery and their reintegration upon return to their country of origin.

In its first report on Germany, GRETA urged the German authorities to ensure that assistance to victims is not made conditional on their willingness to act as a witness; provide adequate funding to maintain the provision of assistance; develop adequate counselling centres across the country for victims of THB for the purpose of all types of exploitation, not just sexual exploitation; and ensure that safe and suitable temporary accommodation is provided to male victims of trafficking, according to their needs.

The existence of a network of specialised counselling centres for victims of trafficking in Germany is an important feature of the German system for tackling human trafficking from a human-rights based perspective. However, the accommodation and assistance needs of victims of trafficking, in particular those of male victims, are not met in a consistent manner across the country. This is an issue of concern, especially since the number of such victims is increasing.

Moreover, the availability of qualified interpretation and specialised legal assistance are crucial for building trust with victims, helping them understand their situation and increasing the chances of successful investigation and prosecution.

Trafficking in children

The Convention provides for special measures and procedures for children in the context of victim identification, such as in case of age disputes and in respect of unaccompanied children, who should be appointed a legal guardian. Assistance to child victims should be adapted to their special needs. To take care of child victims, shelters specialised in receiving and assisting child victims should be set up.

In general, GRETA's monitoring of the Convention has revealed important gaps in the fulfilment of obligations under the Convention related to children, which is one of the focuses of the second round of evaluation of the Convention.

When it comes to Germany, GRETA has urged the authorities to adopt a specific procedure for the identification of child victims of trafficking which involves child specialists, child protection services and specialised police and prosecutors. This should enable better identification of child victims, including for the purpose of exploitation of begging or criminal activities. Another recommendation made by GRETA in the first report is to ensure those child victims of trafficking benefit from the assistance measures provided by the Convention, including guardianship, interpretation, services, dedicated shelters and medical, legal and psychosocial assistance.

Recovery and reflection period

The provision of a recovery and reflection period is one of the important safeguards under the Convention. It should be granted to any presumed victim and should not be made conditional on the victim's co-operation with the investigative or prosecution authorities. However, in many countries, including Germany, the number of recovery and reflection periods issued is low or there is an absence of data on the number of such periods issued.

In its first evaluation report on Germany, GRETA notes that the purpose of the recovery and reflection period under section 59, paragraph 7, of the Residence Act is not as clearly stated as in the Convention, i.e. to enable possible victims of trafficking to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with the competent authorities. GRETA expressed the view that consideration should be given to amending the legislation by renaming the "order to leave the territory" which is issued to victims of trafficking who are granted a recovery and reflection period in order to reflect the spirit in which this period should be granted, according to the Convention. GRETA urged the German authorities to ensure, in compliance with the obligations under Article 13 of the Convention, that all possible victims of trafficking, including victims of trafficking for the purpose of labour exploitation and child victims, are offered an effective recovery and reflection period and all the measures of protection and assistance envisaged in Article 12, paragraphs 1 and 2, of the Convention during this period.

German legislation related to the recovery and reflection period has not changed in the meantime and there are apparently no nationwide statistics on the number of periods granted. The approach to granting this period varies from one federal state to the other; in some federal states, it involves the specialised counselling centres working with victims which provide an assessment of the indicators of trafficking thus direct contact between the presumed victim and the police and the Foreigners Registration Office granting the recovery and reflection period is avoided.

In this context, GRETA has noted that the approach to issuing of the recovery and reflection period should be changed, making it possible for victim support organisations to grant such a period and provide all the assistance needed by the victims.

Temporary residence permits

Article 14 of the Convention allows Parties to make the issuing of a temporary residence permit conditional on the victims' co-operation in the investigation/prosecution, which may result in blocking access to assistance for foreign victims of trafficking. There are situations in which victims might be afraid to co-operate in the investigation because of threats from the traffickers. Granting a residence permit on account of the personal situation of the victim, as envisaged by Article 14 of the Convention, takes in a range of situations, such as the victim's safety, state of health and family situation, and tallies with the human-rights based approach to combating human trafficking. Granting a work permit can also be conducive to increased victim identification as this may act as an incentive for victims to report their exploitation.

In its first report on Germany, GRETA noted that under the Residence Act the possibility of obtaining a residence permit was linked to a trafficking victim's willingness to co-operate with the law enforcement authorities and the value of their testimony. The uncertainty for victims was thus high because the issuing of a permit depends on a prosecution for THB taking place. In many cases, investigations do not lead to criminal proceedings for THB; for instance, it might be the case that the victim's information is not considered valuable for the evidence, or is already known by the police, the perpetrators remain unidentified or the prosecution service decides that there is not sufficient evidence to bring charges of THB.

The amendments made to the Residence Act in 2015 have made some important improvements to the right of victims of trafficking to be granted a residence permit, including by introducing the possibility of extending the temporary residence permit after conclusion of the criminal proceedings if humanitarian or personal reasons or public interests require the foreigner's further presence in the federal territory. Access to social benefits for holders of humanitarian residence permits for victims of trafficking was also improved by including them into the scope of the Social Code Book II (SGB II) rather than in the Asylum Seekers Benefits Act. The immigration authorities can issue work permits to persons with a residence permit pursuant to 25, paragraph 4a, of the Residence Act, without approval by the Federal Employment Agency.

These welcome developments have the potential of strengthening the human-rights based approach to the fight against human trafficking.

Prevention of human trafficking

The Convention requires Parties to establish effective policies and programmes to prevent trafficking in human beings, in particular for groups and persons vulnerable to exploitation and trafficking. This calls for measures going beyond the symptoms and addressing the structural factors underlying human trafficking, through economic, migration and labour policies. National immigration and labour laws can influence the vulnerability of migrant workers and should be reviewed in the light of the legal obligations – and moral imperative – to combat human trafficking and protect its victims. The landmark judgment of the European Court of Human Rights in *Chowdury and Others v. Greece*, which was the first case in which the Court found a violation of Article 4 of the European Convention on Human Rights in respect of trafficking for the purpose of labour exploitation, is particularly relevant in this sense.

GRETA's most recent general report, whose thematic focus was human trafficking for the purpose of labour exploitation, analyses trends, gaps and promising practices in this area. The report highlights the vulnerability to trafficking and exploitation of migrant workers, especially seasonal and irregular migrant workers, domestic and care workers, as well as asylum seekers who have no access to the labour market. Particular attention is paid to the mandate, resources and training of labour inspectors, their collaboration with specialised anti-trafficking agencies (e.g. through joint inspections and joint training) and their involvement in the National Referral Mechanism. Moreover, GRETA stresses that co-operation with trade unions is essential and needs to be organised in a structured way.

In its first report on Germany, GRETA noted the lack of measures to prevent and combat trafficking for the purpose of labour exploitation. Since then, the Federal Working Group on Combating Human Trafficking for the Purpose of Labour Exploitation has been set up, with

thematic working groups focusing on prevention and public awareness; advice and support for victims; and prosecution and improvement of data collection. These developments are commendable, but there is still no agency with a comprehensive mandate for performing labour inspections in Germany and detect trafficking for the purpose of labour exploitation and therefore this element of public action against human trafficking is lacking in Germany.

Another important provision of the CoE Convention in the area of prevention is Article 6 on measures to discourage demand, which can be achieved through a combination of steps, one of which is the criminalisation of the use of services of victims of trafficking (Article 19 of the Convention). In its first report on Germany, GRETA asked the German authorities to make further efforts in this area with a view to discouraging demand for all forms of exploitation, in partnership with the private sector and civil society, including trade unions and employers.

The move towards greater transparency in supply chains is highlighted by GRETA as a potentially useful tool for combating human trafficking. In addition to the UK's 2015 Modern Slavery Act in 2015, which introduced a requirement for businesses of a certain size to prepare a "slavery and human trafficking statement" for each financial year on the steps taken to ensure that their supply chains and any part of their own business are clean, other countries, in particular Norway, are in the process to developing similar legislation. Such legislation would go beyond the National Action Plan "Business and human rights".

National Action Plan or Strategy

In its first report on Germany, GRETA urged the German authorities to develop a comprehensive national action plan or strategy against human trafficking which addresses all forms of exploitation. The adoption of such a plan or strategy is yet to take place. The vast majority of State Parties to the Convention have such action plans and/or strategies to tackle human trafficking. While there is no provision in the Convention requiring that there be a national action plan or strategy against THB, the adoption of such a document at national level facilitates meeting the purposes of the Convention and is linked to the implementation of many of the Convention's provisions, including Article 29(2) on co-ordination.

National Co-ordination

The Convention envisages the setting up of co-ordination bodies at national level to co-ordinate the policies and actions of all public agencies involved in combating trafficking in human beings. In order to be viable, these structures need to be provided with adequate human and financial resources, enabled to meet regularly and given effective decision-making powers. Establishing a dedicated National Anti-trafficking Co-ordinator can add visibility and accountability to the process.

National Rapporteur

GRETA has stressed that Article 29 of the Convention makes a clear distinction between National Co-ordination and National Rapporteur. In GRETA's view, the key features of National Rapporteurs' mechanisms in the sense of Article 29, paragraph 4, of the Convention¹ should be the ability to critically monitor the efforts and effectiveness of all state institutions, including national co-ordinators, and to that end maintain a constant exchange with civil society, the research community and other relevant stakeholders. The human rights-based approach to anti-trafficking policies advocated by the Convention requires adequate monitoring and evaluation. A structural separation between monitoring and executive functions enables an objective evaluation of the implementation of anti-human trafficking legislation, policy and activities, identification of lacunae and shortcomings, and the formulation of comprehensive legal and policy recommendations.

A growing number of countries in Europe have designated independent human rights institutions as National Rapporteurs. GRETA has asked the authorities of the other State Parties to examine the possibility of establishing an independent National Rapporteur or designating another mechanism as an independent organisational entity with a view to ensuring an effective monitoring of the anti-trafficking activities of State institutions and making recommendations to persons and institutions concerned.

Concluding remarks

Germany has clearly made progress in many areas covered by the CoE Convention on Action against Trafficking in Human Beings. Being predominantly a country of destination, Germany has continued to lead in the area of international police and legal co-operation as well as through supporting international development co-operation.

Shared objectives - such as the fight against trafficking of human beings - must remain a political priority nationally and internationally.

The risks of the increased arrival of migrants and asylum seekers in Europe being exploited by criminal networks to target vulnerable people and subject them to trafficking and exploitation, are high, and therefore a clear political commitment is needed to sustain and strengthen the efforts to combat human trafficking by following the human-rights based approach of the Council of Europe Convention.

¹ "Each Party shall consider appointing National Rapporteurs or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements."