

EUROPEAN COURT OF HUMAN RIGHTS
Rantsev v. Cyprus and Russia, Application 25965/04

INTERIGHTS WRITTEN SUBMISSION

Introduction

Expressed interest

1. These written comments are submitted by INTERIGHTS (the International Centre for the Legal Protection of Human Rights) pursuant to leave granted by the President of the Chamber in accordance with Rule 44 para 2 of the Rules of the Court.¹ INTERIGHTS is an international human rights law centre with extensive experience of human rights litigation, including in the fields of security and rule of law and gender equality.²

The scope of these comments

2. This submission will address the positive obligations of the Contracting States to the European Convention on Human Rights (the ‘Convention’) in the context of trafficking in human beings. While this Court has developed substantial jurisprudence on the due diligence standard generally, it has yet to consider the applicability of international standards on trafficking in effectively protecting human rights under the Convention. Part One of this intervention addresses the international recognition of trafficking in human beings for sexual exploitation as a form of violence against women and a modern-day form of slavery. Highlighting the developments in anti-trafficking international law which focus primarily on States’ positive obligations in combating trafficking in human beings, Part Two analyses the applicability of these obligations in light of the European Convention on Human Rights in the particular context of identification and protection of victims. Part Three considers the nature and scope of the States’ duty to investigate the circumstances of exploitation and death in the context of human trafficking.
3. This analysis draws upon a substantial body of international and comparative law, as well as established principles of interpretation of the Convention such as effectiveness³, autonomous concepts⁴, contemporaneity⁵, and the *jus cogens*⁶ status of some rights under the Convention.

1. The Nature of Trafficking in Human Beings

4. The international community’s growing awareness of present day human trafficking has been reflected in the development of new international anti-trafficking instruments.⁷ The Palermo Protocol and the Council of Europe Convention on Trafficking (2005) set out States’ positive obligations and give a clear definition of human trafficking, originally set out and developed in a number of legal documents adopted by regional and international bodies.⁸

¹ Letter of the Deputy Section Registrar Andre Wampach dated 23 September 2008;

² Alone and jointly with other organisations, INTERIGHTS has submitted written comments in a number of cases before this Court, most recently in *Finogenov and others v. Russia, Opuz v. Turkey, Boumediene and Others against Bosnia and Herzegovina*;

³ As applied in the case of *Conka v Belgium*, judgment of 5 February 2002, para 46, concerning the realistic possibility of using remedies against arbitrary detention. This principle preserve the Convention as a system for the protection of human rights and freedoms and as such it is of utmost importance that it is interpreted and applied in a manner which renders these rights practical and effective, not theoretical and illusory. The States can not therefore escape their obligations by protecting a right in a superficial manner;

⁴ As underlined, for example, in the case of *Chassagnou v France*, judgment of 29 April 1999, para 100, concerning the term “association” under Article 11 of the Convention. Emphasize should lie on the substance of the right protected when an interpretation of the extent and application of substantive rights and freedoms under the Convention is given;

⁵ See, among others, *M.C. v Bulgaria*, judgment of 4 December 2003, para 155 and *Selmouni v France*, judgment of 28 July 1999 para 101, where this Court stated that the Convention is seen as a living instrument, to be interpreted in the light of the present day conditions. It is therefore important that the Court has regard to the increasingly high standards being applied to the protection of human rights and fundamental freedoms. This should ensure greater firmness in assessing breaches of fundamental values in democratic societies;

⁶ Such rights are freedom from torture and slavery; The concept of *jus cogens* was accepted by the UN International Law Commission as early as 1953 and incorporated in the final draft of the Vienna Convention on the Law on Treaties (1969), see Article 53;

⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter the „Palermo Protocol”), which supplemented the United Nations Convention Against Transnational Organised Crime (2000) and the Council of Europe Convention on Action against Trafficking in Human Beings (2005) (hereinafter “Council of Europe Convention on Trafficking (2005)”);

⁸ See among others, European Union Framework Decision on Combating Trafficking in Human Beings (2002), Council of Europe Committee of Ministers Recommendation No R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation;

5. The adoption and ratification of these instruments has contributed to changes in the domestic legislation and practice of many States with respect to trafficking in human beings.⁹ However, while human trafficking continuously poses new challenges and threats, national policies and measures in the field are not always adequate and effective.¹⁰ The paramount requirement for any legal system to effectively address human trafficking is recognition of the need for a multidisciplinary approach, cooperation among states and a legal framework with an integrated human rights approach.¹¹
6. Trafficking in human beings is a combination of three components: action¹², means¹³ and purpose¹⁴ and they should always be considered together when determining if specific conduct constitutes the offence. Within the context of human trafficking, the actions and the means become relevant only when the purpose is present. 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 removal of organs are important elements of the offence. It is these human rights violations that anti-trafficking international law seeks to redress. Replicating such laws in the domestic setting should provide an effective counter-trafficking framework.
7. The inclusion of „exploitation of the prostitution of others” in the definition of human trafficking does not suggest a duty to criminalize prostitution, but merely draws a distinction between prostitution and human trafficking for sexual exploitation. Consequently, the issue of prostitution and related matters are outside the scope of human trafficking and should be dealt with by States individually, in accordance with their national laws and policies. Coercive sexual exploitation and forced prostitution however fall within the scope of the definition of trafficking in human beings as part of the purposive element of the crime and should be more properly dealt with through comprehensive criminal laws.¹⁵
8. A distinctive characteristic of human trafficking, in legal terms, is the irrelevance of the victim’s consent to the intended exploitation where any of the means of coercion, as given by the definition, have been used.¹⁶ It is therefore accepted that a person’s awareness of being employed in the sex industry or in prostitution, does not exclude such person from becoming a victim of trafficking¹⁷. While being aware of the general nature of that work, a person may be misled about the conditions of work, which have turned out to be exploitative and coercive.
9. The terms ‘smuggling’ and ‘trafficking in people’ are frequently used more or less synonymously, although there are significant differences between the two, and it is important for this distinction to be made.¹⁸ The aim of human trafficking is the exploitation of the trafficked person whereas the focus of smuggling is on unlawful movement of migrants across international borders. Therefore, smuggling concerns primarily the protection of the State against illegal migration, while trafficking is a crime against

⁹ As can be seen in the 3rd Report of the Committee of Experts on the Application of Conventions on Forced Labor Convention, 1930 (No. 29), and the Abolition of Forced Labor Convention, 1957 (No. 105), ILO, 96th session, 2007;

¹⁰ See for example the OSCE “Summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE region” 2006;

¹¹ See the Preamble and Articles 1-3 to the Council of Europe Convention on Trafficking (2005);

¹² Examples of action: recruitment, transportation, transfer, harbouring or receipt of persons, see article 4 of Council of Europe Convention on Trafficking (2005);

¹³ Ibid., examples of means: the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;

¹⁴ Ibid., for the purpose of exploitation, which includes “at 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”;

¹⁵ It’s also covered by the Article 2 paragraph 1 of *ILO Convention concerning forced or compulsory labour* (1930) which gives the following definition, the term ‘forced and compulsory labour’ shall mean all work or services which is exacted from any person under the menace of any penalty and for the which the said person has not offered himself voluntarily’. The means of coercion used against the individual, which include the threat or use of force, abduction, fraud, deception, the abuse of power or a position of vulnerability as given by the definition of trafficking in human beings, definitely exclude the consent of the victim;

¹⁶ See Article 3 (b) of Palermo Protocol and Article 4 (b) of the Council of Europe Convention on Action against Trafficking in Human Beings (2005);

¹⁷ This approach is consistent with the European Court’s case-law, see *Van der Musselle v. Belgium*, judgment of 23 November 1993, para 37 where the Court held that the consent of the person concerned was not sufficient to rule out forced labour;

¹⁸ There are four main differences between trafficking in human beings and smuggling of migrants: consent, exploitation, sources of profit and transnationality. For more details see the Resolution 55/25, Annex II and III of the UN General Assembly, the Palermo Protocol and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both supplementing the United Nations Convention against Transnational Organised Crime;

individuals and does not necessarily involve a transnational element. It may exist at national level as well.¹⁹

Human trafficking is a form of modern-day slavery

10. International instruments on trafficking in human beings have highlighted the re-emergence of slavery in new guises of bondage.²⁰ These international instruments recognise slavery, and practices similar to slavery, as being among the purposes of the exploitation of victims.²¹ According to a number of recent international reports the slave trade in women is thriving in both industrialised and developing countries and has become a very profitable business, ranking third after arms and drug trafficking.²²
11. The Slavery Convention defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised’.²³ The Rome Statute of the International Criminal Court distinguishes ‘enslavement’ as ‘the exercise of any or all the powers attaching to the right of ownership over a person... and includes the exercise of such power in the course of trafficking in persons, in particular women and children’.²⁴
12. The first time both definitions were applied in the particular context of enslavement and rape of women before an international court was before the International Criminal Tribunal for Former Yugoslavia in the case of *Prosecutor v Kunarac et als*.²⁵ In the Tribunal’s view, ‘the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement. These factors include the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour’.²⁶ It further observes that ‘the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery”, has evolved to encompass various contemporary forms of slavery which are based on the exercise of any or all of the powers attaching to the right of ownership’. Consequently, the definition of slavery does not require the right of ownership over a person to exist, but rather may require that one or more of the powers attached to such right is established.
13. The modern-day understanding of the term ‘slavery’ may, therefore, include situations where the victim is subject to violence and coercion thereby giving the perpetrator of these acts total control over that victim.²⁷ Trafficking in human beings may include actions such as involuntary confinement to a well secured perimeter, constraint, torture, rape, coercive prostitution and labour, systematic sexual abuse, and mutilation, which may also be constituent elements in any definition of slavery.

¹⁹ See Article 2 of the Council of Europe Convention on Trafficking (2005);

²⁰ Various authorities use the term ‘bondage’ to define forced and exploitative dependence of the victim from her traffickers, such as debt bondage and matrimonial bondage; see among others the European Union Council Framework Decision on Combating Trafficking in Human Beings of 19 July 2002; *In modern bondage: sex trafficking in the Americas*, by International Human Rights Law Institute DePaul University College of Law, October 2006;

²¹ See the definition in the Palermo Protocol and the Council of Europe Convention on Trafficking mentioned above; See also Parliamentary Assembly of the Council of Europe recommendations 1523 (2001) of 26 June 2001 and 1663 (2004) of 22 June 2004;

²² The report of the Europol, Crimes Against Persons Unit, Trafficking of Women and Children for Sexual Exploitation in the EU: the Involvement of Western Balkans Organised Crime 2006, p. 7 which states “Trafficking in human beings is considered to be the fastest growing criminal business in the world, generating massive profits for international criminal organisations. Not surprisingly, trafficking in human beings for sexual exploitation represents a global challenge of the same proportions as trafficking in drugs and weapons and can be easily linked to the forgery of documents, money laundering and people smuggling”; see also the statement made by UNICEF, South Africa Media Centre on 3 September 2007, http://www.unicef.org/southafrica/media_4047.html and the United Nations Population Fund (UNFPA), State of World population 2006, http://www.unfpa.org/swp/2006/english/chapter_3/index.html;

²³ See Article 1 of Slavery Convention (1926, amended by Protocol of 1953);

²⁴ See Article 7(2)(c) of the Rome Statute of the International Criminal Court, adopted in 1998;

²⁵ First case to deal with definition of enslavement as a crime against humanity for the prosecution of sexual slavery were cases of Kunarac, Vukovic and Kovac, see the ICTY Appeals Chamber judgment of 12 June 2002, paras 117-119 in the case no IT – 96 – 23& IT – 96 – 23/1-A of the *Prosecutor v Kunarac et als*;

²⁶ *Ibid*, para 119;

²⁷ See para 89 of *Silidian v France* case, judgment of 26 July 2005, where this Court found that “limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective”;

14. In many jurisdictions across Europe and beyond, States recognise trafficking in human beings to be a widespread contemporary form of slavery.²⁸ This approach is supported by several international instruments²⁹, by the United Nations treaty bodies³⁰, regional bodies³¹, and jurisprudence of domestic courts³².

Human trafficking for sexual exploitation is a form of violence against women

15. It is acknowledged that women are mostly affected by trafficking in human beings for the purpose of sexual exploitation because they are women.³³ Many international instruments focus on measures to ensure effective protection of women against violence³⁴ and highlight the special situation of women with regard to human trafficking³⁵.
16. Since 1991 the Council of Europe has been closely involved in formulating provisions to ensure the protection of women from trafficking for the purposes of sexual exploitation.³⁶ In 1997 the Parliamentary Assembly defined trafficking in women and forced prostitution as a form of inhuman and degrading treatment and a flagrant violation of human rights.³⁷ In same year, the heads of States and Governments of the Council of Europe Member States adopted a Declaration to affirm the need to combat violence against women and all forms of sexual exploitation of women.³⁸
17. The recognition of trafficking in human beings for sexual exploitation as a form of violence against women appears directly or indirectly in a number of important international legal instruments and declarations.³⁹ The United Nations *Declaration on the Elimination of Violence against Women* provides

²⁸ See, e.g., the Swiss Guidelines on Co-operation Mechanisms for Combating Trafficking in Human Beings (2005), p.5; the UK Action Plan on Tackling Human Trafficking (2007), p.34; the Law of Italy no 269 on measures against prostitution of minors, pornography, sex tourism and other contemporary forms of slavery, adopted on 3 August 1998; the USA Trafficking Victims Protection Act of 2000, Sect 102(a);

²⁹ See Articles 1, 5, 6 of the Supplementary Convention on the Abolition of Slavery (1956);

³⁰ The CEDAW Committee, expressed the view that “*the forced labour of women is a contemporary form of slavery and a denial of their rights*”, see para. 113 of the Report A/55/38, of 17 August 2000 and it draws attention „*to the wide and increasing dimensions of trafficking in women, which constitutes a major part of contemporary trade in persons and is a form of slavery and a violation of article 6 of the Convention*”, para. 383 of the Report A/57/38, 2 May 2002; the UN Human Rights Committee in several Concluding Observations expressed the opinion that “*the practice of trafficking of women*” particularly for purposes of sexual exploitation and prostitution “*constitutes a violation of several Covenant rights, including the right under article 8 to be free from slavery and servitude*”. Also, see para 18 of the Report E/CN.4/2005/71 of the UN Special Rapporteur on human trafficking; the UN Working Group on Contemporary Forms of Slavery Report of 23 June 1993, E/CN.4/Sub.2/1993/30, para. 99 and the Report of 6 July 1998, E/CN.4/Sub.2/1998/14, para. 97, point 6;

³¹ The Report of the Secretary-General of the Council of Europe „Review of Developments in the field of Contemporary Forms of Slavery, Measures to Prevent and Repress All Contemporary Forms of Slavery...” p. 19, E/CN.4/Sub.2/AC.2/2000/4; Committee of Ministers of the Council of Europe Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, from 19 May 2000; The Parliamentary Assembly of the Council of Europe Recommendation 1545 (2002), Campaign against trafficking in women;

³² See the UK Court of Appeal, CA (Crim Div.) case of *R. v. Shaban Maka*, 16 November 2005, where the sentencing judge stated that “human trafficking was an international problem which produced untold misery throughout the world. The conduct had echoes of slavery with the victim being sold from one procurer to another” para. 7, <http://www.legislationline.org>; the United States DoJ, US’ Attorney’s Office, Eastern District of Michigan, Press release, *Maksimenko*, 25, June 2007, http://www.usdoj.gov/usao/mie/press/Jun_2006.pdf

³³ Council of Europe Committee of Ministers recommendation No R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation; Parliamentary Assembly of Council of Europe recommendations 1523 (2001) of 26 June 2001 and 1663 (2004) of 22 June 2004; the European Parliament resolution on the communication from the Commission to the Council and the European Parliament ‘For further actions in the fight against trafficking in women’ (COM(1998) 726 - C5-0123/1999 - 1999/2125(COS));

³⁴ *Palermo Protocol*, Art. 2 (a): “Paying particular attention to women”; *Council of Europe Convention on Action against Trafficking in Human Beings*, Preamble: “Considering that all actions or initiatives against trafficking in human beings must be non-discriminatory, take gender equality into account” and its *Explanatory Report*, CETS No 197, point 1;

³⁵ Poverty, along with high levels of unemployment among women and the predominant gender stereotypes and violence are listed among the major factors that increase a woman’s vulnerability to human trafficking, see ILO Reports of 2005 -2007;

³⁶ The first international instrument dealing comprehensively with matters of human trafficking for sexual exploitation in children and young adults was the Committee of Ministers Recommendation No R(91) 11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults. In 1992-93 an action Plan on trafficking in women was drawn up by the Steering Committee for Equality between Men and Women with the support of the Group of Experts on trafficking in women;

³⁷ See the Parliamentary Assembly Recommendation 1325 (1997) on trafficking in women and forced prostitution in Council of Europe member states where it is stated that ‘migration connected with trafficking in women and prostitution has developed into a gigantic, highly organised international crime trade linked to the exploitation of women’, see also the recommendation 1610 (2003), para 2 and recommendation 1325 (1997) para 3;

³⁸ Second Summit of the Heads of States and Governments of the Council of Europe, October 1997;

³⁹ See, among others, UN Secretary General *In-depth study on all forms of violence against women*, A/61/122/Add.1 of 6 July 2006, paras 24, 135-138, 229-232; UN GA Resolution 59/167 *Elimination of all forms of violence against women, including crimes identified in the outcome document of the twenty-third special session of the General Assembly, entitled “Women 2000: gender equality, development and peace for the twenty-first century”*, 20 December 2004; Document CCPR/CO/79/LVA, dated 06/11/2003 and CEDAW Report A/53/38/rev.1 of 1998 and General Recommendation no 18;

that violence against women includes trafficking in women and forced prostitution.⁴⁰ The Committee of Ministers *Recommendation Rec(2002)5*⁴¹ defines violence against women as including trafficking and states that it violates and impairs the enjoyment of their human rights and fundamental freedoms. The *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* includes trafficking in persons and forced prostitution as forms of violence against women.⁴²

Equal protection under the law

18. States' positive obligation to secure equal protection of the law to both men and women⁴³ requires actions beyond the adoption of laws to prevent discrimination on the basis of sex. Affirmative actions⁴⁴, designed to give practical effect to the positive enjoyment of rights, must be put in place to complement the legislative framework.⁴⁵
19. Since most identified victims of trafficking are women,⁴⁶ it is essential to bear in mind their specific needs as women and as victims when adopting measures to prevent and combat human trafficking. The duty to guarantee gender equality⁴⁷ in the context of criminal justice means better service provision to women who are victims of violence. In the context of legislation it also means that specific policies must be adopted for women who are more likely to be exposed to practices that qualify as cruel, inhuman and degrading treatment (physical violence, rape, genital mutilation, trafficking in human beings for the purpose of sexual exploitation). These violations constitute forms of violence against women⁴⁸ and an offence to the dignity and integrity of the human being. Failure to protect women in the context of human trafficking may lead to States' failure to comply with its obligation to ensure equal protection of the law.

2. The States Positive Obligations with Respect to the Rights Protected by the European Convention

The nature of positive obligations under the European Convention

20. The case-law of the European Court has developed the concept of positive obligations by recognising that States are not only obliged to refrain from interfering with Convention rights but they also have a duty to take action to ensure such rights are not violated.⁴⁹ Where there is a failure to provide appropriate measures of protection, the State may become liable for the acts committed by private individuals or group of individuals.⁵⁰ The doctrine of positive obligations is rooted in Article 1 which requires States to "secure" the Convention rights to all those within its jurisdiction⁵¹. Throughout the Convention this Court

⁴⁰ UN General Assembly Resolution 48/104 of 20 December 1993, Article 2(b);

⁴¹ See the Recommendation Rec(2002)5 of the Committee of Ministers on the protection of women against violence, Council of Europe;

⁴² See Article 2(b) of the Convention;

⁴³ Article 7 Universal Declaration of Human Rights, Article 26 ICCPR, Article 24 American Convention on Human Rights, Article 3 African Charter on Human and Peoples' Rights, Protocol No. 12 to the ECHR, Preamble ("Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law"), and Article 1(1) (general prohibition of discrimination), Article 20 of the Charter of Fundamental Rights of European Union; see also UN Charter, Article 1(3). At the domestic level, many Constitutions provide for this general principle, e.g. 14th amendment of the US Constitution, Section 1(6) of the Canadian Bill of Rights, Article 1 of the Constitution of France; GC no. 18, *Non-discrimination*, para 12. and GC no 4, para 13 of United Nations Human Rights Committee;

⁴⁴ Women's right to equal enjoyment of human rights has been reaffirmed by the UN Convention on the Elimination of All Forms of Discrimination Against Women, see Article 3;

⁴⁵ See, among others, *Secic v Croatia*, judgment of 2007, *Timishev v Russia*, judgement of 2005;

⁴⁶ Council of Europe Committee of Ministers recommendation No R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation;

⁴⁷ See articles 1, 3 Council of Europe Convention on Trafficking (2005). In particular article 3 prohibits victims to be discriminated against in the enjoyment of measures aimed to protect and promote their rights; see also the Council of Europe Committee of Ministers Recommendation R(98)14 on gender mainstreaming;

⁴⁸ Council of Europe Committee of Ministers Recommendation Rec (2002)5 on the protection of women against violence;

⁴⁹ See *Marckx v. Belgium* (1979) where the Court held that under Article 8 States have a positive obligation to legally recognise the family relationship between a mother and her illegitimate child; in *X and Y v Netherlands*, judgment of 26 March 1985, the Court upheld the States positive obligation to enact new criminal offences; in *Buchholz v. Germany*, judgement of 6 May 1981, the Court found that the State was under obligation to re-organise its judicial systems to ensure their capacity to determine cases within a reasonable timeframe; see also the dissenting opinion of Judge Martens in *Gul v. Switzerland*, judgement of 19 February 1996, who for the first time gave a definition of positive obligations;

⁵⁰ The first judgment in this regard was adopted in the case of *X and Y v the Netherlands* cited above, para 23 where the Court held that there was an obligation on the State to adopt criminal-law provisions to secure the effective protection of individuals. This approach was later replicated in the case of *M.C. v Bulgaria*, cited above; see also *Osman v UK*, Judgment of 28 Oct 1998; *Young, James and Webster v UK*, judgment of 13 August 1981, para 49;

⁵¹ See paras 77-82 *Siliadin v France*, judgment of 26 July 2005; *Kurt v Turkey*, Judgment of 25 May 1998, para 124;

has identified various positive obligations, in particular the obligation to investigate a killing⁵², to protect vulnerable people from serious ill-treatment inflicted by others⁵³, to provide free legal assistance⁵⁴, to provide a fair trial⁵⁵, and to secure respect for private and family life⁵⁶.

21. In interpreting articles of the Convention, this Court has previously considered international treaties binding on Council of Europe States to render an effective protection of the rights under the Convention.⁵⁷ In particular with a less developed jurisprudence under article 4, this Court has once again confirmed that, taken together with Article 1 of the Convention, it gives rise to States positive obligations arising out of: 1. well established case-law that positive obligations may arise from any provisions of the Convention; 2. the absolute nature of the right protected by Article 4, when no exceptions are allowed even during emergency situations; and 3. international instruments that oblige States to take measures to protect, prevent and prosecute human trafficking.⁵⁸ The duty to secure and protect rights and freedoms under the Convention to everyone within its jurisdiction is therefore a primary source of States positive obligations.

Positive obligations arising in context of trafficking in human beings

22. States have an **obligation to enact appropriate legislation on trafficking in human beings**, as set out in the Council of Europe Convention on Trafficking (2005)⁵⁹ and supported by this Court's case-law⁶⁰. This Court has recently held, in *Siliadin v. France*, that States have an obligation to adopt effective criminal law measures to protect individuals from ill-treatment and servitude.⁶¹ Adopting appropriate substantive legislation on trafficking is therefore a paramount element in ensuring the effectiveness of any strategies formulated by the States to combat human trafficking.⁶²
23. States Parties to the Palermo Protocol and to the Council of Europe Convention on Trafficking (2005) are required to criminalise trafficking in human beings in their domestic criminal laws, whether by a single criminal offence or by combining several offences covering, at a minimum, all conduct⁶³ capable of falling within the definition.⁶⁴ The definition of human trafficking should be used to determine the elements of the offence that States are called to establish: actions, means and purpose.
24. States might also consider making it a criminal offence to knowingly use the services of a victim of human trafficking. This measure should be intended not against the victims of human trafficking in carrying on an occupation or hinder their social rehabilitation but to punish those who by buying the services of an exploited person play a part in exploiting the victim.⁶⁵ This obligation should not be understood as a prerogative for criminalisation of prostitution. The anti-trafficking international instruments are concerned with exploitation of the prostitution of others and other forms of sexual exploitation only in the context of human trafficking, leaving it to the States to deal with prostitution in their domestic laws.

⁵² See, e.g., *Kelly v UK*, judgment of 4 May 2001; *Osman v UK*, Judgment of 28 October 1998;

⁵³ See, e.g., *Z v UK*, judgment of 10 May 2001; *MC v Bulgaria*, Judgment of 4 December 2003;

⁵⁴ *Fox, Campbell and Hartley v UK*, judgment of 30 August 1990; *Storck v Germany*, Judgment of 16 June 2005;

⁵⁵ See, among others, *Airey v Ireland*, Judgment of 9 October 1979;

⁵⁶ See also *Christine Goodwin v UK*, judgment of 11 July 2002;

⁵⁷ *Van der Musselle v Belgium*, judgment of 23 November 1983, para 32, *Siliadin v France* judgment of 26 July 2005 para 125;

⁵⁸ See paras 77-84, 89, 112 in *Siliadin v France* case cited above;

⁵⁹ See Chapter IV of the Council of Europe Convention on Trafficking (2005) and also the Palermo Protocol, both ratified by Cyprus and Russian Federation;

⁶⁰ *L v Lithuania* judgment of 11 September 2007, *Gorelishvili v Georgia* judgment of 5 June 2007, *Svipsta v Latvia* judgment of 9 March 2006;

⁶¹ See para 89;

⁶² See the Council of Europe Committee of Ministers recommendations No. R(91)1 and R (2000) 11 para 3, cited above; Parliamentary Assembly of Council of Europe recommendation 1610 (2003); UN Guidelines E/2002/68/Add.1, Guideline 4;

⁶³ Such as debt bondage, forced marriages, forced labour, forced prostitution, see the UN Economic and Social Council Principles and Guidelines E/2002/68/Add.1;

⁶⁴ Article 3 of Palermo Protocol; Council of Europe Parliamentary Assembly recommendation 1610 (2003); see also Article 18 of the Council of Europe Convention on Trafficking (2005) and Article 5 of the Palermo Protocol, both ratified by Cyprus and Russian Federation. Additionally, for Cyprus as member of the European Union this obligation is imposed by the EU Directive of 19 July 2002, Article 1, cited above; see also the case of *M.C. v. Bulgaria* where this Court held that 'it is essential that the relevant criminal law provisions are fully and vigorously applied in order to provide the applicant with practical and effective protection';

⁶⁵ See para 112 in *Siliadin v France* cited above; paras 64-74 of the report E/EC.4/2006/62 by Sigma Huda UN Special Rapporteur on human trafficking of 20 February 2006;

25. Enacted legislation should be able to provide for a) administrative, civil and criminal liability of legal persons in addition to natural persons⁶⁶, b) review of current laws and practice on licensing and operation of businesses often used as cover for human trafficking⁶⁷, and c) proportional penalties⁶⁸ considering the aggravating circumstances⁶⁹, the use of forged identity and travel documents⁷⁰, the complicity of state officials⁷¹, and the age and health of the victims⁷². States shall further consider adopting legislative measures to protect victims of trafficking by preventing their prosecution, detention or punishment for crimes arising out of them being trafficked.⁷³
26. By harmonizing domestic legislation with international legal instruments States will be able to more effectively co-operate, through the exchange of data and other means, thereby creating a more effective system through which the trafficking in human beings can be investigated.⁷⁴
27. States have the **obligation to promote a multidisciplinary co-ordinated approach** to trafficking in human beings. Human trafficking takes many forms, cuts across various sectors and has implications for various groups in society. Therefore, to be effective the public authorities responsible for prevention and combating human trafficking must co-ordinate their actions.⁷⁵ A more coherent and efficient system could be created by co-ordinating the actions of the various authorities and relevant bodies including the police, migration authorities, customs officials, social care workers, prosecution lawyers and non-governmental organisations.
28. It is submitted that any such policies and programmes adopted for the prevention of human trafficking should involve relevant authorities and civil society actors in order to ensure the efficient implementation of such policies and programmes. Professionals who come in contact with the victims of trafficking should assist in the creation and implementation of such policies and programmes.⁷⁶ Law enforcement authorities and civil society actors should develop strategies of mutual co-operation in pursuing cases on human trafficking to secure proper identification, assistance and protection of victims.
29. There is a **positive obligation on States to discourage demand**⁷⁷ for human trafficking which fosters sexual exploitation, forced labour, slavery or practices similar to slavery, and servitude. In order to achieve effective dissuasion States should adopt legislative, administrative, educational, social, cultural and other measures by analyzing the factors that generate demand for exploitative commercial sexual services and exploitative labour.⁷⁸ Any such measures should target primarily the demand that “fosters all forms of exploitation of persons, especially women and children that leads to trafficking”⁷⁹. The UN Special Rapporteur on human trafficking emphasised that the demand in the context of trafficking should

⁶⁶ Article 22 of the Council of Europe Convention on Trafficking (2005); the UN Economic and Social Council principles and Guidelines E/2002/68/Add.1, guideline 4, p.2;

⁶⁷ Such can be marriage bureaux, employment agencies, travel agencies, escort services and hotels; see also the UN Economic and Social Council principles and Guidelines E/2002/68/Add.1;

⁶⁸ Article 23 of the Council of Europe Convention on Trafficking (2005); see also *Nikolova and Velichkova v. Bulgaria*, judgment of 20 December 2007;

⁶⁹ *Ibid*, Article 24;

⁷⁰ *Ibid*, Article 20;

⁷¹ The UN Economic and Social Council principles and Guidelines E/2002/68/Add.1, guideline 4 p.11;

⁷² Article 10 of the Council of Europe Convention on Trafficking (2005);

⁷³ See Article 26 and Chapter 3 of the Council of Europe Convention on Trafficking (2005); The UN Economic and Social Council principles and Guidelines E/2002/68/Add.1, guideline 4 p.5-10 and guideline 6;

⁷⁴ In various context the European Court found violation of the Convention rights by States failing to enable clear and foreseeable substantive laws, see for example *Van Vondel v the Netherlands* judgment of 25 October 2007, *L. v Lithuania* cited above, *Copland v UK* judgment of 3 April 2007, *Vetter v France* judgment of 31 May 2005;

⁷⁵ See Articles 9, 10 of Palermo Protocol, Article 5 (1) of the Council of Europe Convention on Trafficking (2005);

⁷⁶ Dissemination of information, raising awareness, education campaigns and social and economic initiatives are among the recommended programmes for the prevention of human trafficking; see further Article 5(2) of the Council of Europe Convention on Trafficking (2005);

⁷⁷ The issue of demand was recognised to be of crucial importance in addressing trafficking in human beings for sexual exploitation by Council of Europe Convention on Trafficking (2005) having an entire article devoted to it, see Article 6; by Palermo Protocol, see Article 9 p.5 and by the UN Special Rapporteur on human trafficking, Sigma Huda, in her report E/EC.4/2006/62 of 20 February 2006;

⁷⁸ See, para 27 in case of *X and Y v the Netherlands*, cited above, where this Court held that “the effective deterrence is indispensable for the protection against ill-treatment and it can be achieved only by criminal-law provisions”; e.g. Article 1 of the Supplementary Convention on the Abolition of Slavery adopted on 30 April 1956;

⁷⁹ See Article 6 of the Council of Europe Convention on Trafficking (2005) and Article 9 p.5 of Palermo Protocol;

be understood as contributing to the growth of various forms of exploitation that ultimately leads to trafficking in human beings.⁸⁰

30. At a minimum the States should consider adopting⁸¹ a) research on best practices, methods and strategies, b) raising awareness of the media and civil society about the demand as one of the root causes of trafficking, c) target information campaigns involving public authorities and policy makers, d) educational programs and e) prevention of sex tourism.⁸² Additionally States should be encouraged to review policies that may compel people to resort to irregular labour migration, thereby increasing opportunities for legal and non-exploitive labour migration, reduce vulnerability to human trafficking by ensuring that appropriate legal documentation for birth, citizenship and marriage is available and provided to all persons entitled to hold such documentation.⁸³
31. The States **obligation to ensure an adequate law enforcement response** should aim to identify and eradicate any involvement of law enforcement officials in human trafficking and build victims' confidence in police and judicial system to enhance the effective prosecution of human trafficking. Effective measures should be taken to ensure that such involvement is investigated, prosecuted and punished.⁸⁴ The cooperation of victims and witnesses with prosecution to secure a lawful conviction of traffickers depends on the adequate legal response of the law enforcement.
32. Programmes could be put in place for law enforcement bodies to be sensitized on safety and immediate well-being of the victims of trafficking and be provided with training on the investigation and prosecution of human trafficking.⁸⁵ Training is a key element for any strategy and action plan. This training should always aim to increase the knowledge of all actors involved in the implementation of national strategies on anti-trafficking, be sensitive to the needs of the trafficked persons, in particular to those of women and children, and strengthen the capacity of law enforcement agencies to develop investigative techniques in countering human trafficking. Public officials that may come in contact with victims of trafficking need to be trained in recognising signs of a trafficking offence and to collect information relevant for anti-trafficking measures that may be adopted in the future. They also should be fully aware of methods for the identification, protection and support of trafficked persons, and be able to carry out effective anti-trafficking investigations in line with human rights principles.⁸⁶
33. The States have an **obligation to ensure that the identification of victims of trafficking takes place efficiently and effectively.**⁸⁷ The process of identification of the person as a victim of trafficking is the starting point for any assistance, as well as for finding and prosecuting traffickers.⁸⁸ An adequate legal framework plays an important part in the prevention of trafficking, of which identification of victims of human trafficking is a component.⁸⁹ Failure to identify a person as being victim of trafficking puts that person at risk of serious ill-treatment that can be life-threatening and subject to secondary victimization.⁹⁰
34. For a rapid and accurate identification of trafficked persons, guidelines on victim's profile and indicators⁹¹ must be developed and made available to the law enforcement agencies likely to be in contact with a

⁸⁰ Para 51 of the report E/EC.4/2006/62 by Sigma Huda UN Special Rapporteur on human trafficking Sigma Huda, of 20 February 2006;

⁸¹ See Article 6 of the Council of Europe Convention on Trafficking (2005);

⁸² See the Council of Europe Committee of Ministers recommendations no R (2000)11, cited above, p.4 and Rec(2001)16 para 72; also US State Department Report on Trafficking in Human Beings for 2007, paragraphs on Cyprus;

⁸³ Article 5 p.4, 5 of the Council of Europe Convention on Trafficking (2005), the UN Economic and Social Council Principles and Guidelines E/2002/68/Add.1, guideline 7, p. 6-9;

⁸⁴ See cases of *Celniku v Greece*, judgment of 5 July 2007, *Teren Aksakal v Turkey* judgment of 11 September 2007, *Silih v Slovenia*, judgment of 28 June 2007, *Brecknell v UK* judgment of 27 November 2007 in which the European Court found the public officials' impunity to violate States positive obligations to protect life;

⁸⁵ The UN Economic and Social Council Principles and Guidelines, E/2002/68/Add.1, Guideline 5;

⁸⁶ Article 29 of the Council of Europe Convention on Trafficking (2005);

⁸⁷ *Ibid*, Article 10;

⁸⁸ According to the international organisation on combating human trafficking "LaStrada", an effective identification depends on the national legislation and its incorporation of the definition of human trafficking, see the "Express" newsletter no 2 from 2006 dedicated to the identification of victims of human trafficking;

⁸⁹ The UN Economic and Social Council Principles and Guidelines, E/2002/68/Add.1, Guideline 4; Article 10 of the Council of Europe Convention on Trafficking (2005);

⁹⁰ See *Kontrova v Slovakia*, judgment of 31 May 2007;

⁹¹ Example of indicators taken from Norwegian organisation ROSA's "Identification manual" (2006): General indicators of a victim's profile, among others, can be: the woman has not arranged her own travelling, she has no passport or travel documents or she is in possession of false documents, she

trafficked person, such as front-line police officers, immigration services, detention centres workers and specialised police units (for instance anti-trafficking and domestic violence).⁹² A system for identification of victims of trafficking will be effective when it is independent from any criminal proceedings against those responsible for human trafficking.⁹³

35. **States must strengthen border and administrative controls** as may be necessary to prevent and detect trafficking in human beings.⁹⁴ This can be achieved by co-operation among countries of origin and destination with regard to a better management of international migration flows, especially schemes of legal labour exchange. The nature of measures taken is left to the States' discretion. However no measure should prejudice the right to freedom of movement or limit the protection provided to asylum seekers, refugees and migrants in international law.⁹⁵
36. Any measures taken by the States should have regard to the possibility of unintended consequences whereby prospective migrants become more dependent on traffickers as a result of more stringent border and administrative controls.⁹⁶ Additionally, administrative measures on regulation and monitoring of private employment, marriage, tourism, the sex industry and other sectors where trafficking in human beings is taking place, should be considered and implemented in combination with trainings for law enforcements.⁹⁷ These can contribute to reduction of the invisibility of human trafficking and related forms of exploitation, the identification of trafficked persons and collection of evidence to be used in criminal proceedings against traffickers.⁹⁸

3. The Duty To Investigate Effectively The Crimes Of Trafficking In Human Beings

37. There is an implied positive obligation on States to carry out an effective and diligent investigation into the circumstances surrounding a person's death when the authorities knew or ought to have known about the killing, committed either by a public official or another private person.⁹⁹ The duty to investigate was endorsed by the Court in various contexts under the Convention where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical and illusory but practical and effective.¹⁰⁰
38. Trafficking, like any other crime, should be investigated thoroughly, effectively and efficiently. The effectiveness of any investigation depends on the circumstances of each individual case however the Court has set out specific standards¹⁰¹ which require that an investigation should be independent¹⁰², be capable of leading to identification and punishment of perpetrators¹⁰³, ensure reasonable steps to secure evidence are taken¹⁰⁴, ensure promptness and reasonable expenditure of the investigation are observed¹⁰⁵ and the victim's family are involved as early as reasonably possible in the investigation to ensure sufficient public accountability¹⁰⁶.

doesn't know what kind of permit she has that allows her to enter the country. In addition there are health and behaviour indicators such as anxiety, depression, aggression, bodily injuries, insomnia, the woman avoids eye-contact, she rejects help, her story seems studied by heart, and others;

⁹² Limanowska, B. *Trafficking in Human beings in South-Eastern Europe: Current situation and Responses to Trafficking in Human beings in Albania, Bosnia and Herzegovina, Bulgaria, the Federal Republic of Yugoslavia, the former Yugoslav Republic of Macedonia, Moldova, Romania*, ODIHR/UNICEF/UNOHCHC, 2002, p.152;

⁹³ See Article 10 of the Council of Europe Convention on Trafficking (2005);

⁹⁴ *Ibid*, Article 7, Article 11 of Palermo Protocol;

⁹⁵ *Ibid*, Articles 8 and 9; Articles 12, 13 of Palermo Protocol;

⁹⁶ Parliamentary Assembly of Council of Europe recommendation 1325 (1997), cited above, para ii, iii; Recommendation 1306 (1996) on migration from the developing countries to the European industrialised countries;

⁹⁷ Council of Europe Committee of Ministers recommendations no R (2000)11 and Rec (2001)16 cited above;

⁹⁸ See the Report of the Experts Group of Trafficking in Human beings, European Commission, Brussels, 22 December 2004;

⁹⁹ *McCann and Other v UK* judgment of 27 September 1995, para 161; *Osman v UK* judgment of 28 October 1998 para 115; *Orhan v Turkey* judgment of 18 June 2002; *Assenov and Others v Bulgaria* judgment of 28 October 1998, para 93;

¹⁰⁰ *Ilhan v Turkey*, judgment of 27 June 2000 para 89-92; *Dikme v Turkey*, judgment of 11 July 2000 para 101;

¹⁰¹ See, e.g., judgments of 4 May 2001 issued in cases of *Kelly and Others v UK*, *Hugh Jordan v UK*, *McKerr v UK*, *Shanaghan v UK*;

¹⁰² *Gulec v Turkey* judgment of 27 July 1998 para 81-82; *Ergi v Turkey* judgment of 28 July 1998, para 83-84;

¹⁰³ *Ogur v. Turkey*, judgment of 20 May 1999, para 88;

¹⁰⁴ *Anguelova v Bulgaria* judgment of 13 June 2002 para 139, *Gul v Turkey* judgment of 14 December 2000 para 89;

¹⁰⁵ *Tas v Turkey*, judgment of 14 November 2000, *Yasa v. Turkey*, judgment of 1998 para 102-104;

¹⁰⁶ *Paul and Audrey Edwards v UK*, judgment of 14 March 2002 para 80 -81;

39. The above requirements of effectiveness in the context of human trafficking must be complemented with adequate guidelines aimed at securing the protection of victims¹⁰⁷ and securing the conviction of traffickers. When there is an arguable claim¹⁰⁸ that the person has been subjected to human trafficking for sexual exploitation, criminal proceedings should be able to identify and collect as soon as possible any evidence that may lead to the identification of those traffickers, their networks, types of activity and border crossing points. Facilitated by efficient, up-to-date legislation, the investigation should seek to establish the purpose of the exploitation, the duration and severity of any coercion used against the victim and measures taken by the traffickers to maintain control over the victim and prevent the escape.¹⁰⁹ It is absolutely crucial that the investigating authorities distinguish a case of human trafficking from smuggling in persons, which would deprive the victim of protection as a victim of trafficking. The rule of law and internationally recognised human rights must be respected in all aspects of the investigation of human trafficking.
40. Operational policies on victims and witness protection would be most effective where they complemented any criminal proceedings arising out of human trafficking offences.¹¹⁰ Adopted measures should be able to afford an effective and appropriate protection against any forms of intimidation and threats, whether direct or indirect, and be able to ensure that the traffickers do not become aware of the measures adopted in any particular case. Without prejudice to the assessment of evidence by domestic courts, criminal procedure should allow for the consideration of the impact of intimidation on testimonies and entire efficiency of the criminal proceedings. Acts of intimidation should be made punishable either as separate criminal offence or within the offence of human trafficking as an aggravating circumstance.¹¹¹
41. Appropriate rules of procedure should be adopted to enable the prosecution to initiate and conduct a criminal investigation on human trafficking independently from any victim's complaint. This would ensure that any attempt by traffickers to intimidate witnesses into withdrawing a complaint would not result in the suspension of any investigation.¹¹² In addition, provisions should be made to allow victims of trafficking to lodge complaints with the competent authorities of the State of his/her new place of residence, should he/she wish to do so. If the State of residence has no jurisdiction in the matter, it has an obligation to forward such a complaint to the competent authority of the State in whose territory the offence was committed.¹¹³

Conclusion

42. There is a clear obligation on the State to provide a legal framework within which persons at risk will be afforded protection. The obligation on States to carry out a thorough, effective and efficient investigation is of paramount importance in order to ensure that subsequent criminal proceedings avail of all the necessary evidence in order to secure the prosecution and conviction of perpetrators of this crime. In particular there is an obligation on the State to ensure that trafficking is prevented and, where it does occur, that it is properly investigated and that individuals engaged in such activity are prosecuted to the full extent of the law. It is respectfully submitted that the crime of trafficking in human beings requires an immediate and effective response from States to prevent continuing violations of fundamental human rights.

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¹⁰⁷ In light of States positive obligation to take action to protect persons within its jurisdiction from serious ill-treatment that infringes the absolute prohibition of Article 3 of the Convention, see further *A. v UK*, judgment of 23 September 1998, *H.L.R. v France* judgment of 29 April 1997, *Z. v UK* judgment of 10 May 2001;

¹⁰⁸ Among others, *Boyle and Rice v UK* judgment of 27 April 1988 para 81; *Varnava and Others v Turkey* judgment of 10 January 2008 para 128;

¹⁰⁹ In the case of *M.C. v Bulgaria*, cited above, this Court has stated that investigations require 'context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances', para 117;

¹¹⁰ Article 28 of Council of Europe Convention on Trafficking (2005), the Council of Europe Committee of Ministers recommendation no R(97)13 concerning intimidation of witnesses and the rights of the defence, adopted on 10 September 1997;

¹¹¹ See the Council of Europe Committee of Ministers recommendation No. R (97) 13;

¹¹² *Ibid*;

¹¹³ *Ibid* Article 27; the EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings; See Brussels Declaration on preventing and combating trafficking in human beings adopted by EU Member States, Russia, Ukraine, NIS countries, USA, Canada and many others;