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## **The crisis of a legal framework: protection of victims of human trafficking in Bulgarian legislation**

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The Council of Europe Group of Experts on Action against Trafficking in Human Beings reported that in Bulgaria no adult victim of human trafficking received any assistance and that no adult victim was granted a reflection period. A close examination of the Bulgarian legislative framework could explain this unpromising picture. In this article I develop three arguments in relation to the Bulgarian legislation on protection of trafficked persons. First, in some respects, Bulgaria has failed to fulfil its international obligations. Second, the national legal framework regulating the conditions under which trafficked person are assisted and protected is surrounded by legal uncertainty prone to arbitrariness. Third, the national legislation has been drafted from the perspective that Bulgaria is only a country of origin, which has created major gaps concerning protection of non-EU nationals who could be victims of human trafficking in Bulgaria. Despite its engagement with a single country, this article has wider relevance. It points out that some of the problems at national level originate from weaknesses within the Council of Europe Convention. It exposes the disconnect between, on the one hand, the interpretation of the trafficking definition for the purposes of criminal prosecution and, on the other hand, its interpretation for the purposes of determining the scope of individuals eligible for assistance and protection. It reveals the added value of the EU Trafficking Directive and the EU Residence Permit Directive.

**Keywords:** assistance for victims of human trafficking; Bulgaria; Group of Experts on Action against Trafficking in Human Beings (GRETA); human trafficking

### **1. Introduction**

In order to fulfil its international obligations under the Council of Europe Trafficking Convention and under EU law, Bulgaria has adopted The Combating Trafficking in Human Beings Act (hereinafter The Trafficking Act).<sup>1</sup> The objective of the Act is to regulate the conditions for affording individuals recognised as victims of human trafficking protection and assistance. In December 2011 the Group of Experts on Actions against Trafficking in Human Beings (GRETA) issued a report concerning the implementation of the Council of Europe Trafficking Convention (hereinafter the CoE Convention) in Bulgaria.<sup>2</sup> Since the CoE Convention imposes concrete obligations upon its state parties to protect and assist victims of human trafficking, it has been applauded for its victim-centred approach.<sup>3</sup> The report on Bulgaria, which represents the first comprehensive effort of subjecting the national anti-trafficking legislation to careful international scrutiny, reveals an unfortunate

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picture.<sup>4</sup> In 2008 and 2009 (the years for which statistics were available), there were no victims above 18 years of age who received assistance of any type. In 2008 and 2009, there were no victims above 18 years of age accommodated in shelters.<sup>5</sup> There has been no victim of trafficking granted compensation.<sup>6</sup> No victim of human trafficking was granted a reflection period.<sup>7</sup> No third-country national received a special protection status and a residence permit in his/her capacity as a victim of human trafficking.<sup>8</sup> The report notes that 'as regards foreign victims of trafficking, according to the statistical data provided by the Bulgarian authorities, only three cases have been identified in recent years (one from Poland and two from Moldova)'.<sup>9</sup>

The situation depicted above is not promising. At the same time, however, it does not remain in contrast to what is generally reported about assistance and protection of victims of human trafficking in other EU countries.<sup>10</sup> Nevertheless, it needs to be acknowledged that the situation in Bulgaria is particularly disturbing. In this article I argue that there are some peculiarities with the Bulgarian legislative framework on human trafficking which could explain the unpromising data.<sup>11</sup> First, in some respects, Bulgaria has failed to fulfil its obligations under the CoE Convention and relevant EU law. Second, the national legal framework regulating the conditions under which trafficked persons are assisted and protected is surrounded by legal uncertainty prone to arbitrariness. This results in a lack of predictability as to when and under what conditions individuals should be assisted and protected. This situation is incompatible with the notions of foreseeability and lawfulness. Third, the national legislation has been drafted from the perspective that Bulgaria is only a country of origin, which has created major gaps concerning protection of non-EU nationals who could be victims of human trafficking in Bulgaria.

I take the following path in developing my arguments. First, I explain that under the Bulgarian legislation there are two definitions of human trafficking: one for the purposes of criminalisation and another for identifying individuals as victims for affording them protection and assistance. The latter definition has more restrictive scope, which means that a person might be a victim for the purposes of convicting the alleged traffickers and not a victim for the purpose of benefiting from assistance. This inconsistency is not precluded by the applicable international law. Yet, it raises serious questions about the integrity of the definition of human trafficking. It gives bases for uncertainty whether individuals who are victims from the perspective of the criminal trial will receive any assistance in their capacity as victims of human trafficking.

Second, the national procedure for formal identification of victims of human trafficking does not guarantee an objective assessment. I demonstrate that the process of identification of individuals as victims of trafficking and any practical benefits ensuing from the formal identification are severely undermined by the badly drafted national legislation.

The last section of the article is devoted to immigrants (non-EU nationals) in Bulgaria who could be victims of human trafficking. I show how significant it is that Bulgaria is also perceived as a country in which immigrants could be trafficked and abused. Regarding this vulnerable group of individuals, Bulgaria is in clear violation of its international obligations since the national legal framework does not provide for a recovery/reflection period which could prevent deportation. Resorting to the system of applying for asylum in Bulgaria could be equally futile. In addition, major inconsistencies between the national legislation on human trafficking and the national immigration laws expose victims to arbitrariness.

The development of the above arguments presupposes reference to the CoE Convention, the Trafficking Directive and the Residence Permit Directive since they are the roots from which the national legislation originates.<sup>12</sup> However, the present article does not engage in a detailed analysis of the international law and the EU law. This would be

both a tedious and unnecessary task since they have been an object of extensive analysis in other contributions.<sup>13</sup> The focus is rather on the relevant national legislation, including its interpretation by the Bulgarian Supreme Court of Cassation. The interaction between different national laws and how this interaction plays out in regard to individuals who could be victims of trafficking also constitutes a focus of this article.

Despite its engagement with a single country, this article has wider relevance. It points out that many of the problems at national level originate from weaknesses within the CoE Convention. It exposes the disconnect between, on the one hand, the interpretation of the trafficking definition for the purposes of criminal prosecution and, on the other hand, its interpretation for the purposes of determining the scope of individuals eligible for assistance and protection. It reveals the added value of the EU Trafficking Directive and the EU Residence Permit Directive.

## 2. Two national definitions of human trafficking for two different purposes

Article 4(a) of The CoE Convention stipulates that

'Trafficking in human beings' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, *by means of* the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, *for the purpose of exploitation*. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>14</sup>

As it is generally explained, the definition consists of three elements: the 'action' element (recruitment, transportation, transfer, harbouring or receipt), the 'means' element (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) and the 'purpose' element (exploitation).<sup>15</sup> The CoE Convention also defines the term 'victim' as any natural person who is subject to trafficking in human beings as defined above. Thus, the above cited definition of human trafficking applies for the purpose of criminalisation and for the purpose of identifying individuals as victims so that protection and assistance mechanisms can be triggered.<sup>16</sup> In contrast, the Bulgarian legislation has two different definitions of human trafficking: one for the purposes of criminalisation and another one for identifying individuals as victims for the purpose of affording them protection and assistance. The criminal law regime rests on Section IX the Bulgarian Criminal Code. The protection and assistance regime rests on a different piece of legislation: The Trafficking Act. The latter act stipulates that a victim is any person who has been an object of human trafficking. For the purpose of the Trafficking Act,

1. 'Trafficking in human beings' means the recruitment, transportation, transfer, concealment or receipt of human beings, regardless of their own will, by means of coercion, abduction, unlawful deprivation of liberty, fraud, abuse of power, abuse of a state of dependence, or by means of giving, receiving or promising benefits to obtain the consent of a person who has control over another person, when it is carried out for the purpose of exploitation;
2. 'Exploitation' means illegal use of human beings for debauchery, removal of physical organs, forced labour, slavery or servitude.<sup>17</sup>

As the above quotation demonstrates, there is an obvious synchronisation between the international definition and the national definition as set out in The Trafficking Act.

The definition of human trafficking in the Bulgarian Criminal Code can be broken down into the following separate elements.<sup>18</sup> The 'action' element consists of recruitment, transportation, harbouring or receipt of individuals. Any of these actions has to be committed for the purpose of debauchery, forced labour, removal of organs, keeping somebody in forceful subjection or selling the child of a pregnant woman. It is explicitly stated in the Criminal Code that the consent of the trafficked person is irrelevant.<sup>19</sup> Under the Bulgarian legislation a no 'means' element is required so that the crime of human trafficking is constituted.<sup>20</sup> Consequently, the criminal law definition and the definition in The Trafficking Act can be differentiated in at least one important way. Since the 'means' element is absent in the criminal law definition but present in The Trafficking Act's definition, for persons to qualify as victims and to be offered assistance, some manner of 'means' should have been used against them (they should have been recruited or transported by means of deception, coercion, and so on). Accordingly, an individual could be a trafficked person for the purposes of initiating criminal prosecution and obtaining convictions against the perpetrators, yet the same individual might not be a trafficked person for the purposes of assisting him/her since no 'means' might have been employed. These appear to be contradictory approaches in addressing the category of victims of human trafficking. On the one hand, from the perspective of the national criminal law, there is a victim since a person might have been transported for the purposes of debauchery, which will be sufficient for qualifying the transportation as human trafficking. On the other hand, that same person will not be a victim and thus eligible for assistance and protection under The Trafficking Act since he/she might not have been transported by means of deception or coercion.

James Hathaway has raised an argument that the requirement of particular 'means' results in restricting the scope of abuses which could be defined as human trafficking and which are therefore worthy for consideration.<sup>21</sup> Hathaway's concern has been confirmed by the Dutch National Rapporteur on Human Trafficking. She has reported that when the Dutch courts find that there has not been abuse of vulnerable position since the alleged trafficker was not aware of the vulnerable position of the migrant, the courts do not proceed to consider the question of whether exploitation has taken place.<sup>22</sup> In light of the Bulgarian legislation, Hathaway's concern has been confirmed. In fact, it is augmented since there has been a clear intention to restrict the scope of abuses defined as human trafficking when the trafficking definition is applied for the purposes of identifying trafficked persons for assistance.

In this context, reference should be made to an Interpretative Decision of the Bulgarian Supreme Court of Cassation dated 16 July 2009.<sup>23</sup> The Interpretative Decision addressed the elements of the crime of human trafficking as defined in the Bulgarian Criminal Code.<sup>24</sup> The Supreme Court of Cassation observed that by removing the 'means' as an element of the crime of human trafficking, the Bulgarian legislature has allowed the possibility for holding *more* individuals criminally responsible for human trafficking since no coercion or deception has to be proven. This suggests that there is a general recognition that the 'means' element is sufficiently hard to prove to justify it being removed altogether from the elements of the crime. The Supreme Court of Cassation explained the discrepancy between the Bulgarian criminal legislation and the international definition of human trafficking by referring to the principle of state sovereignty. In particular, it emphasised the sovereignty of the state to define the elements of the crimes in view of the national needs for effective legal regulation and the specificities of the state.

A question which transpires at this junction is whether by modifying the definition of human trafficking in its criminal law Bulgaria is in violation of its international obligations. In relation to this question, it needs to be clarified that the international obligation of criminalising human trafficking does not imply that states have to adopt an identical definition of human trafficking as found in international law at the domestic level. The concrete elements of the criminal conduct are left for the discretion of each state. The states parties to transnational criminal law treaties are under no obligation to incorporate the crime proscribed in the international treaty with identical subjective and objective elements or identical wording.<sup>25</sup> Therefore, states preserve their sovereign powers as to how to concretely define the elements of the crime of human trafficking. This is made explicit by Article 11(6) of the UN Convention against Transnational Organized Crime.<sup>26</sup> To the same effect, The Explanatory Report to the CoE Trafficking Convention clarifies that

It was understood by the drafters that, under the Convention, Parties would not be obliged to copy *verbatim* into their domestic law the concepts in Article 4 [the definition of human trafficking], provided that domestic law covered the concepts in a manner consistent with the principles of the Convention and offered an equivalent framework for implementing it.<sup>27</sup>

Accordingly, states might have the label of human trafficking within their national criminal legislation; however, they are under no obligation to define human trafficking in the same way as it is defined at international law level. States have discretion and can take into consideration local peculiarities when construing the elements of the criminal offence. Thus, the answer to the above posed question is negative: by modifying the elements of the crime and more specifically by removing the ‘means’ element Bulgaria is not in breach of its international law obligations.

Yet, the implications from the existence of two definitions at the level of the national legislation need to be examined. Pursuant to the Bulgarian legislation, the answer to the question whether a particular individual is ultimately a victim or not, depends on the purpose for which one is asking the question. If the purpose is to obtain more convictions, the victims are extant. On the other hand, if the purpose is to assist and protect individuals, then these individuals might not be recognised as victims. Removal of the ‘means’ element from the criminal law definition was justified with the onerous difficulties in obtaining sufficiently probative evidence to reach a conviction; yet the same difficulties are not considered part of the policy calculus when the objective is recognising individuals as victims so that they can receive assistance. The definition of human trafficking for the purposes of assisting and protecting victims has a *more limited scope* and it is intended to encompass fewer individuals.

Strangely, in its Interpretative Decision, the Bulgarian Supreme Court of Cassation argued in favour of a separate and more limited definition for the purposes of assistance and protection. It buttressed its argument by emphasising that under the criminal law regime, the range of victims of trafficking had been expanded since it included persons who had not suffered violence or any other form of unlawful infringement of their personal integrity.<sup>28</sup> Pursuant to the Supreme Court of Cassation’s reasoning, if a person has not suffered violence or any other form of unlawful infringement of personal integrity, the person has not been coerced or deceived and does not need assistance under The Trafficking Act. The Bulgarian Supreme Court of Cassation’s reasoning promotes robust law enforcement agenda with little regard to protection and assistance.<sup>29</sup> If the Court of Cassation’s interpretation is viewed from the perspective of a woman whose immigration to work as a prostitute was facilitated and she was subsequently repatriated back to Bulgaria, the following



transpires. She could be considered as a trafficked person for the purposes of the criminal law. She will not be a victim of trafficking for the purposes of assistance and protection. This result is very unfortunate. Although her immigration might have been voluntary, the woman might have been subjected to violence once in the country of destination where she worked as a prostitute. In addition, once repatriated back to Bulgaria she might face economic and social hardships and might be in need of assistance. Her country of nationality, viz. Bulgaria, seems to be an appropriate actor for offering her protection and assistance. Bulgaria will not make this offer to her in her capacity as a victim of human trafficking since she will not fall under the scope of The Trafficking Act.

In conclusion, the intellectual integrity of the concept of human trafficking becomes suspect since as it is utilised at national level it creates mutually exclusive conveniences. If the definition of human trafficking is employed for the purpose of law enforcement, its scope appears over-inclusive. However, if it is employed for the purpose of offering protection and assistance to individuals, its scope becomes under-inclusive. Individuals who are victims from the perspective of the criminal trial cannot be certain that they will receive any assistance in their capacity as victims of human trafficking. The adverse consequences are underscored in the data revealed in the GRETA's report and mentioned in the introduction of this article.

### 3. The procedure for formal identification of individuals as trafficked

In addition to the restrictive scope of the definition of human trafficking when applied for the purpose of assisting individuals, there are further problems related to the procedure for victim identification. The procedure as regulated by the national legislation can be divided into two stages: informal identification and formal identification.<sup>30</sup> The informal identification could be carried out by any institution or non-governmental organisation, including by the alleged victim himself/herself.<sup>31</sup> The formal recognition is done by the pre-trial proceeding authorities responsible for criminal investigation and by the prosecutor. The significance of the informal recognition stage should not be overemphasised since, as will be demonstrated below, the ensuing benefits are very limited. The process of formal recognition is of substantial importance. Formal recognition is achieved through the conferral of a special protection status.

For the purposes of clarity, I will quote the provisions from The Trafficking Act relevant to the procedure for formal identification of individuals as victims of trafficking.

#### Article 25

Individuals who are victim of trafficking and have declared their willingness to cooperate for disclosure of the perpetrators of trafficking shall be granted special protection status for the time of the criminal proceedings, which includes

1. Permission for foreign nationals for long-term stay in the country.
2. Extension of the accommodation period in the shelters.

#### Article 26

- (1) After identifying the persons as victims of human trafficking, the pre-trial proceeding authorities shall immediately inform them about the possibility of receiving special protection, if within one month the victims declare willingness to cooperate for the disclosure of the crime.
- (2) [...]

#### Article 27

- (1) Within three days of the filing of the request of the victim of human trafficking, the Prosecutor shall issue a degree granting the individual a special protection status.



- (2) Denial of the status in paragraph 1 may be appealed within three days before a higher-level Prosecutor, who shall make a decision concerning the appeal immediately.

It is noteworthy that the Bulgarian legislation does not envision a stage at which there are only reasonable grounds to believe that a person has been trafficked.<sup>32</sup> This lacuna is at considerable cost for trafficked persons who are third-country nationals. For now, however, the precarious situation of third-country nationals recedes into the background in order to re-emerge later in the text. At this junction I will rather focus on other important aspects from the above-quoted provisions.

There is some ambiguity as to which body formally identifies individuals as trafficked. On the one hand, the pre-trial proceeding authorities identify victims. They do this for the purpose of informing them about the possibility for being granted special protection status. The pre-trial proceeding authorities convey the information about the special protection status only if the person is willing to cooperate for the purpose of disclosing the crime. However, it is ultimately the prosecutor who makes the formal identification whether individuals are trafficked persons. It is noteworthy that neither the pre-trial proceeding authorities nor the prosecutor is an independent body. These are bodies with mandates to investigate and prosecute crimes and, in principle, they have little to do with social assistance. A question which surfaces at this point is whether the above depicted procedure is in violation of Bulgaria's obligations under the CoE Convention.

Article 10(1) of the CoE Convention stipulates that:

Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with the relevant support organizations, so that *victims can be identified in a procedure* duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention [emphasis added].<sup>33</sup>

The state parties to the CoE Convention adopt the obligation to ensure the availability of competent national authorities to identify victims of human trafficking. These authorities have to be specifically trained in identifying and helping victims. In addition, states are under the obligation to ensure collaboration between different national authorities so that victims can be identified. Finally, Article 10(1) of the Council of Europe Trafficking Convention requires that states have a procedure for victim identification. The specific regulation of the procedure is, however, left for each state to determine. The particular national body responsible for victim identification is left within the discretion of each state. Bulgaria has chosen that the formal identification of persons as trafficked is done by the pre-trial proceeding authorities and by the prosecutor. Other states have made different choices.<sup>34</sup> In this context, there is little basis for arguing that Articles 25, 26 and 27 of The Trafficking Act render Bulgaria in violation of its international obligations. In addition, the CoE Convention does not demand that the competent national authorities responsible for victim identification are independent.<sup>35</sup> Neither does it provide for an independent review (for instance, by a judicial body) of the refusal by the competent authorities to recognise an individual as a victim of human trafficking.<sup>36</sup>

Yet, as the identification of individuals as victims is regulated at national level, the identification is made with one sole objective in mind, viz. criminal investigation and prosecution. This might be in conflict with Article 12(6) of the CoE Convention, which stipulates that 'Each Party shall adopt such legislative or other measures as may be necessary to

ensure that assistance to a victim is not made conditional on his or her willingness *to act as a witness* [emphasis added].<sup>37</sup> It is of significance, however, to comprehend the true meaning of the quoted provision. It says that assistance should not be contingent on the victim's willingness to act as a witness. This does not necessarily mean that states cannot make assistance contingent on the victim's willingness to cooperate in the criminal investigation in other possible forms.<sup>37</sup> The Bulgarian legislation refers to the victim's willingness to cooperate for the disclosure of the crime. Cooperation for the disclosure of the crime is more general in scope than acting as a witness. In addition, Article 12(6) of the CoE Convention is framed vaguely. The latter provision does not regulate concretely how the process of victim identification and of affording assistance should be independent from victims' willingness to act as a witness. In contrast, Articles 10, 13 and 14 of the CoE Convention concretely deal with the procedure for victim identification and they do not explicitly guarantee disconnectedness between identification and cooperation by the victim in the criminal investigation. Therefore, the CoE Convention does not explicitly envision a procedure different from what has been developed in Bulgaria.

In comparison with Article 12(6) of the CoE Convention, Article 11(3) of The EU Trafficking Directive is framed differently:

Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the *victim's willingness to cooperate in the criminal investigation, prosecution or trial*, without prejudice to Directive 2004/81/EC [the Residence Permit Directive] or similar national rules [emphasis added].

The first part of this provision clarifies that the victim's willingness to cooperate should not be a precondition for assisting him/her.<sup>38</sup> Evidently, this has not been achieved in the Bulgarian legislation. The second part of Article 11(3) of The EU Trafficking Directive, which refers to the Residence Permit Directive, means that cooperation by the victim can be required for the purpose of granting him/her a residence permit. Pursuant to the Bulgarian legislation, cooperation is indeed required so that a residence permit is granted.

The ultimate problem is that in the eyes of the Bulgarian legislation victims exist, or, in other words, individuals are recognised as victims, only if they cooperate for the disclosure of the crime. There is no stage at which a person is recognised as a victim just for the purposes of affording him/her assistance. There is complete convergence between victim identification and the requirement for cooperation with the authorities. A situation in which an individual is recognised as a victim and is assisted, but does not cooperate for the disclosure of the crime is not envisioned by the national legislation. In the logic of the Trafficking Act, if he/she does not cooperate, he/she would not be a victim.<sup>39</sup>

#### 4. The benefits from formal identification as a victim of trafficking

In this section, I scrutinise the substance of the assistance and protection offered to victims of human trafficking in Bulgaria. The question to be analysed is if one happens to be recognised as a victim under The Trafficking Act what positive consequences could be expected in terms of assistance and protection. The Trafficking Act establishes shelters for temporary housing and centres for protection and support of victims of trafficking. The shelters ensure: normal living and sanitary conditions; provision of food and medication; emergency medical and psychological services; and assistance in establishing contact with relatives, competent agencies and support organisations.<sup>40</sup> The shelters accommodate persons who *claim* to be victims of trafficking. The person himself/herself could declare that he/she is

a victim and request shelter. This is an informal identification of an individual as a victim. The period of accommodation is up to 10 days.<sup>41</sup> Therefore, at the stage of informal identification, the only ensuing benefit is accommodation for 10 days. After the initial 10 days, there could be a 30-day extension. The extension can be requested by the individual. However, it is granted *only* upon a recommendation by the local anti-trafficking commission (this is a state body), the pre-trial proceeding authorities, or the court.<sup>42</sup> The national law does not regulate the conditions under which the local anti-trafficking commission, the pre-trial proceeding authorities or the court take a decision for prolonging the period of accommodation. The national legal framework is far from unambiguous whether the 30-day extension is granted only after a formal recognition of the person as a victim of trafficking, which implies granting the person a special protection status.

The eventual conferral of a special protection status clearly entitles the person to accommodation in the shelters. Since the status is granted only upon cooperation for the purpose of disclosing the alleged crime, a place in the shelter will not be offered if a person has been subjected to trafficking but refuses to cooperate.

A sub-law entitled Regulation on Shelters for Temporary Housing and Centres for Protection and Support of Victims of Trafficking sheds further light on how the accommodation in the shelters is regulated.<sup>43</sup> The sub-law stipulates that within 24 hours from admission to the shelter, the pre-trial proceeding authorities have to be informed thereof.<sup>44</sup> Beyond the implications for the right to privacy that this requirement holds, an immediate submission of information to the pre-trial proceeding authorities *irrespective of the will of the individual* raises doubts concerning the true objective of the shelters. The shelters appear as instruments for initiation of criminal proceedings. The victim may have reservations as to whether the pre-trial proceeding authorities should be made aware of his/her matter. The victim may be hesitant as to whether the state authorities will be efficient in providing sufficient protection against reprisals from the perpetrators.<sup>45</sup> The person who seeks shelter might doubt whether he or she will be formally recognised as a victim. Such recognition is contingent on the authorities' discretion, and if the authorities do not regard the individual as useful for the purpose of criminal prosecution and investigation and the initial 10 days have passed, he or she might not expect further assistance. Moreover, even if the individual is formally recognised as a victim and the 30 days of shelter expire, the provision of shelter is extended *only* if the person agrees to cooperate for the purposes of disclosure of the alleged crime.<sup>46</sup>

In conclusion, the shelters appear as a decoy, designed in furtherance of the state's principle objective of initiating criminal proceedings and obtaining convictions, vis-à-vis being *bona fide* instruments of social policy. Further on, the balance between the benefits flowing from being sheltered and the dangers that accrue to the trafficked person once he or she comes under the auspices of the state's authorities, is uncertain. Although a person might be provided with shelter, the subsequent exposure to dangers prior to or during the ensuing criminal proceedings and thereafter might undermine the enduring value of the assistance.

The centres for protection and support of victims of trafficking (hereinafter 'centres') serve the following purposes: provision of simple-language information regarding the administrative and judicial procedures that administer victim support and protection; ensuring specialised psychological and medical services; and facilitation of victims' re-integration into the family and the social environment.<sup>47</sup> This type of assistance is provided to individuals formally recognised as victims of human trafficking and not to individuals who claim to be victims. The national legislation does not contain an answer to the question of what happens if an individual refuses to act as a witness or in any way to assist the

criminal investigation but nevertheless wishes to avail himself/herself of the assistance offered by the centres. The national legislative framework is characterised by ambiguity as to the access to assistance by individuals who do not want to cooperate.

Additional observations as to the substance of the assistance provided by the centres also need to be included. The substance of that assistance remains vague and its practical meaning indeterminable because The Trafficking Act contains terms and conditions whose meaning is hard to assess. It does not offer answers to questions of paramount importance. For instance, it is not clear whether specialised psychological and medical services are provided if the trafficked person has no health insurance.<sup>48</sup> It is equally unclear whether victim reintegration extends to assistance in finding employment.<sup>49</sup> The certainty and clarity that characterise well-crafted instruments of judicial and social policy appear absent in this instance.

### 5. Victims of human trafficking who are third-country nationals

Bulgaria is, in principle, perceived as a country of origin. In accordance with this perception, when human trafficking is discussed in Bulgaria, the underlying assumption is that the victims of human trafficking are Bulgarian nationals who have been repatriated from Western European countries.<sup>50</sup> However, it would be incorrect to perceive Bulgaria as only a country of origin. Bulgaria is also a destination of immigrants (the scope of the term 'immigrants' is herein restricted to non-EU nationals, who are also referred to as third-country nationals) who arrive in the country by various channels, including illegal channels.<sup>51</sup> Many of them willingly or unwillingly stay and work in the country. It should also be kept in mind that Bulgaria is at the external borders of the EU, which leads to many immigrants being returned to the country under the Dublin mechanism.<sup>52</sup> As failed asylum-seekers and/or as undocumented migrants, many of them have no legal grounds to stay in the country and, therefore, a procedure for their deportation is initiated upon contact with the state authorities. They might be exposed to abusive practices in the process of their migration and once in Bulgaria. Therefore, the national legal framework on human trafficking is of relevance to them. My objective in this section is to examine the significance of The Trafficking Act to victims of human trafficking in Bulgaria who are non-EU nationals. I investigate to what extent Bulgaria has fulfilled its international law and EU law obligations regarding this category of individuals.

Prior to a detailed analysis of the national legislation, a clarification of the pertinent provisions from the CoE Trafficking Convention is necessary. The latter convention establishes two stages for victim identification: a 'reasonable grounds' to believe stage and a 'conclusive decision' stage. The availability of a preliminary stage in which a person is only suspected to be a victim of human trafficking ('the reasonable grounds to believe' stage) is justified with the precarious immigration status of victims. If victims' presence in the territory of the country of destination is irregular, upon contact with the state authorities, a procedure for their deportation can be initiated. Therefore, they might be removed before being conclusively identified as victims, which could prevent provision of immediate assistance and could hamper their use as witnesses in potential criminal proceedings.<sup>53</sup>

The first stage of victim identification is regulated in the following way:

Each party shall ensure that, if the competent authorities have *reasonable grounds to believe* that a person has been victim of trafficking in human beings, *that person shall not be removed from its territory* until the identification process as victim of an offence provided for in Article 18 of this Convention [the offence of human trafficking] has been completed

by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2 [emphasis added].<sup>54</sup>

From the perspective of the state, the rationale behind the first stage is to have time to make a conclusive decision without removing the presumed victim from its territory. From the perspective of the presumed victims (individuals in regard to whom there are reasonable grounds to believe that they are victims), the first stage of the identification process guarantees them at least a 30-day period of grace. This is called a recovery and reflection period, during which time they are allowed to remain on the territory of the host state for at least 30 days and are provided with minimum support and assistance. More specifically, Article 13(1) of the CoE Convention stipulates that:

Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers *and/or to take an informed decision on cooperation with the competent authorities* [emphasis added].

The inclusion of an intermediate stage can serve the important purpose of temporarily preventing deportation when the state authorities have not yet decided whether the suspected victim is indeed a victim. Therefore, the reflection period can have important safeguarding functions. In this respect it could be interpreted as an accommodation between the migrants' protection needs and the host state's immigration control objectives. The host state agrees to delay removal from its territory and to provide a minimum level of assistance, until it makes a conclusive decision whether the migrant is a trafficked person.

### **5.1. No 'reasonable grounds to believe' stage and no recovery/reflection period in the Bulgarian legislation**

The Bulgarian Trafficking Act does not provide for a stage at which there are only reasonable grounds to believe that an immigrant is a trafficked person and thus non-deportable. If an immigrant is encountered by the authorities and he/she has no legal ground to stay in the country, he/she will be issued with a deportation order and practical measures as to his/her deportation can be initiated. The Trafficking Act cannot provide a legal basis for postponing the deportation if there are reasonable grounds to believe that the person is a victim of human trafficking. In this sense, Bulgaria has failed to fulfil its obligations under Article 10(2) of the CoE Convention.

Furthermore, and in relation to the lack of 'reasonable grounds to believe' stage, The Trafficking Act does not provide for a recovery and reflection period. Article 13 of the CoE Convention is very clear to the effect that '[e]ach State Party shall provide in *its internal law* a recovery and reflection period of at least 30 days [emphasis added]'. This means that the national legislation has to explicitly provide for and regulate the recovery and reflection period. Similarly, Article 6(1) of the EU Residence Permit Directive stipulates that the national legislation has to specifically regulate the duration and the starting point of the reflection period.<sup>55</sup>

Bulgaria argued before GRETA that Article 26 of The Trafficking Act can be interpreted to the effect that it provides for a reflection period.<sup>56</sup> However, this provision from the national legislation refers to a stage at which the person is already formally identified as a victim. The above quoted national provision does not refer to the required standard of



proof, namely ‘reasonable grounds to believe’. GRETA invited the Bulgarian authorities ‘to review the legislation in order to ensure that the recovery and reflection period provided for in Article 13 of the Convention is *specifically* defined in Bulgarian law [emphasis added].’<sup>57</sup> In fact, however, there is no recovery/reflection period in the national legislation either explicitly or implicitly. Accordingly, undocumented migrants in Bulgaria who could be victims of human trafficking are left without proper protection.

In this context, the Bulgarian constitution should also be taken into consideration. The constitution stipulates that ratified international treaties become part of the national legislation and they have primacy over any conflicting provisions of the legislation.<sup>58</sup> Bulgaria ratified the CoE Convention in 2008.<sup>59</sup> Therefore, it could be argued that the CoE Convention is directly applicable and it has supremacy over conflicting provisions of the domestic legislation. If the national legislation stipulates that an undocumented migrant has to be deported, this could be in conflict with Article 10(2) of the CoE Convention. This is a viable line of legal reasoning. The problem is that due to the lack of specific national legislation stipulating that the immigration authorities should suspend deportation upon reasonable grounds to believe that a migrant is a victim of trafficking, by the time his/her lawyer tries to prevent removal by submitting arguments before a court of law based on the Bulgarian constitution the person might already have been deported. In light of the above, the recovery/reflection period needs to be expressly guaranteed in the national legislation.

The above omission is very troublesome. Taking into consideration the applicable Bulgarian legislation and the practice of the Bulgarian authorities regarding undocumented migrants, I would like to investigate the question of what could happen to an undocumented migrant who could be a victim of trafficking. Deportation orders are usually issued with a ruling of their preliminary execution, which means that appeal against them has no suspensive effect unless an asylum application is registered.<sup>60</sup> I will revert later to the interaction between the processes of applying for asylum and the national human trafficking legal framework. Based on the deportation order, many undocumented migrants are kept in administrative detention pending their deportation. Valeria Ilareva has extensively reported on the legislative deficits regarding the rights of immigrants kept in administrative detention in Bulgaria.<sup>61</sup> For example, Ilareva has reported that immigrants spend months in detention before they manage to get access to the order for their detention and the reasons for its issuance.<sup>62</sup> In addition to general legal and practical deficiencies concerning the protection of immigrants in administrative detention, Bulgarian legislation is characterised by further inadequacies, specifically in regard to victims of human trafficking. For example, the relevant national legislative framework does not regulate any process to be followed by the authorities in the detention centres in case a detained immigrant could be a victim of human trafficking. There is no obligation imposed upon the authorities in the detention centres to forward the issue to any other competent body.<sup>63</sup> This constitutes an obstacle for triggering the application of The Trafficking Act. Above all, however, even if the application of the latter act is triggered, the responsible authorities can proceed with the planned deportation because there is no law specifically barring them from doing so. If the national legislation were to provide for a reflection/recovery period, then there would be a legal basis for suspending the deportation proceedings. Suspension of the deportation proceedings implies releasing the immigrant from administrative detention.<sup>64</sup> Once released, the migrant has much broader opportunities for accessing legal assistance, which is vital in his/her circumstances.

Since The Trafficking Act is useless for the purpose of suspension of deportation proceedings, it is worth examining whether other legal mechanisms might achieve the desired effect. More specifically, resort to the protection mechanisms afforded to asylum-seekers

might be helpful. Pursuant to the Bulgarian Asylum and Refugees Act, any immigrant can submit an application for asylum. Upon registration of the application the deportation proceedings are suspended.<sup>65</sup> This is in fulfilment of the prohibition on *refoulement*, which is the bedrock principle in refugee law.<sup>66</sup> Importantly, the submission of an application for asylum does not automatically lead to its registration.<sup>67</sup> The application has to be registered by the National Refugee Agency. In Bulgaria, asylum applications are not registered at the moment of their submission. This results in arbitrariness. The applicable national law does not ensure that the submission of the application necessary leads to its registration. Neither does it provide for a time period within which the submitted application has to be registered.<sup>68</sup> As a result, asylum-seekers are removed from the territory of Bulgaria as irregular migrants before the National Refugee Agency registers their applications.<sup>69</sup> Therefore, due to the above-described gap, migrants, including victims of human trafficking, are left without protection against deportation.

Even if an immigrant is registered as an asylum-seeker and is released from administrative detention, the national legislation does not establish any legal basis ensuring collaboration between The National Refugee Agency and the shelters and the centres for protection and support of victims of trafficking. Article 10(1) of the CoE Convention imposes an obligation on Bulgaria to ensure *inter alia* that the different authorities collaborate with each other so that victims can be identified. Compliance with this obligation implies that there should be a procedure established by law for referring potential trafficking cases.

## 5.2. *The conflict between the special protection status and Bulgarian immigration laws*

The above analysis exposed the legislative gaps concerning the process of formal identification of migrants as victims of human trafficking. This section proceeds to examine the challenges after the conferral of special protection status by the prosecutor. For the duration of the criminal proceedings, this status ensures two benefits: legal migration status (permission for long-term residence in the country) and accommodation in shelters. The question under review in this section is how and under what conditions is an immigrant recognised as a trafficked victim by the prosecutor and able to receive legal migration status in Bulgaria. I advance an argument that there is a major clash between The Trafficking Act and The Foreigners in the Republic of Bulgaria Act (hereinafter The Foreigners Act), which has the unfortunate effect of eviscerating the special protection status of meaning.<sup>70</sup>

Article 28 of The Trafficking Act stipulates that

(1) Long-term stay permission shall be issued in accordance with The Foreigners in the Republic of Bulgaria Act by the competent administrative control services with the Ministry of Interior, based on the decree issued pursuant to Article 27 [Article 27 stipulates that the prosecutor shall issue a decree granting the migrant a special protection status].

(2) During their stay in the country, the individuals who have obtained permissions under paragraph 1 shall be entitled to the same rights as the rights held by the permanent residents in the country within the meaning of The Foreigners in the Republic of Bulgaria Act, barring the right under Article 35(2) thereof.

(3) Permissions under paragraph 1 shall not be granted to individuals who do not possess identity documents and refuse to co-operate with their identification.

Since The Trafficking Act refers to The Foreigners Act, it is necessary to analyse the preconditions for the issuance of permissions for long-term residence as regulated by the latter act. In



principle, possession of visa D is a necessary precondition for granting migrants long-term residence permissions.<sup>71</sup> Up until 2012 when The Foreigners Act was amended, victims of human trafficking granted special protection status were also required to have entered the country with visa D in order to receive long-term residence. The Bulgarian legislation prior to its amendment created an absurd situation: victims who entered the country without this specific type of visa could not receive a long-term residence permit. In 2012 The Foreigners Act was amended and the requirement for visa D was lifted.<sup>72</sup> Yet, there are further requirements applicable to immigrants granted special protection status that need to be fulfilled so that they are granted permission for long-term residence. Victims need to have a valid passport.<sup>73</sup> Those victims who do not have a passport or who have a falsified passport cannot be granted a residence permit.<sup>74</sup> Victims can enter the country through various illegal means. The Foreigners Act does not allow the possibility for granting a residence permit for immigrants who have entered illegally. At the same time, The Trafficking Act does not provide an exception for victims of human trafficking, which could bar the application of the requirement for legal entry so that a permit is issued. This situation of the national legislation is not in compliance with Article 3 of the EU Residence Permit Directive, which says that

Member States *shall* apply this Directive to third-country nationals who are, or have been victim of offences related to the trafficking in human beings, *even if they have illegally entered the territory of the Member States* [emphasis added].

The removal of the requirement for visa D does not fulfil the above obligation. Illegal entry can be constituted by other means, not only by entering without a visa.

The Foreigners Act raises additional requirements. For foreigners to be issued permission for residence they should have (i) a guaranteed home, (ii) they should have paid the obligatory national health insurance contributions, and (iii) they should prove means of supporting themselves without being dependent on the national social support system.<sup>75</sup> It could be argued that The Trafficking Act resolves the first of the above-mentioned conditions since migrants granted special protection status continue to be accommodated in the shelters for as long as the criminal proceedings are ongoing. It is highly questionable, however, to what extent victims will be able to demonstrate that they have means of supporting themselves, which presupposes gainful employment. Due to this requirement, the Bulgarian legislation puts victims granted special protection status in a paradoxical situation. If they are granted a residence permit they have access to the labour market.<sup>76</sup> However, in order to be granted the residence permit, they need to prove means of supporting themselves, which presupposes proof of employment. By requiring proof of gainful employment, The Foreigners Act imposes a contradictory restraint. And, lastly, it is doubtful whether victims can prove that they have paid contributions to the national health insurance fund.

A sub-law entitled Regulation on the Implementation of the Foreigners in the Republic of Bulgaria Act also needs to be taken into account. This regulation is intended to regulate in more detail the necessary documents that a foreigner has to submit in order to be granted a permit for residence. It requires that victims of human trafficking pay a fee in order to be granted a residence permit.<sup>77</sup> The fee is 200 lv (€100) for up to six months' long-term presence and 500 lv (€250) for up to one year's long-term presence.<sup>78</sup> The national legislation does not exempt victims of human trafficking from paying these fees.

What emerges from the above analysis is that there is a collision between two legal regimes: on the one hand, the regime of special protection for identified victims of human trafficking who agree to cooperate with the authorities, and on the other hand, the legal regime regulating the entry and presence of foreigners in the territory of Bulgaria. Since

victims are also migrants, they enter the sphere of the second legal regime. However, that regime has not been adapted to their special situation. As a result of this lack of adaptation, victims are confronted with requirements applicable to migrants in general. There is little consideration of their special situation. The Bulgarian legislation could have regulated the residence status of victims of human trafficking in a way similar to the way the residence status of refugees and individuals granted humanitarian or temporary protection is regulated. The Foreigners Act stipulates that foreigners are granted residence permits without meeting the conditions in the Act if they are granted refugee status, humanitarian protection or temporary protection.<sup>79</sup> This implies that migrants granted these forms of protection are not required to be in possession of a valid passport, to prove that they have accommodation or to prove that they have means of sustaining themselves without relying on the national social support system. Neither are they required to pay fees to receive their residence permits.

It appears that The Trafficking Act was drafted from the perspective that Bulgaria is only or predominantly a country of origin. The mindset which underlines the national legislative framework seems to be that the victims of human trafficking will be Bulgarian nationals repatriated back to Bulgaria. Since the victims are assumed to be Bulgarian nationals, a specific regulation of a reflection period ensuring non-enforcement of deportation orders was viewed as unnecessary. No revision and adaptation of The Foreigners Act to make it compatible with Bulgaria's international obligations was undertaken.

### 5.3. *Entitlements and disentanglements of victims granted special protection status*

Finally, the benefits accrued in case a victim of trafficking happens to be granted a special protection status and a residence permit need to be examined. The benefit of being accommodated in shelters has already been mentioned. In addition to accommodation, victims have the right to free high school education and the right to work.<sup>80</sup> It is worthwhile looking into how likely it is that a migrant identified as a victim of human trafficking actually finds employment. A factor to be taken into consideration is the duration of the residence permit. Its duration is entirely contingent on the discretion of the pre-trial proceeding authorities and the length of the criminal proceedings. Therefore, the victim has no certainty as to the duration of his/her stay. This creates a situation of insecurity which is far from conducive to finding employment.

In anticipation of an argument that Bulgaria has not complied with the EU Residence Permit Directive, the following needs to be clarified. Article 8(3) of the EU Residence Permit Directive stipulates that

Without prejudice to the provisions on withdrawal referred to in Article 14, the residence permit shall be valid for *at least six months*. It shall be renewed if the conditions set out in paragraph 2 of this Article continue to be satisfied [emphasis added].

On its face, Article 8(3) of the EU Residence Permit Directive requires a minimum time of validity of the residence permit. However, the first sentence of Article 8(3) is of paramount significance since it refers to the conditions under which the residence permit can be withdrawn. These conditions are regulated in Article 14 of the EU Residence Permit Directive. Discontinuance of the proceedings by the competent authorities is a ground for withdrawal. The latter deprives Article 8(3) of the EU Residence Permit Directive, which seemingly envisions a minimum duration of the residence permit, of much meaning. In practice, there is no minimum time of validity of the permit since even before the expiration of the six months the permit can be withdrawn due to discontinuance of the criminal proceedings.

Not only are victims placed in a situation of uncertainty as to their stay in the territory of Bulgaria, but they are also deprived of the right to leave the territory of Bulgaria and to return back home for the time period when they have the special protection status.<sup>81</sup> Article 35(2) of the The Foreigners Act stipulates that 'A foreigner who has permission for long term stay shall be able to leave the country and to return back without a visa till the elapse of the permitted term of stay'. However, victims of trafficking are exempt from this entitlement. This could have serious repercussions as to the right to leave any country as recognised by Article 13(2) of the Universal Declaration of Human Rights and Article 12(2) of the International Covenant on Civil and Political Rights.<sup>82</sup> The implication is that the victims of human trafficking cannot leave the territory of Bulgaria for as long as they are useful for the purposes of the criminal proceedings.

## 6. The crisis of a legal framework

In the context of Bulgaria, the national legal framework on human trafficking is in crisis. Bulgaria has modified the elements of the crime of human trafficking to serve the policy objective of demonstrating tough law enforcement. This disingenuous manoeuvre leads to a policy of robust criminalisation in order to raise the number of prosecutions and convictions for human trafficking, but when it comes to actually assisting individuals, the situation is dire. No one appears to be recognised as being eligible to receive assistance. Bulgaria has failed to fulfil a number of international obligations. The applicable national legislation is rife with inconsistencies and ambiguities which seriously weaken its effectiveness. When it comes to non-EU nationals who could be victims of human trafficking in Bulgaria, the national human trafficking legal framework seems to be, in practice, without substance. It does not ensure temporal non-removal for the time when the authorities make a conclusive decision whether or not a migrant is a trafficked person. It raises paradoxical and insurmountable requirements so that a residence permit is issued to a migrant recognised as a victim of human trafficking. And finally, it contains conditions which are in violation of international recognised human rights norms.

## Acknowledgements

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## Notes

1. The Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197), Warsaw, 16.V.2005; Council Directive 2004/81/EC of 29 April 2004 on the residence permit issues 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 the competent authorities (hereinafter The EU Residence Permit Directive); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (hereinafter The EU Trafficking Directive).
2. In accordance with Article 36(1) of the CoE Convention, GRETA 'shall monitor the implementation of this Convention by the Parties'.
3. See Anne Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments', *European Journal of Migration and Law* 8 (2006): 163.
4. *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Bulgaria* (First Evaluation Round), GRETA(2011)19, Strasbourg, 14 December 2011, 36 (hereinafter GRETA Report on Bulgaria); See also *Reply from*

*Bulgaria to the Questionnaire for the Evaluation of the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties*, GRETA(2011)2, Strasbourg, 7 March 2011.

5. Trafficking of children is excluded from the scope of the article.
6. GRETA Report on Bulgaria, 42.
7. Ibid., 40.
8. Ibid., 41.
9. Ibid., 36.
10. See GRETA's reports from the first evaluation round, available at [http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Monitoring/Country\\_Reports\\_en.asp](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Monitoring/Country_Reports_en.asp).
11. Translations of most of the legal instruments relevant to the topic of human trafficking in Bulgaria can be found at the official website of the Bulgarian National Anti-Trafficking Commission, available at <http://www.antitrafficking.government.bg/en/2011-12-15-11-21-11/legislation>.
12. The CoE Trafficking Convention and the EU law are not the sole sources of Bulgaria's obligations regarding victims of human trafficking. As a party to the European Convention on Human Rights (ECHR), Bulgaria has positive human rights obligations towards individuals who have been trafficked or are at risk of trafficking. Yet, the focus of the present article is on the obligations originating from the CoE Trafficking Convention and the relevant EU law. The European Court of Human Rights (ECtHR) has elaborated upon the nature of states' positive obligations under Article 4 of the ECHR in the following cases: *Siliadin v. France*, Judgment of 26 July 2005; *Rantsev v. Cyprus and Russia*, Application No.25965/04, Judgment 7 January 2010; *C.N. and V. v. France*, Judgment of 11 October 2012; *C.N. v. The United Kingdom*, Judgment 13 November 2012; *M. and Others v. Italy and Bulgaria*, Application No. 40020/03, Judgment of 31 July 2012. See also Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations', *International Journal of Refugee Law* 24, no. 2 (2012): 181–201; Ryszard Piotrowicz, 'The Legal Nature of Trafficking in Human Beings', *Intercultural Human Rights Law Review* 4 (2009): 175–203.
13. See Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010); Venla Roth, *Defining Human Trafficking and Identifying its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Leiden/Boston: Martinus Nijhoff Publishers, 2012); Jean Allain, *Slavery in International Law. Of Human Exploitation and Trafficking* (Leiden/Boston: Martinus Nijhoff Publishers, 2013); John R. Spencer, 'People-Trafficking: Some Reflections on the EU Legislation, and its Implementation in the UK', *Cambridge Yearbook of European Legal Studies* 11 (2008–2009): 189; Saadiya Chaudary, 'Trafficking in Europe: An Analysis of The Effectiveness of European Law', *Michigan Journal of International Law* 33, no. 1 (2011): 77–99.
14. See also Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, UN Doc. A/45/49 (Vol. I) (2001), entered into force 9 September 2003; see also Article 2 of the EU Trafficking Directive, which introduces some additions as to the 'purpose' of human trafficking. Begging and 'exploitation of criminal activities' are included as examples of forms of exploitation.
15. For a detailed analysis of the definition of human trafficking in international law see Kara Abramson, 'Beyond Consent, Towards Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', *Harvard International Law Journal* 44 (2003): 473; Gregor Noll, 'The Insecurity of Trafficking in International Law', in *Mondialisation, migration et droits de l'homme : le droit international en question*, ed. V. Chetail (Brussels: Bruylant, 2007), 347–9; Gallagher, *The International Law of Human Trafficking*, 12–53.
16. Pursuant to Article 18 of the CoE Convention, states have to criminalise trafficking in human beings. See also Article 2 of the EU Trafficking Directive.
17. See paragraph 1 of the Additional Provisions of The Trafficking Act.
18. For an analysis of the criminal law definition of human trafficking in the Bulgarian legislation see Vladislava Stoyanova, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law', *Amsterdam Law Forum* 5, no. 1 (2013): 64–79.
19. See Section IX (Trafficking of People) of the Bulgarian Criminal Code (New, State Gazette No. 92/2002). Article 159a (1) (Amended, State Gazette, No. 27/2009). An individual who recruits,

transports, harbours or receives individuals or groups of people for the purpose of using them for debauchery, forced labour, removal of organs or of keeping them in forceful subjection, regardless of their consent, shall be punished by deprivation of liberty of two to eight years and a fine from 3000 to 12,000 leva. (2) Where the act under paragraph (1) has been committed: 1. with regard to an individual who has not turned eighteen years of age; 2. through the use of coercion or by deceiving the individual; 3. through kidnapping or illegal deprivation of liberty; 4. through abuse of a position of dependency; 5. through the abuse of power; 6. through promising, giving or receiving benefits (amended, State Gazette, No. 27/2009) the punishment shall be deprivation of liberty from three to ten years and a fine from 10,000 to 20,000 leva.

20. Pursuant to Article 159a(2) of the Bulgarian Criminal Code, the application of certain means, for example coercion or deception, could be an aggravating circumstance.
21. James Hathaway, 'The Human Rights Quagmire of Human Trafficking', *Virginia Journal of International Law* 49 (2009): 1–59. For a rejoinder see Anne T. Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway', *Virginia Journal of International Law* 49, no. 4 (2009): 789–848.
22. See 'Trafficking in Human Beings, Seventh Report of the Dutch National Rapporteur' (2009), 496.
23. According to Article 124 of the Bulgarian Constitution, the Supreme Court of Cassation exercises supreme judicial oversight as to the precise and equal application of the law by all courts. According to Article 124 of the Bulgarian Judiciary System Act, in case of contradictory or erroneous jurisprudence on the interpretation or application of the criminal law, an interpretative judgment is adopted by the general assembly of the criminal college of the Supreme Court of Cassation.
24. Bulgarian Supreme Court of Cassation, Interpretative Decision No. 2 of 16 July 2009. A summary of the interpretative decision in English is available at [http://www.antitrafficking.government.bg/images/documents/Polezna\\_informacia/EN/1263815111.doc](http://www.antitrafficking.government.bg/images/documents/Polezna_informacia/EN/1263815111.doc). The summary does not contain the Supreme Court of Cassation's reasoning. The full version of the interpretative decision in Bulgarian is available at [http://www.vks.bg/vks\\_p10\\_36.htm](http://www.vks.bg/vks_p10_36.htm).
25. See Neil Boister, *Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2012). See also Ethan A. Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society', *International Organization* 44, no. 4 (1990): 479–526; Neil Boister, 'Transnational Criminal Law', *European Journal of International Law* 14, no. 5 (2003): 953–76.
26. See also 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto' (UN Office on Drugs and Crime Division for Treaty Affairs, 2004), 10, para. 17.
27. Explanatory Report to the CoE Trafficking Convention, para. 70. Article 2(1) of the EU Trafficking Directive cannot be interpreted to the effect that the EU member states are under an obligation to have the same definition of human trafficking as the one set out in the directive.
28. Bulgarian Supreme Court of Cassation, Interpretative Decision No. 2 of 16 July 2009, para. 3.
29. Stricter criminalisation is generally endorsed as an appropriate measure for addressing human trafficking. See Alice Edwards, 'Trafficking in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor', *Denver Journal of International Law and Policy* 36, no. 1 (2007): 9–53. Pursuant to the statistics made public by the Supreme Cassation Prosecutor's Office, in 2011 there were 138 newly started pre-trial proceedings in relation to the crime of human trafficking in Bulgaria, 115 raised charges and 131 sentenced persons. See <http://www.antitrafficking.government.bg/en/2011-12-15-11-21-11/statistics>.
30. These two stages are not explicitly indicated in The Trafficking Act. They can only be implied from its text. The National Mechanism for Referral and Support of Trafficked Persons in Bulgaria interprets the national legislation as implicitly containing two stages: informal recognition and formal recognition. See Национален Механизъм за Насочване и Подпомагане на Жертви на Трафик [National Referral Mechanism for Referral and Support of Trafficked Persons in Bulgaria], National Commission for Combating Trafficking in Human Beings, Animus Association Foundation, La Strada Bulgaria, Sofia 2010.
31. GRETA Report on Bulgaria, 35, para. 145.
32. CoE Trafficking Convention, Article 10(2) and Article 13.
33. Ibid., Article 10(1). See also Article 29 of the CoE Trafficking Convention which further elaborates on states' obligations regarding establishment of national institutions specialised in anti-trafficking. Anne Gallagher has commented that the most important of all victim protection provisions in the CoE Trafficking Convention is the one relating to identification of individuals



- as victims of trafficking. Gallagher, 'Recent Legal Developments in the Field of Human Trafficking', 163, 176.
34. In the United Kingdom, for example, the government has developed a National Referral Mechanism, which is not regulated by a specific law, it is rather a policy. Under the National Referral Mechanism, first respondents (police, local authorities, social services, Poppy Project and other organisations) identify indicators of human trafficking and make referrals to the 'Competent Authorities'. The first respondents cannot formally identify individuals as victims of human trafficking. The United Kingdom has designated only two bodies as being 'Competent Authorities' for the purpose of formal victim identification. These are the United Kingdom Border Agency for non-EEA citizens, and for EEA citizens, the United Kingdom Human Trafficking Center. See Parosha Chandran, *The Identification of Victims of Trafficking in Human Trafficking Handbook: Recognizing Trafficking and Modern-Day Slavery in the UK*, ed. Parosha Chandran (Lexis Nexis, 2011): 27–48.
  35. In Northern Ireland, persons who were refused formal identification as victims of human trafficking have tried to argue that the National Referral Mechanism which provides for formal identification by the Border Agency is in violation of the procedural obligations under Article 4 of the ECHR. Article 4 of the ECHR imposes an obligation upon states to investigate potential trafficking. Pursuant to the ECtHR's case law, the body responsible for the investigation has to be *inter alia* an independent body (see *Rantsev v. Cyprus and Russia*, Application No.25965/04, Judgment 7 January 2010, para. 288). In relation to the above argument, the High Court of Justice in Northern Ireland has responded that 'The State, in the adoption and administration of the NRM [National Referral Mechanism] policy, has not breached Article 4. They have successfully achieved all procedural requirements thereunder. The procedural requirements under Article 4 are not co-extensive with the protections in the Anti-Trafficking convention [The Council of Europe Trafficking Convention]. [...] The applicant is not deprived of a general victim status, but only the particular type of victim status required to obtain access to special rights.' In the above quoted paragraph, the High Court of Justice in Northern Ireland says that the national procedure for formal identification of victims is done for the purpose of assistance and protection in fulfillment of the CoE Trafficking Convention. The procedural obligations under Article 4 of the ECHR are of a different nature. See *In the Matter of an Application by W for Judicial Review*, W's Application [2012] NIQB 37, 31 May 2012, para. 27.
  36. In the process of drafting the CoE Trafficking Convention, there was a proposal that a refusal to recognise a person as a victim of trafficking should be an object of an independent review. This proposal was not endorsed. See Parliamentary Assembly, Opinion No. 253 (2005) on the Draft Council of Europe Convention on Action against Trafficking in Human Beings, 26 January 2005, para. 14(iv)(d), available at <http://assembly.coe.int/Documents/AdoptedText/t05/EOP1253.htm>.
  37. The Explanatory Report to the CoE Trafficking Convention (para. 168) contains the clarification that 'The drafters wish to make it clear that under Article 12(6) of the Convention, assistance is not conditional upon a victim's agreement to cooperate with competent authorities in investigations and criminal proceedings [emphasis added].' The wording of the Explanatory Report contradicts the clear language of Article 12(6) of the CoE Trafficking Convention, which refers to 'willingness to act as a witness'. In this context, it should be kept in mind that although of assistance, the explanatory report is not an authoritative interpretation of the text of a given Council of Europe treaty. See Jorg Polakiewicz, *Treaty-Making in the Council of Europe* (Council of Europe Publishing, 1999), 26–8.
  38. See generally Carolina Villacampa Estiarte, 'The European Directive on Preventing and Combating Trafficking in Human Beings and the Victim-Centric Treatment of this Criminal Phenomena', *European Criminal Law Review* 2 (2012): 291–317.
  39. It has been noted that practically the international legal framework does not ensure victim protection; it rather ensures forms of witness protection. In the context of Bulgaria, individuals cannot be even formally recognised as victims if they do not cooperate with the authorities. See Katja Ziegler, 'The Legal Framework of Trafficking and Smuggling in Germany: Victim Protection emerging from Witness Protection', in *Immigration and Criminal Law in the European Union, The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings*, E. Guild and P. Minderhoud (Leiden/Boston: Martinus Nijhoff Publishers, 2006): 69–112, at 97; Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking who Give Evidence against Their Traffickers', *International Journal of Refugee Law* 14, nos 2–3 (2002): 263–78.

40. The Trafficking Act, Article 10.
41. Ibid., Article 9(2).
42. Ibid., Article 9(3).
43. Regulation on Shelters for Temporary Housing and Centers for Protection and Support of Victims of Trafficking, State Gazette No. 19, 9 March 2004. There is no official translation of the Regulation into English. The text of the Regulation in Bulgarian is available at <http://www.lex.bg/bg/laws/ldoc/2135480536>.
44. Regulation on Shelters for Temporary Housing and Centers for Protection and Support of Victims of Trafficking, Article 19(3).
45. GRETA has reported that one of the reasons for victims to be afraid or reluctant to testify in criminal proceedings is lack of trust in the effectiveness of the actions of the police. GRETA's Report on Bulgaria, 48.
46. The Trafficking Act, Article 26.
47. Ibid., Article 11.
48. 'Most victims cannot benefit from free of charge health care because they have not paid contributions to the State Health Fund. As a result, NGOs running accommodation facilities for victim have to pay for any health care which is not "emergency" assistance', GRETA's Report on Bulgaria, 38.
49. One of the proposals which GRETA has transmitted to the Bulgarian government is to 'facilitate the reintegration of victims of trafficking into society and avoid re-trafficking by providing them with vocational training and access to the labor market', GRETA's Report on Bulgaria, 53.
50. GRETA Report on Bulgaria, 10, para. 10.
51. There has been an increase in immigration flows in Bulgaria. See National Strategy on Migration, Asylum and Integration (2011–2012), available at <http://www.mvr.bg/NR/rdonlyres/EBCD864F-8E57-4ED9-9DE6-B31A0F0CE692/0/NationalStrategyinthefieldofMigrationAsylumandIntgrationENG.pdf>.
52. See European Council on Refugees and Exiles, 'Dublin II Regulation: National Report': European Network for Technical Cooperation on the Application of the Dublin II Regulation – Bulgaria, May 2012, <http://www.refworld.org/docid/51404db22.html> (accessed April 25, 2013).
53. Explanatory Report to the CoE Trafficking Convention, para. 131.
54. CoE Trafficking Convention, Article 10(2).
55. See Steve Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 2011), 558.
56. GRETA Report on Bulgaria, 40, para. 172.
57. Ibid., para. 175.
58. The Bulgarian Constitution, Article 5(4).
59. Council of Europe Treaty Series, Status of the Council of Europe Convention on Trafficking in Human Beings, available at <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=23/04/2013&CL=ENG>.
60. Valeria Ilareva, 'Bulgaria's Treatment of Asylum Seekers', *Forced Migration Review* 29 (2007): 60–1.
61. See, for example, Valeria Ilareva, *Immigration Detention in International Law and Practice. In Search of Solutions to the Challenges Faced in Bulgaria*, <http://www.statewatch.org/news/2008/jan/valeria-illareva-immigration-detention-bulgaria.pdf>.
62. Ibid., 11.
63. When a foreigner in administrative detention submits an application for asylum, the state authorities in the detention centre are under an obligation to forward the application to the National Refugee Agency. A similar possibility should be available for immigrants who claim to be victims of human trafficking. See Article 19(1), Regulation No.I-1201 from 1 June 2010 on the Temporary Accommodation of Foreigners, on the Organization and the Activities of the Special Homes to Temporary Accommodation of Foreigners, available (in Bulgarian) at [http://lex.bg/bg/laws\\_stoyan/ldoc/2135684112](http://lex.bg/bg/laws_stoyan/ldoc/2135684112).
64. Immigration detention is meant to facilitate removal from the territory. If this purpose is not served, the detention is in violation of Article 5(1)(f) of the European Convention on Human Rights. The ECtHR has held that detention under Article 5(1)(f) is permissible if actions are being taken 'with a view of deportation'. See *Saadi v. The United Kingdom*, [GC] Application 13229/03, Judgment 29 January 2008, para. 72. On immigration detention, see Galina Cornelisse, *Immigration Detention and Human Rights. Rethinking Territorial Sovereignty* (Leiden/Boston: Martinus Nijhoff Publishers, 2010).



65. The Asylum and Refugees Act, Article 67.
66. Article 33, Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force 22 April 1954; see W. Kalin, M. Karoni and L. Heim, 'Article 33, para. 1 1951 Convention', in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary*, ed. Andreas Zimmermann (Oxford: Oxford University Press, 2011), 1327–1396.
67. In 2007 Bulgaria amended The Asylum and Refugees Act in order to fulfill its obligations under the relevant EU law. As a result of this amendment, a provision in the Act (Article 58(2)) stating that the asylum procedure is initiated with the submission of the asylum application was repealed. As a result of the repeal, the submission of an asylum application does not automatically lead to its registration.
68. Valeria Ilareva, 'Bulgaria's Treatment of Asylum Seekers', *Forced Migration Review* 29 (2007): 60–1. Ilareva has commented that 'In Bulgaria the time between submission of an asylum application and its registration has no restriction, resulting in tremendous hardship for asylum seekers as many are obliged to remain indefinitely in detention without legal recourse while awaiting "registration"'.
69. Valeria Ilareva, 'Arbitrariness Regarding Access to the Asylum Procedure in Bulgaria', Information Note, 2 January 2012, [http://lcien.files.wordpress.com/2012/01/information\\_note\\_access.pdf](http://lcien.files.wordpress.com/2012/01/information_note_access.pdf).
70. The Foreigners in the Republic of Bulgaria Act, available at <http://lex.bg/bg/laws/ldoc/2134455296>. The English version of the law without the more recent amendments incorporated is available at [http://www.mvr.bg/NR/rdonlyres/8C3CCC42-3E72-4CBB-900A-E8CB6DE82CAD/0/ZVPNRBGESChTS\\_EN.pdf](http://www.mvr.bg/NR/rdonlyres/8C3CCC42-3E72-4CBB-900A-E8CB6DE82CAD/0/ZVPNRBGESChTS_EN.pdf).
71. See The Foreigners Act, Article 15(1) and Article 24(1).
72. Ibid., Article 24(4).
73. While possession of identity documents is a logical requirement for the purposes of regularising one's immigration status in the country, this is not necessarily the case in the context of human trafficking.
74. Bulgaria has no specific provision in its criminal code which can ensure the application of Article 26 of the CoE Convention. The latter article obliges the state parties to 'provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'.
75. The Foreigners Act, Article 24(2).
76. The following section of the article discusses the entitlements once a special protection status is granted.
77. The Regulation on the Application of the Foreigners in the Republic of Bulgaria Act, Article 13 and Article 27a, adopted by the Council of Ministers, available in Bulgarian at <http://lex.bg/laws/ldoc/-12560383>.
78. Tariffs Collected in the System of the Ministry of Interior, available in Bulgarian at <http://www.kat.mvr.bg/tarifa4.htm>.
79. The Foreigners Act, Article 25(b).
80. In accordance with paragraph 4 of the additional provisions of the Bulgarian Public Education Act, foreigners who are permanent residents are entitled to free high school education. Victims of human trafficking with special protection status and long-term residence permits have the same rights as foreigners who are permanent residents in Bulgaria (see The Trafficking Act, Article 28(2)). Foreigners who are permanent residents are entitled to start work by the order established for Bulgarian citizens (see The Foreigners Act, Article 33).
81. The Trafficking Act, Article 28(2).
82. Universal Declaration of Human Rights, G.A. res. 217A (III), UN Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976.

### Notes on contributor

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