

NOT FOR SALE – JOINING FORCES AGAINST TRAFFICKING IN HUMAN BEINGS,
17-18 FEBRUARY 2014, VIENNA

ISSUE PAPER BY CONNY RIJKEN

1. Introduction

The Council of Europe Convention on the Action against Trafficking in Human Beings (the Convention), which entered into force on 1 February 2008, established a group of experts on action against trafficking in human beings (GRETA) to monitor the implementation of the Convention by the State parties in Article 36. GRETA held its first meeting in February 2009 and started the first round of evaluations in 2010. The evaluation of the third group of States to be evaluated in the first round is now in its final stage. GRETA annually reports on its activities, trends and developments they have identified while monitoring the State parties, in a general report. The third general report has been released in October 2013.

Currently, the evaluation process of 26 States has been completed. GRETA has commissioned a study to evaluate its monitoring process based on the final evaluations of the 23 State parties which were available in autumn 2013. The objectives of the study were:

- to identify and provide an analysis of the main challenges and trends in the implementation of the Convention,
- to make suggestions for issues to be addressed in the second evaluation round and,
- to discuss future challenges.

The study has been conducted by Conny Rijken (INTERVICT, Tilburg University), Eefje de Volder and Stefanie Jansen-Wilhelm (De Volder & Jansen International Law Consultancy). This paper highlights the main findings of the study and puts it in a broader perspective, gives insight into the consistency of the evaluation, identifies cross-cutting themes as well as challenges for the future evaluation process and will address the following issues:

- a. Procedure
- b. Non-discrimination
- c. Labour exploitation
- d. Unconditional access to protection and support
- e. Scope of the mandate in relation to new developments
- f. Consistency
- g. The human right-based approach
- h. Other aspects

2. Procedure

Following Article 38 of the Convention GRETA has developed an evaluation strategy consisting of a questionnaire, a country visit enabling GRETA to have a dialogue with State representatives and civil society (including NGOs), the production of a draft report and a final report. The final report is published on the website together with the final comments of the State. This procedure reflects the co-operative spirit and is intended to assist States in their efforts to implement the Convention.

The publication of the reports forms an important source of information on the performance of a particular State for organisations and institutions in the State under evaluation and other groups, researchers, activists etc. and reflects transparency.

In each of the reports the evaluation procedure is well explained. As a first step, a detailed questionnaire is sent to the authorities of the party undergoing evaluation which States are obliged to fill out. Another important source of information is civil society, which is consulted as well. In each of the States evaluated GRETA has used its mandate to carry out country visits to collect additional information or to evaluate the practical implementation of the adopted measures. During the country visits GRETA meets with governmental representatives of diverse ministries and agencies, and visits facilities where protection and assistance are provided to victims of human trafficking. Separate meetings are held with NGOs and other civil society actors.

Although it is to be encouraged that GRETA collects the information from various sources, including sources independent from the authorities, no information is available on how NGOs and other actors are selected. While it will partly be dependent on the availability of such NGOs and actors in the country under evaluation, especially in countries with an active civil society in the field of combating human trafficking, the establishment of criteria on how to select actors for the meetings during country visits would benefit transparency.

After the country visit GRETA sends a draft report to the State undergoing the evaluation which has the opportunity to comment on the draft. Comments are taken into account when GRETA writes the final report. On the basis of GRETA's reports, the Committee of the Parties may adopt recommendations concerning the measures to be taken to implement GRETA's conclusions. This is the second phase in the evaluation process. The implementation of the Convention is a continuous process and the recommendations formulated will help States to take steps towards the full implementation of the Convention. This cyclic process will be reflected in the monitoring of the follow-up actions taken, based on the recommendations that will need to be addressed in the next round of evaluations. Although the recommendations of the Committee of Parties are based on the recommendations made by GRETA, the Committee of Parties sets priorities and makes a selection of the recommendations. Therefore, GRETA should take a stance before starting the second evaluations whether they will evaluate follow-up actions, based on the list of recommendations it has made during the first evaluation or based on the list of recommendations as formulated by the Committee of the Parties.

3. Non-discrimination

While assessing the reports made by GRETA it appears that similar problems are experienced by State parties. Additionally, a number of these problems cannot be addressed in isolation by a State but need further coordinated actions as well as reinforced attention beyond State level. GRETA is in the excellent position to identify these issues based on its monitoring activities. Within the organisational structure of the Council of Europe with a broad range of activities and mandates, ranging from criminal co-operation to minority protection and social rights, GRETA, in line with the

overall aim of the Convention, should feel compelled to bring these cross-cutting issues to the attention of the competent bodies and committees within the Council of Europe.

Many of the cross-cutting issues, at risk groups, and victimisation, distilled from the reports relate to some form of discrimination. For its prevention a particular provision on non-discrimination is adopted in Article 3 of the Convention. In most of the reports non-discrimination was not specifically addressed. In addition, only in one report specific reference was made to racial discrimination in the context of THB.

The following general trends in the country evaluations that relate to non-discrimination were observed:

Vulnerable groups: Roma citizens, children and mentally less gifted.

In many reports Roma citizens are identified as a group at heightened risk of becoming victims of THB. The position of Roma needs to be further addressed at the European level and in the context of anti-discrimination initiatives as well. Only with an integrated and comprehensive approach this risk can be diminished. Another group at heightened risk is children. The Convention pays a great deal of attention to children highlighting the importance of addressing the issue comprehensively. Yet, while many conclusions and recommendations are aimed at child-specific considerations, GRETA does not comprehensively and consistently address child specific needs in accordance with the Convention. An example thereof is the omission in most reports to address the child's best interest in the context of issuing residence permits. A third vulnerable group consists of those who are mentally less gifted but are able to function in society to a certain extent. Especially young girls with limited capacities seem to be at heightened risk. GRETA, however, does not sufficiently focus on the needs of this group in the first evaluation round.

Male victims.

To some extent related to the previous aspect is the lack of assistance and protection measures available for male victims and an overall lack of awareness for male victims. Shelters or similar safe accommodations are often only available to (adult) women. Although there seems to be an increased attention for male victims GRETA should reinforce addressing attention to obligations State parties have in relation to all victims of THB including male victims.

4. Labour exploitation

The general lack of attention for labour exploitation is reflected in the 23 countries evaluated by GRETA. The implementation of the Convention's definition is closely monitored but no further information on the application of the forms of labour exploitation as included in the definition has been asked or evaluated. Nor have States been asked to provide an analysis of the relevant case law and a differentiation between victims of sexual exploitation and labour exploitation is not systematically made. In addition States are not questioned on phenomena related to labour exploitation such as slavery, forced labour, although there are many countries that have criminalised these practices apart from THB. This brings us to another, more general problem, namely, how practices of labour exploitation can best be addressed;

through the prohibition of THB, through other criminal provisions, through labour law, through social security law etc. This question ties in with the difficulty on how to draw the line between bad labour conditions and exploitation and is a consequence of the lack of an international definition of exploitation. Still the realm of the definition of labour exploitation needs to be further explored and GRETA could contribute to this by questioning the States more specifically on how labour exploitation has been defined in national laws and how these laws have been applied by the judiciary.

Despite the lack of attention labour exploitation is of increased importance and in some States also an increase in the numbers of victims of labour exploitation can be deducted. However and without generalising, it is often reflected on in literature that the needs of victims of labour exploitation differ from the needs of victims of sexual exploitation. Differentiation to some extent might be desirable, taking into account the knowledge that show that men are more often victim of labour exploitation and that compensation and claiming unpaid wages is an important need of victims of labour exploitation. At the same time the evaluation has shown the difficulty of victims to get compensation. In general, possibilities are limited and only exceptionally successful cases are mentioned. Considering the need of victims of labour exploitation for compensation this difficulty especially targets victims of labour exploitation.

5. Unconditional access to support

Article 12(6) guarantees unconditional access to support to THB victims and states:

‘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’.

GRETA very closely monitors the extent to which access to assistance is dependent on the co-operation in criminal procedures. Even in cases where such link is not formally established but seems to exist *de facto*, GRETA asks critical questions to be able to evaluate the compliance with Article 12(6). However, in relation to foreign victims the link between co-operation and access to assistance seems to be re-established in case States have chosen to implement Article 14(1) by making the residence permit conditional to the co-operation. Following article 14(1) States may choose to;

‘issue a renewable residence permit to victims, in one or other of the two following situations or in both:

- a. the competent authority considers that their stay is necessary owing to their personal situation;
- b. the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.’

Consequently States can make the residence permit conditional to cooperation which makes the unconditional access to assistance become illusionary, since without a residence permit a person is not allowed to stay in a country. The consequences of making the residence permit conditional to co-operation is not systematically

evaluated. Special attention should be paid to the question to what extent foreign victims illegally residing have access to victim assistance as adopted in Article 12.

A similar difficulty exists at the EU level where Directive 2004/81 and Article 11(3) Directive 2011/36 seem to have the same effect. Directive 2004/81 (on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities) obliges Member States to provide victims of trafficking who *cooperate with the authorities* a residence permit which includes various forms of assistance. Article 11(3) Directive 2011/36 obliges Member States 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, however without prejudice to Directive 2004/81/EC. Although this article seems to include a general obligation to provide such assistance and support, this general obligation seems to be limited by consideration 18 of the preamble to this directive. Consideration 18 states: 'In cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period'. In addition it is unclear how the addition 'without prejudice to Directive 2004/81/EC' must be interpreted. Already in 2010 the European Commission in its evaluation of this directive has announced an amendment to extend the issuing of a temporary residence permit based on the vulnerable situation of the victim and not necessarily in exchange for cooperation. However, so far no attempts to such amendment have been made.

The reflection and recovery period of at least 30 days is a first step in the assistance and protection to THB victims. In relation thereto two aspects are highlighted.

First is the use of the term *reasonable grounds*. When there are *reasonable grounds* to believe the person concerned is a victim the reflection and recovery period must be provided. Thus the interpretation of the term *reasonable grounds* is crucial to access the reflection and recovery period (Article 13) and therefore of central importance in the Convention. Therefore, in future evaluations GRETA could focus more on the implementation of this term in national law as this is lacking in the reports in the first round of evaluations. The *reasonable grounds* indication is also present in Article 11(2) of the EU Directive 2011/36 and it would be interesting to see how the Commission monitors the implementation of this provision.

Second, the explanatory report to the Convention limits the application of the reflection and recovery period to illegally residing migrants or those with a temporary residence permit, although such limitation cannot directly be derived from the Convention. GRETA should be consistent in how it evaluates this provision including recommendations in this regard, since it has criticized States that did not provide such period to nationals. Again, comparison with the EU Directive is interesting as Article 11(2) seems not to be restricted to non-citizen and thus to apply to all victims of THB.

6. Scope of the mandate in relation to new developments

The combating of human trafficking (including the protection of victims, prevention and prosecution of the crime and the co-operation) is constantly influenced by new developments, initiatives and new insights and therefore not a static given. Logically the State obligations in the context of THB are constantly being influenced by these developments as well. The ruling of the European Court of Human Rights in the Rantsev case is a clear example of how such developments can give a boost to the understanding of the (positive) obligations of States in the context of THB. Obviously GRETA feels the need to anticipate these dynamics and to reflect upon them in its monitoring task. In some reports it has reflected upon the influence of developments and initiatives from other organisations (such as the UNHCR guidelines on international protection for victims of trafficking or at risk of being trafficked, EU directives on THB and victim protection, EU instruments in the field of European criminal law, such as Joint Investigation Teams and Recommendation Rec(2005)10 of the Committee of Ministers). Since strictly speaking GRETA monitors solely the implementation of the Convention it needs to be clear and transparent when it is including other developments and initiatives as well. It needs to be clear for State Parties what the obligations are that derive from the Convention and, maybe more importantly, what the limits are of these obligations. More fundamentally it can be questioned to what extent GRETA is mandated to take these developments into account in its monitoring task. Should the Convention be considered a living instrument in a similar vein as the European Convention on Human Rights? Can only developments directly related to the interpretation of the Convention be taken into account? How can the line be drawn when a development is directly related? It would be interesting to consider these questions more fundamentally.

In relation thereto the question can be posed whether GRETA is mandated to interpret provisions of the Convention. As follows from the evaluation GRETA gives a specific interpretation of some articles which not necessarily follow from the Convention nor from the explanatory report. The explicit reference of a national referral mechanism or data collection and research are clear examples thereof. Although this seems to follow from the Convention, neither the adoption of a national referral mechanism as such nor data collection and research are explicated in the Convention. An extensive interpretation of the Convention's obligations is not problematic per se as long as this is not *contra legem*. Especially in relation to those aspects that do not directly follow from the Convention but are nevertheless systematically monitored by GRETA, clarification on the interpretation of the legal basis in the Convention is required. To be open and transparent on these aspects GRETA could draft a document in which it reflects upon the impact of recent developments, initiatives and new insights on the State obligations following from the Convention and translate these into the parameters/criteria States are evaluated upon. In drafting such a document GRETA could find inspiration from other international monitoring bodies who are confronted with similar challenges.

7. Consistency

GRETA is a relatively new body and has had to find its way in the evaluation process. Over the first years GRETA has been refining the structure and content of its reports, and sometimes felt the need to put additional questions which went beyond what was asked in the questionnaire. In addition it sometimes makes a selection into what issues to raise, which might vary per country. Consequently, GRETA is not always consistent in the aspects it is mentioning. Sometimes, a report is silent on a certain matter and it is not certain which conclusion can be drawn from this. It can indicate that information on a certain issue was not given or was not discussed.

Information and analysis of the information is not always included under the same headings in the reports. Although there is a certain level of overlap in some of the provisions in the Convention, the evaluation on the implementation of the State obligations must be conducted in a uniform way, and must be reported on under the same provisions. The discussion of the irrelevance of the consent of a victim if any of the explicated means are used under three different headings is an example thereof.

Following the country reports and the questionnaire used by GRETA, GRETA does not entirely follow the structure of the Convention. The reports start with the legal, policy and institutional framework and the implementation of a human rights-based approach and a comprehensive approach. Consequently these sections include detailed information and actually cover the Convention as a whole including aspects that are addressed in specific provisions of the Convention.

Finally, the reports lack substantiation of the laws and regulations with information how these have materialised in practice. Only rarely, states are questioned to provide information on cases. For instance, no case law is given on how labour exploitation (including forced labour, slavery, slavery-like practices) is put into practice in case law and what additional criteria were adopted to further define these concepts. Even if such cases were only available in the national language countries must be able to provide relevant information to GRETA either in written or orally.

To improve on these points, all elements should be mentioned more systematically, even if no information is available, asked or provided this should be mentioned. This could be achieved if the structure of the Convention is followed more closely in the evaluation reports.

8. Human rights-based approach

The human rights-based approach is another key-pillar of the Convention. It is included in Article 5(3) and is further interwoven throughout the Convention as a whole. In the reports the human rights-based approach is specifically reflected upon in the general part of the report (where definitions and a comprehensive approach are addressed as well). In addition it is sometimes mentioned in other chapters wherein the prevention, protection and prosecution are addressed seeking to establish the effectiveness of the human rights-based approach. Yet the fact that the human rights-based approach is systematically addressed in the general part gives the impression that these other chapters are not connected to the human rights-based approach.

From the description of the human rights-based approach in the general part of the report of some States the impression can arise that they perform well, while the effectiveness of the approach in the remainder of the report proves the contrary. It is therefore unclear what GRETA aims to gain from the general description of the human rights-based approach (reflection in law and policy) for the overall performance of States. It would be logical that the human rights-based approach is addressed under Article 5(3) where the human rights-based approach is specifically referred to, or at the end of the report as a kind of overall assessment. It would be helpful if GRETA could further determine what, in the light of the Convention, the explanatory report and the Rantsev case, a human rights-based approach entails and what measurable indicators follow from the approach. It should be explicated what GRETA expects from States on this point. In addition it is noteworthy that in almost no report recommendations on the human rights-based approach are made, although the response of states differs considerably. The only recommendation to include THB as a serious violation of human rights gives a hint of what GRETA expects. From GRETA's implicit explanation of the rights-based approach it is clear that it understands the prevention, protection and prosecution to be indispensable elements of the right-based approach. In order to fully reflect this position the right-based approach should be separately addressed in all reports with an explanation that only if States have implemented the Convention in line with all Convention obligations, it can claim it has implemented a human rights-based approach.

9. Other aspects

Commitment of states

GRETA thoroughly analyses a State's performance on the implementation of the Convention. States seem to be very committed to the work of GRETA as can be concluded from the fact that nearly all States comply with GRETA's requests for information and feedback in time. Compared to other international monitoring mechanism this is a great achievement and confirms the importance of GRETA's monitoring task. In addition we have seen that during the period of evaluation many States initiated actions to further implement the Convention and although we cannot establish whether this is a consequence of the evaluation, it gives such impression.

Jurisdiction

A (systematic) evaluation of the implementation of the extension on jurisdiction as codified in Article 31 is lacking. As this article includes important extensions to claim jurisdiction especially in transnational cases the implementation should be closely monitored.

Corporate liability

A trend and at the same time a challenge for the future is the lack of cases on corporate liability. Although sixteen States have implemented such a provision, it must be concluded from the reports that only one conviction was mentioned. With the increase of labour exploitation, and attention for corporate social responsibility this aspect needs further scrutiny.

10. Conclusion

In general, GRETA performs an important task in evaluating the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings and provides a very welcome additional source of information with the publication of the comprehensive and detailed country reports. The importance of its task is reflected in the commitments of the States to contribute to GRETA's task, to provide GRETA with the requested information on time and the high level of representatives present at the dialogue with GRETA during country visits. The main outcomes of the evaluation of GRETA's monitoring task have been highlighted in this paper and some suggestions to optimise its task were made and can be summarised as follows:

- to follow the structure of the Convention more strictly,
- to initiate a debate on the scope of its mandate in relation to developments and new insights
- to address non-discrimination more thoroughly since this seems to be an important source of victimisation in the context of trafficking in human beings.