



## **A CRITICAL ANALYSIS OF THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS: SUCCESS AND FAILURE IN PROTECTING HUMAN RIGHTS OF THE VICTIMS**

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### **ABSTRACT**

*It is a bitter truth that human beings are still treated as slaves for various purposes across the world and trafficking of human beings is taking place at such a fast rate that it is becoming difficult day-by-day to combat it. Human Trafficking is now the second largest transnational organized crime in the world. The victims of human trafficking comprise mostly women and children since they are the most vulnerable ones. The human rights of these victims are severely violated and victims are at the mercy of the traffickers. This is an easy way of making money and violating human rights by the traffickers since human beings can be sold and re-sold and used as a commodity. In contemplating this heinous crime of human trafficking, this article will mainly focus on the human trafficking taking place in the European countries and how successful is the Council of Europe Convention on Action against Trafficking in Human Beings (the CoE Convention) in protecting the rights of the victims of trafficking in the region. European countries are considered as the destination countries and there is a large influx of human beings from the developing countries, Middle East Countries, South Asian and Asian countries. This is due to the fact that victims look for better opportunities in developed nations and hence are lured for the same but ultimately fall prey to the traffickers. Several legislations, United Nations Conventions, Protocols and Treaties have been passed but nothing much has been done in eradicating this crime. The CoE Convention was also adopted and enforced by the Committee of Ministers of the Council of Europe as a means to combat human trafficking but this went beyond the usual trends and*

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*standards of enforcing a convention or a treaty against human trafficking. The CoE Convention was framed with human rights perspective and focused mainly on the victim protection. This article will thus highlight the extent of human trafficking and the conditions of the victims of trafficking, how the CoE Convention has helped in protecting the victims of trafficking in the region. A special focus will be given on the applicability of the CoE Convention in Germany in upholding the rights of the victims and further curbing the crime. The article will provide a critical analysis of the CoE Convention and how successful it has been in protection of rights of the human trafficking victims.*

**Keywords:** CoE Convention, Human Trafficking, Human Rights, Victims of Trafficking, European Commission, GRETA

## **1. Introduction**

It is a universal and bitter truth that human beings are still treated as slaves for various purposes across the world and trafficking of human beings is taking place at such a fast rate that it is becoming difficult day-by-day to combat it. It has now become the second largest transnational organized crime in the world. The victims of human trafficking comprise mostly women and children since they are the most vulnerable ones. The human rights of these victims are severely violated and victims are at the mercy of the traffickers. This is an easy way of making money and violating human rights by the traffickers since human beings can be sold and re-sold and used as a commodity.

In contemplating this heinous crime of human trafficking, this article would mainly focus on the human trafficking taking place in the European countries and how successful is the Council of Europe Convention on Action against Trafficking in Human Beings (the CoE Convention) in protecting the rights of the victims of trafficking in the region. European countries are considered as the destination countries and there is a large influx of human beings from the developing countries, Middle East Countries, South Asian and Asian countries. This is due to the fact that victims look for better opportunities in developed nations and hence are lured for the same but ultimately fall prey to the traffickers. Several legislations, United Nations Conventions, Protocols and Treaties have been passed but nothing much has been done in eradicating this crime. The CoE Convention was also adopted and enforced by the Committee of Ministers of the Council of Europe as a means to combat human trafficking but this went beyond the usual trends and standards of enforcing a convention or a treaty against human trafficking. The CoE Convention was framed with

human rights perspective and focused mainly on the victim protection. Article 15(2) of the CoE Convention provides that the parties “*shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.*” This article will thus highlight the extent of human trafficking and the conditions of the victims of trafficking, how the CoE Convention has helped in protecting the victims of trafficking in the region. A special focus will be given on the applicability of the CoE Convention in Germany in upholding the rights of the victims and further curbing the crime. The article will provide a critical analysis of the CoE Convention and how successful it has been in protection of rights of the human trafficking victims.

## **2. Overview of the CoE Convention**

The Council of Europe Convention on Action against Trafficking in Human Beings (more commonly referred to as the CoE Convention) was adopted on 16 May 2005 (European Commission, CoE Convention, 2008) by the Committee of Ministers of the Council of Europe. It was the result of a number of various initiatives taken up by the Council of Europe for combating trafficking in human beings. The CoE Convention was entered into force on 1 February 2008 (European Commission, CoE Convention, 2008), which was done after the 10th ratification. The CoE Convention was enacted and enforced based on existing international instruments and strengthening those instruments. This is evident from the fact that the CoE Convention goes beyond the minimum standards which have been agreed upon and further strengthens the protection provided to the victims of human trafficking.

The Convention has a wide-ranging applicability which recognizes and includes all forms of trafficking, irrespective of the fact that the trafficking is conducted on a national or international or transnational level. Linkage with organized crime or not is not considered and thus it has a blanket effect of any or all forms of human trafficking and takes into account all victims of trafficking including women and children.

However, the different forms of exploitation which are considered and taken into account by the CoE Convention includes sexual exploitation, slavery, practices similar to slavery or any kinds of related practice, forced labour or services, any kind of servitude and the also the removal of organs.

The major difference and the significant value of this CoE Convention is the human rights perspective with a victim protection. It is evident from the Preamble of the Convention

which defines trafficking in human beings as a violation of human rights and it is also considered as an offence to the dignity and integrity of human being.

This Convention recognizes a number of rights for the victims of trafficking. The prominent rights recognized by the CoE Convention includes some of the most important human rights such as the right to be identified as a victim, to be protected and assisted, to be granted a renewable residence permit, to be given a recovery and reflection period of at least 30 days, and the right to receive compensation for the damages suffered by the victims. This is a big step towards strictly implementing the laws for combating human trafficking. This Convention also possesses a Monitoring system which oversees and supervises the proper implementation of the clauses of Monitoring system. To do this, the Convention has set up two clauses: the Group of Experts on Action against Trafficking in Human Beings (GRETA) (Council of Europe, Monitoring Mechanism, 2009) and the Committee of the Parties.

Despite being enacted and enforced by the Council of Europe for eradicating the human trafficking crime from the region, it is not just limited to the member States of the Council of Europe. It also includes the non-members states as well as the European Union who can have the possibility of becoming a Party to the Convention.

### **3. Comparison of CoE Convention and UN Trafficking in Persons Protocol**

The two most important legal instruments enforced at the international level are the United Nations Trafficking in Persons Protocol and the Council of Europe Convention on Action against trafficking in human beings which is also known as the CoE Trafficking Convention.

Although both, the United Nations Trafficking Protocol and the CoE Trafficking Convention work towards preventing and combating the same phenomenon, that is, human trafficking, they work in different ways. We can say that the UN Trafficking Protocol seeks to ensure the prosecution of those who commit the crime of human trafficking by enhancing law and enhancing cross border cooperation whereas the CoE Convention seeks to promote the protection of trafficked person's human rights.

The following table (*see Table 1*) illustrates the major similarities and differences between the two most important legal instruments related to Human Trafficking by identifying the main feature from the human rights perspective (Roth, 2012):

**Table 1: Comparison of the UN Trafficking Protocol and the CoE Trafficking Convention**

<b>Basis</b>	<b>UN Trafficking Protocol</b>	<b>CoE Trafficking Convention</b>	<b>Observations</b>
Definition of Trafficking	Article 3	Article 4	The definition varies as CoE Convention includes definition of trafficking victims
Scope of the Law	Transnational Trafficking connected with Organized Crime	All forms of trafficking whether Transnational or National connected with Organized Crime	The CoE Trafficking Convention has a wider scope
Identification of Victims of Trafficking	-	Art 10	The CoE Convention prohibits removal of a person from the territory of a state party if there are reasonable grounds to support trafficking.
Protection of Privacy and Identity	Article 6. In appropriate cases and to extent possible under domestic law	Article 11. Obligatory	The CoE convention additionally obliges to ensure that the child victims are not made public except under exceptions
Assistance to VOT	Art 6.3: Discretionary. State parties to consider in appropriate cases.	Article 12.1. Some rights are given to all VOT's. It is obligatory to ensure that assistance is not made conditional on his or her willingness to act as witness	Rights guaranteed by CoE convention include accommodation, psychological and material assistance, emergency medical aid, counseling, education for children, access to labour markets, rights to criminal proceedings etc.
Protection of VOT	Art 6.5. Obligatory while trafficked person remains within the territory of the state party	Art 12.2. Obligatory to take into account the safety needs. Obligatory to provide protection to the VOT and to their families from potential retaliation or intimidation. In particular, during and after investigation and prosecution of	Ambit is wider in case of CoE Convention. Art 33 of CoE Convention talks about missing and endangered persons and their protection.

		perpetrators. Art 30 obliges to ensure in the course of judicial proceedings the protection of VOT's private life and where appropriate his identity.	
Protection of witness	No specific article in the UN protocol, Parent Convention Art 24 obligatory to provide effective protection from potential retaliation or intimidation of witnesses and when appropriate for their relatives and other persons close to them.	Art 28 Obligatory to provide effective and appropriate protection of witnesses and when necessary, members of their families from potential retaliation or intimidation. Obligatory to ensure and offer various kinds of protections such as physical protection, relocation, identity change, and assistance in obtaining jobs. Child victims are to be afforded special measures so that the best interest of the child is protected.	CoE Convention has wider ambit
Provisions on non punishment	No Provision in this regard	Article 26. Obliges to provide for the possibility of not imposing penalties on VOT's stemming from their involvement in unlawful activities to the extent they have been compelled to do so.	CoE Convention aims to protect the victims

#### 4. Scenario of Human Trafficking in Europe, special focus on Germany

Human trafficking, as it is universally known as a heinous transnational organized crime, violates human rights and abuses the human dignity. It is taking place every where around the world, not a single nation is untouched from this grave crime. Among these nations, the poorer ones serve as the country of origin, where the victims of human trafficking belong. And the developing nations as well as developed nations act as either a country of transit or a destination. The regions which are mostly known as the destination countries of human trafficking include the Middle-east, European region and the United States. Among these, the countries of European region mostly act as the destination countries

for the victims of trafficking. However, few countries of the European region also act as the country of origin. This has been proven by evidence of trafficking collected within the borders as well as between the borders of the countries of this region.

The victims of trafficking in this part of the world mainly comprise the residents from the eastern part of Europe who are then trafficked to the Western and the Central part of Europe. Besides the European persons being trafficked, the victims also hail from Asian countries, who fall into the trap of the traffickers in search of better livelihood. The victims here include adult women mostly. These women are trafficked for the sole purpose of sexual exploitation, sexual servitude and prostitution. Besides, these victims are also trafficked and exploited for domestic service, abuse, forced labour etc. (UNODC Report, 2008)

The countries of the European region has ratified the CoE Convention and the Trafficking in Persons Protocol of the United Nations so as to combat this crime, protect the victims of trafficking and punish the traffickers and thereby uphold the human rights. Besides these international and regional Conventions and Protocols, the countries of this region has also enacted and enforced various laws at the local level so that they could fight this crime.

The law enforcement in this region are as per the International standards and strive to comply with various protocols and conventions of the United Nations by providing fundamental human rights, victim protection, refugee status to the victims of trafficking in the country of destination, proper deportation and framing of immigration laws to combat human trafficking, enforcement of various anti-trafficking laws to combat trafficking for labour, slavery and sexual servitude. The government with the help of the United Nations organizations and various non-governmental organizations are also trying to bring down the rate of human trafficking in this part of the world. (Chaudary, 2011)

Apart from the law enforcement, the officials, law enforcement officers and the bureaucrats are given proper training and information about the prevalent laws, international as well as the domestic laws so as to help them to identify the traffickers and their activities, their nature of working in the region and the possible victims of trafficking and taking effective measures and actions in combating and preventing the organized crime.

Some of the laws enforced in European nations are as follows (UNODC Report, 2009):

- **Austria:** The offence of trafficking in human beings is specifically criminalized under article 104a of the Austrian Penal code, article 217 of the criminal code referred to as the offence of “exploitative human smuggling” and “Cross-border dealings in prostitution”, article 214 for offences pertaining to “Paid negotiation of sexual contacts with minors”

etc. The Austrian Federal Criminal Intelligence Service (Bundeskriminalamt) has a special “Central Service for Combating Trafficking in Human Beings and Illegal Immigration” as well as an “Office for Organized Crime” which also deals with trafficking cases.

- **Belgium:** The specific offence of “trafficking in and smuggling of human beings” has existed in Belgium since 1995. The law was amended in 2005 to make a clearer distinction between smuggling and trafficking in human beings. It is an offence under the Belgium Criminal Code. A Central Unit on Trafficking in Human Beings was created in 1992 and integrated into the Federal Judicial Police and the Directorate General of Federal Judicial Police. This unit is part of the Directorate of Crimes against (the integrity of) Persons.
- **Bulgaria:** Amendments were brought in to the Bulgarian Penal Code special section in 2002. Entitled “Trafficking in human beings” was added under the chapter against the persons”. This criminalizes specifically trafficking for sexual exploitation for other purposes. In trafficking of pregnant purposes of selling babies was introduced in the Penal Code (Article 159a). A National Programme for Prevention and Counteraction of Trafficking in Human Beings and Protection of Victims is adopted every year.
- **Cyprus:** A new legislation on trafficking in persons for sexual exploitation was adopted covering all of the other forms of trafficking listed in Article 3 of the UN Trafficking Protocol. The Office of Combating Trafficking in Human Beings has been operating since 2004 at the headquarters of the Cyprus police.
- **Denmark:** The Domestic Investigative Centre of the Danish National Police carries out national and systematic monitoring of, among other crimes, trafficking in human beings.
- **France:** The specific offence of trafficking in persons was established in France in 2003 through Article 225-4-1 of the French Criminal Code. The definition of the offence criminalizes all forms of trafficking indicated in Article 3 of the UN Trafficking Protocol, with the exception of trafficking for the purpose of the removal of organs and for servitude.
- **Hungary:** The National Investigation Bureau is a special unit responsible for handling cases of human trafficking, terrorism, drug trafficking, money-laundering and other economic crimes. Twenty officers were assigned full time to the policing of human trafficking in 2007.
- **Ireland:** Ireland has specific provisions on international child trafficking in place as part of its criminal code since 1998. A human trafficking bill entered into force in 2007 with a

definition of trafficking in persons that criminalizes all forms of trafficking as indicated in Article 3 of the UN Trafficking Protocol.

- **Italy:** According to the Italian criminal procedure code, investigations on human trafficking are conducted by the local anti-mafia bureaus (Direzioni Distrettuali Anti-mafia), and coordinated by the national anti-mafia bureau (Direzione Nazionale Anti-mafia).
- **The Netherlands:** Trafficking in persons was criminalized in the Netherlands in 1911. The previous Article 250a of the Dutch Criminal Code was replaced by a new and extended Article 273a on 1 January 2005 that criminalizes all the forms of trafficking listed in the UN Trafficking Protocol and more. A national action plan on trafficking in persons was adopted in 2005.

The above mentioned details are just a broad overview. The author here, in the subsequent sections, will be focussing on Germany's role in combating human trafficking and also the severity and extent of human trafficking in the country and the law enforcement system.

## **5. Status of Human Trafficking in Germany**

The criminal code of Germany was amended in 2005 to include the exploitation of persons as workers within the existing definition of human trafficking as per the international standards. And all forms of human trafficking were acknowledged.

Since Germany is a country of destination, as well as transit nation for trafficking victims, the majority of the victims of trafficking, out of which 87% are EU-citizens, who hail from Romania and Bulgaria. As per the data recorded by European Commission in 2013, there were 425 police investigations and 542 victims of trafficking were found to be trafficked for the purpose of sexual exploitation alone, along with other crimes of migrant smuggling, drug trafficking, arms trafficking, forgery, deprivation of liberty etc. Out of these 542 victims of trafficking identified, 23.1% were Romanians, 26.4% were Bulgarian nationals, and 16.6% were German nationals. Further, among them, 96% victims were female. However, despite so many investigations and identification of victims of trafficking, not much has changed in terms of the human trafficking scenario. Further data revealed from 53 investigations of trafficking for labour exploitation. (European Commission, National Information Page, Germany).

Now, since 2007, a minor change has been noticed. The victims of trafficking who cooperate in criminal proceedings against the perpetrators / traffickers, had provision to

receive a residence permit for the time which the state prosecutor deems fit. However, there is a clause under which the residence permit provided to the cooperating victims of trafficking, could be withdrawn, if in any case, he / she found to be contacting the accused trafficker. Since the legal proceedings takes a considerable time, which may extend to few years, the victims of trafficking are given some facilities such as vocational training, access to education, to work in Germany (European Commission, National Information, Germany).

Besides, the Federal Ministry of Labour and Social Affairs (BMAS) has initiated a project called “The Alliance Against Human Trafficking for Labour Exploitation (BündnisgegenMenschenhandelzurArbeitsausbeutung)”, which is being carried out along with the European Social Fund (ESF) funding, and this has taken up various activities and initiatives to prevent human trafficking in the country.

Besides the CoE Convention, Germany is also a party to the United Nations Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (both have been ratified by Germany in 2006), to the United Nations Convention on the Rights of the Child including its Optional Protocols on the Sale of Children, Child Prostitution and Child Pornography (ratified by Germany in 1992 and 2009 respectively), the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol (ratified by Germany in 1985 and 2002 respectively). Germany is also a party to and ratified the following ILO conventions:

- a) Convention concerning Forced or Compulsory Labour (No.29)
- b) Convention concerning the Abolition of Forced Labour (No.105)
- c) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No.182)
- d) Domestic Workers Convention (No. 189).

## **6. Effectiveness of CoE Convention in Prevention of Human Trafficking in Europe, with special focus on Germany**

Trafficking in Human Beings (THB) amounts to an offence to the dignity and fundamental independence of the human being and thus constitutes a grave violation of human rights. To prevent this crime and to uphold the human rights of the victims of trafficking, the CoE Convention was enforced in the European Region by the European Commission. The CoE Convention came into force in the European Region on 1 February 2008 after the 10<sup>th</sup> Ratification. However, Germany ratified the Council of Europe

Convention on Action against Trafficking in Human Beings (the CoE Convention) on 19 December 2012 which was entered into force on 1 April 2013.

As per the provisions of Article 36(1) of the CoE Convention, the Group of Experts on Action against Trafficking in Human Beings (GRETA) monitors the implementation of the CoE Convention by the Parties to it. And this is done as per the provisions of Article 38 of the CoE Convention and the procedures mentioned in it as well as the Rules of Evaluation Procedure for the implementation of the CoE Convention by the parties to the Convention.

GRETA lays stress on the obligation and duty of the states to respect, fulfil and protect human rights, by ensuring compliance by the non-state actors, in accordance with the duty of due diligence. The German authorities have identified the basic rights relevant in relation to trafficking in human beings, which includes the upholding of human dignity, the right to life and the right to physical integrity, as well as the freedom of the person, have been already guaranteed under Article 1 and Article 2 of the German Basic Law. Under the criminal procedure framework, some special rights have also been conferred on the victims of certain serious criminal offences, which definitely include human trafficking.(GRETA, 2015, p.19)

The offence of Trafficking in human beings is further defined in 3 sections of the German Criminal Code (StGB). This includes: (GRETA, 2015, p.19)

- a) Section 232 – Human Trafficking for the purpose of sexual exploitation
- b) Section 233 – Human Trafficking for the purpose of work exploitation
- c) Section 233a – Assisting in Human Trafficking

As identified by GRETA, sections 232 and 233 of StGB do not contain the actions as mentioned in the definition of the Convention. The actions are, however, form a part of Section 233a of the StGB. Section 233a criminalises all actions which are contained in the Convention when they are used to assist in a crime as defined under Sections 232 and 233 of the StGB. (GRETA, 2015, p.20)

Paragraph 1 of both the Sections 232 and 233, contains the basic offence of THB. In Section 232, it is mentioned as, “exploiting another person’s predicament or vulnerability arising from being in a foreign country” which corresponds to the element of the CoE Convention, “abuse of a position of vulnerability”. Further, Paragraph 4 of section 232, which applies *mutatis mutandis* to section 233, contains the means “threat of serious harm or by deception”. (GRETA, 2015, p.21)

However, the other means which are contained in the CoE Convention, namely “other forms of coercion”, “abduction”, “fraud”, “abuse of power”, “giving or receiving of payments

or benefits to achieve the consent of a person having control over another person”, are not mentioned clearly in the definition of Human Trafficking in the StGB. (GRETA, 2015, p.21)

Sections 232 and 233 of the StGB include various forms of exploitation, namely, prostitution, slavery, servitude, other sexual activities, bonded labour, or making a person work “under conditions that are in clear discrepancy to those of other workers”. But these Sections do not refer to “forced labour or services” and “practices similar to slavery” which are considered as forms of exploitation under the CoE Convention. (GRETA, 2015, p.21)

The Victims of Human Trafficking as per the CoE Convention, is defined as “any natural person who is subjected to THB as defined in Article 4 of the Convention”. Therefore, identifying the victims of trafficking is very important since it involves their eligibility to the entitlement of protection and assistance measures which are laid down in the Convention. Sections 232, 233 and 233a of the StGB defined the victims of trafficking as, “any natural person who is subject to the criminal offence of trafficking in human beings”. (GRETA, 2015, p.22)

The CoE Convention aims at designing a comprehensive framework for the protection of and assistance to the victims of trafficking as well as the witnesses thereof. Towards this objective, Article 29(2) of the Convention requires the Parties to the Convention to take steps to ensure the coordination of the national policies and actions against human trafficking in their respective countries, by establishing bodies which would specifically work towards this objective. Article 35 of the Convention also refers to the need to cooperate and build strategic partnership with the civil society with the help of cooperative frameworks which can help the governments to fulfil their duties and obligations of the Convention. In relation to this objective, the Federal jurisdiction of Germany in enacting legislation in the area of combating human trafficking in the country and further protecting and supporting the victims of trafficking, the policies related to human trafficking and further implementation of the anti-trafficking legislations falls within the competence of different *Länder* (States of Germany, the 16 federal subdivisions of Germany) (*German Federal states*). The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) is the coordinating agency in the Federal Government on issues related to human trafficking in the Germany. The Ministry is very active in developing and promoting policies towards fighting and combating human trafficking. The Ministry chairs the Federal Working Group on Trafficking in Human Beings and also finances the work of the KOK. KOK is the German NGO network against trafficking in human beings (KOK) is an alliance of 37 nongovernmental organisations working to combat human trafficking. The application of the Residence Act falls under the

responsibility of the Ministry of Interior while the Ministry for Labour and Social affairs is responsible for human trafficking for labour exploitation. (GRETA, 2015, p.23)

## **7. Recommendations**

The German authorities need to strengthen the institutional frameworks and coordination structures for all the actions against human trafficking taking place in the country, at the Federal level, between Federal and *Länder* level, between the *Länder* as well as within each *Land*. The objective is to ensure more unified and effective actions of all public / federal bodies which are working towards combating the human trafficking and further working towards preventing the same and protecting the victims of trafficking without any kind of discrimination or origin or residence.

The German authorities also need to strengthen the coordination between its public / federal bodies and the NGOs which are working towards the combating the crime of human trafficking and taking various actions which are anti-trafficking in nature. The authorities must also ensure that the Civil societies are involved in the development process and implantation of the anti-trafficking policies and activities as well as the provisions of the CoE Convention in preventing the crime and protecting the victims of trafficking

The German authorities also need to ensure that they are in compliance with the obligations which are contained in various Articles of the CoE Convention, so that all possible victims of trafficking, including those of labour exploitation and child trafficking, are also covered and protected.

## **8. Conclusion**

There seems to be a lack of political will to end this menace for reasons best known including the large sums involved. Data found on UNODC websites is incomplete and unclear as no nation would like to submit adverse data thereby undermining their own positions in the map of the world.

However, in fighting this menace, victims should not be forgotten. Victims must be most efficiently identified as such and recognized in a way that grants them the full range of protection, assistance and support to which they are entitled. Victim recovery is undermined where victims do not have access to information, mental and physical health services, legal aid, compensation and mechanisms of safe repatriation to their country of nationality or residence. The criminal justice system is unable to perform to its full capacity where victim witnesses are not empowered to testify against their traffickers through inadequate support to

do so. Their access to rights must not be hampered by immigration laws which have not been harmonized in accordance with international principles of protection, or by their inappropriate punishment for crimes they committed as a result of having been trafficked.

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