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## Abstract

Civil society involvement in counter-trafficking governance has substantially evolved, and today reaches an unprecedented level. The present paper aims at discussing different aspects of their involvement and their unique position across multiple levels of governance: i) their role in drafting legal instruments; ii) their role in EU's policy and iii) their impact in securing the rights of victims, using the example of the trafficked person's right not to be punished. We highlight that civil society actors, at all multi-governance levels from the global to the local, play an integral role in securing an effective comprehensive counter-trafficking response.

## 1. Introduction

Civil society actors comprise non-governmental organisations, charities, foundations and trusts, composed of citizens and/or professionals who work in isolation or collectively to raise awareness and instigate policy change for common interests often linked to matters of social justice. Their involvement in the prevention and the fight against human trafficking has often preceded the involvement of national authorities<sup>1</sup> and inter-governmental organisations. Moreover, they often contribute to raising awareness of the need to develop and implement ambitious counter-trafficking activities, and they constantly remind of the importance of adapting them to the mutations of the phenomenon. Finally, they have a unique expertise in this field, since they are often the only actors with an experience of what is functioning (or not) on the ground. Their cooperation with relevant stakeholders at international, regional and national level is thus of paramount importance. Moreover, their diversity allows them to occupy a unique position, in which they are able to interact, on multilateral and/or bilateral basis, with any of the actors taking part in the global counter-trafficking governance. Henceforth we have observed that the integration of civil society organisations in global counter-trafficking governance has substantially evolved throughout the years.

The present paper aims at discussing different aspects of the integration of civil society organisations in the global counter-trafficking governance. Each section provides an illustration of their unique position across multiple levels of governance: i) the role of civil society in drafting international legal instruments; ii) their role and integration in the EU's counter-trafficking policy and iii) their contribution to the impact in securing the rights of trafficked persons, using the

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<sup>1</sup> GALLAGHER, A., *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, Human Rights Quarterly, Vol. 23, No. 4, 2001, p. 1002

example of the trafficked person's right not to be punished.

The paper will pinpoint the strengths and weaknesses in the current involvement of civil society organisations in preventing and combating trafficking in human beings at all levels of governance. On the basis of our analysis, we will eventually highlight best practices to be promoted and/or propose ideas to improve the involvement of civil society organisations, as their involvement is crucial, at all multi-governance levels from the global to the local, to securing an effective counter-trafficking response.

## **2. The integration of civil society in counter-trafficking governance**

The development of counter-trafficking governance in the late 1990's as one of the aspects of global migration governance has facilitated a wide-ranging number of institutions addressing human trafficking. Their interactions aim at developing a common comprehensive approach, stimulating the development of synergies and avoiding the duplication of efforts. The crucial role of civil society in combating human trafficking was made clear in 2002 in the *United Nations Human Rights Commissioner Principles and Guidelines on Human Rights and Human Trafficking*, wherein the need to engage with civil society actors is highlighted.<sup>2</sup>

Importantly, civil society organisations offer a unique perspective and experience on the way to address trafficking in human beings. Without a doubt, they have played a big role within counter-trafficking efforts. Such involvement can take very diverse forms, and varies depending their status, objectives and means. The expression "civil society organisations" (hereinafter CSOs)<sup>3</sup> as employed in the present article, covers a large variety of organisations acting independently of government: whereas some act at local/national level, operating shelters for victims, or engaging in discussions on the national counter-trafficking legislation and policy, others are active at a transnational level, where they engage in lobbying actions, research activities or capacity-building projects. The diversity of their missions is well established, and some organisations and/or networks of CSOs conduct tasks ranging from the detection and assistance of trafficking victims to the conduct of raising-awareness campaigns. In addition to these concrete tasks, CSOs have been increasingly recognised as essential partners for the elaboration and implementation of counter-trafficking policies. Public

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<sup>2</sup> UNHCR Principles and Guidelines on Human Rights and Human Trafficking, 2002.

<sup>3</sup> The authors use civil society organisations (CSOs) to also mean non-governmental organisations (NGOs).

stakeholders, active at global, regional or national level, rely on their valuable input and associate them to their discussions and policies.<sup>4</sup>

Yet despite some advancements, the integration of civil society in global, regional and national counter-trafficking efforts is still an emerging topic.<sup>5</sup> CSOs advocating for a comprehensive approach to counter-trafficking, can contribute to agenda setting and strongly influence the drafting processes of international legal frameworks that enunciate the key concepts and thus the direction and focus of efforts to combat trafficking in human beings. Collaboration with CSOs is now standard practice in many countries, although the extent of their involvement varies considerably.<sup>6</sup> Regional organisations, which have acknowledged their expertise, are more than willing to engage with them in diverse fora in order to benefit from their comments and feedback. This move is particularly noticeable in Europe, where specific platforms have been established. The EU Civil Society Platform against trafficking in human beings, has over 100 European member organisations. The Europe-wide Platform serves as a forum for CSOs working at European, national and local levels. The Alliance against Trafficking in Persons, in which numerous CSOs participate, has for instance been established under the patronage of the Organisation for Security and Cooperation in Europe (OSCE).<sup>7</sup> CSOs also assist the GRETA (Council of Europe) when it monitors the compliance of national legislation and policies with regional standards.<sup>8</sup>

Overall, the importance of the long-standing support and involvement of CSOs, has engendered a vast amount of expertise and experience, and fostered links and cooperation, not only amongst the CSOs themselves, but also with intergovernmental organisations and national governments. As a result, their involvement is not only foreseen in policy documents, but also in legally binding

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<sup>4</sup> For instance, several CSOs, namely Amnesty International, Anti-Slavery International, ECPAT, ICMEC, La Strada International, Save the Children and Terre des Hommes, are part of the OSCE's Alliance against Trafficking in Persons, a broad forum that helps developing effective joint strategies, and innovative and coordinated approaches to strengthen the prevention and combat against trafficking. See also the example of Belgium, where CSOs have officially been recognized as members of the national coordinating body (see Royal Decree of 21 July 2014, *Moniteur Belge*, 1<sup>st</sup> September 2014).

<sup>5</sup> Global: De Burca, G., *The EU in the negotiation of the UN Disability Convention*, Jean Monnet Working Paper 14/09; Regional: Gallagher, A., "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*, 2006, 8, p. 163-189 at p. 173; National: L.E. v. Greece, Appl. No. 71545/12, 21 January 2016

<sup>6</sup> See ILO, Strengthening action to end forced labour Report IV(I) 2013, p. 19, available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_217752.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_217752.pdf) on role of CSOs in playing a key role in awareness raising, victim assistance and prevention measures.

<sup>7</sup> The full list of its participants can be found here: <http://www.osce.org/secretariat/107221>.

<sup>8</sup> C.R.J.J. Rijken, S. Jansen-Wilhelm and E.J.A. de Volder, "Taking stock of GRETA's Monitoring Function", not published.

instruments.<sup>9</sup> However, despite the growing importance of civil societies in trafficking agenda setting, there is a dearth of research on their role and influence. Thus further research is encouraged, including questions such as: how do the groups influence the agendas of big organisations such as the EU or UN? Why do some of their issues become included and not others? Why are they influential at certain times but not others? And what are the important factors determining whether a civil society is heard? Taking this into account, the remainder of this paper will broach some of these questions and consider the role of civil society at varying levels of counter-trafficking governance: international (section 3), regional (section 4) and national (section 5).

### **3. Global counter-trafficking governance: The role of civil society in drafting international legal instruments**

This section will determine the integration of civil society in the global debate on human trafficking by examining the regulatory role and influence of CSOs on the drafting processes of international legal frameworks, a role that has been central to the negotiation of other human rights instruments.<sup>10</sup>

The entry into force of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter the Palermo Protocol) saw the beginning of significant developments in the international law of human trafficking and has been the subject of much scholarly debate regarding its effectiveness and achievements.<sup>11</sup> The drafting of the Palermo Protocol saw a significant unprecedented and influential contribution from NGO actors, who assisted in providing more information regarding the phenomenon of human trafficking, something that may be considered as a lacuna in the knowledge

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<sup>9</sup> Convention on Action against THB, Article 27 (3); Directive 2004/81/EC, Article 5, role of civil society when giving information TCNs; Directive 2011/36/EU, Article 18, role of CSOs in prevention; Article 12 (5) Convention on Action against THB, Assistance to victims; Convention on Action against THB, Article 35, Co-operation with civil society & Article 5(6); OSCE Action Plan 2005, V. Partnerships.

<sup>10</sup> De Burca, G., *The EU in the negotiation of the UN Disability Convention*, Jean Monnet Working Paper 14/09.

<sup>11</sup> Gallagher, A., *The International Law of Human Trafficking*, (Cambridge University Press, 2010); Parkes, C., 'The Trafficking Protocol Has Advanced the Global Movement against Human Exploitation: The Case of the United Kingdom,' *Anti-Trafficking Review*, no. 4 (2015): 150–55; Gallagher, A., 'Two Cheers for the Trafficking Protocol,' *Anti-Trafficking Review*, no. 4 (2015): 14–32.

of the drafters.<sup>12</sup> Such involvement contributed to the development of a broad international definition of trafficking in persons.

Nearly 15 years after the adoption of the Palermo Protocol, two more significant binding instruments that will impact upon the next 20 years of counter-trafficking law and policy making were adopted. The International Labour Organisation (ILO) Protocol of 2014 to the Forced Labour Convention, 1930 (No. P029) and Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203) (hereinafter the ILO Forced Labour Protocol and Recommendation) also received significant input from civil society actors that guaranteed that a number of key provisions were included to ensure that all victims of human trafficking are provided with the support and assistance firmly based on a holistic human rights integrated approach.

The involvement of civil society is at the core of the ILO's tripartite system (governmental representatives, workers' organisations and employers' organisations), presenting a particular model of CSO regulation and integration that is embedded throughout the entire decision-making process.<sup>13</sup> CSO engagement is explicitly recognised in the 1919 ILO Constitution,<sup>14</sup> demonstrating that civil society has a significant regulatory legitimacy in ILO governance.<sup>15</sup> As such a number of 'recognised' CSOs have a consultative relationship with the ILO. These represented CSOs are mandated to advocate for a wide range of issues, including the promotion of human rights, poverty alleviation, social security, professional rehabilitation, gender issues and youth matters.<sup>16</sup>

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<sup>12</sup> The polarisation of the debate regarding how the issue of prostitution was to be dealt with in the human trafficking paradigm and the definition of trafficking amongst civil society actors must be noted, but did not do too much damage to the overall result: see Gallagher, A., 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis,' *Human Rights Quarterly* 23 (2001): 975–1004, p. 1003.

<sup>13</sup> Conference of NGOs in Consultative Relationship with the United Nations, *NGO participation arrangements at the UN and in other agencies of the UN System*, 2006, p.3, available at: [https://www.itu.int/council/groups/stakeholders/Resources/Non-Paper%20on%20NGO%20Participation%20in%20the%20UN%20System3%20\\_CONGO\\_.pdf](https://www.itu.int/council/groups/stakeholders/Resources/Non-Paper%20on%20NGO%20Participation%20in%20the%20UN%20System3%20_CONGO_.pdf).

<sup>14</sup> Article 12 (3), ILO Constitution, 1919, available at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO).

<sup>15</sup> Van den Bossche, P., 'Regulatory Legitimacy of the Role of NGOs in Global Governance: Legal Status and Accreditation in NGO Involvement' in Vedder, A., (ed.) *International Governance and Policy: Sources of Legitimacy*, (Martinus Nijhoff Publishers, 2007) p.150.

<sup>16</sup> Conference of NGOs in Consultative Relationship with the United Nations, *NGO participation arrangements at the UN and in other agencies of the UN System*, 2006, p.4, available at: [https://www.itu.int/council/groups/stakeholders/Resources/Non-Paper%20on%20NGO%20Participation%20in%20the%20UN%20System3%20\\_CONGO\\_.pdf](https://www.itu.int/council/groups/stakeholders/Resources/Non-Paper%20on%20NGO%20Participation%20in%20the%20UN%20System3%20_CONGO_.pdf).



In 2013, the ILO sought to address the need to modernise and address gaps in the protection of forced labour.<sup>17</sup> The subsequent negotiation and drafting process of the ILO Forced Labour Protocol and Recommendation has been hailed to be indicative of ‘ILO tripartism functioning at its best and a clear demonstration that treaty-making has not gone out of fashion.’<sup>18</sup> The diversity of actors involved reflects that many civil society actors, both from within the ILO tripartite structure and external CSOs were engaged with the issue.<sup>19</sup>

Although CSOs did not contribute to the detailed discussion regarding proposed amendments, representatives made opening statements that reflected their views regarding some of the essential elements that should be incorporated, including the provision of appropriate remedies including compensation,<sup>20</sup> and the non-punishment of victims who have been compelled to commit unlawful activities. In addition, the NGO Walk Free outlined the advocacy initiatives undertaken in order to secure the support of Member States for a strong Protocol and supplementary Recommendation that could provide a contemporary framework to tackle forced labour.<sup>21</sup> All civil society representatives emphasised the importance of adopting a legally binding Protocol and an accompanying Recommendation.<sup>22</sup>

The content of the proposed Protocol considered the importance of providing redress for victims of forced labour by referring to access to compensation as a form of effective remedy. A suggested amendment to the text attempted to address the limiting nature of compensation, stating for ‘provision of effective remedies, including rehabilitation, adequate compensation and guarantees of non-repetition.’<sup>23</sup> Consultation with civil society actors raised the issue of establishing specific compensation funds for forced labour victims. The proposed Recommendation required Member States to implement measures aimed at

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<sup>17</sup> ILO, Conclusions adopted by the Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation (Geneva, 11-15 February 2013), available at: [http://www.ilo.org/global/standards/WCMS\\_212068/lang--en/index.htm](http://www.ilo.org/global/standards/WCMS_212068/lang--en/index.htm).

<sup>18</sup> Andrees, B., ‘How a landmark treaty on forced labour got passed’ 25 September 2014, available at: <http://iloblog.org/2014/09/25/how-a-landmark-treaty-on-forced-labour-got-passed/>.

<sup>19</sup> The International Labour Office presented the draft text instruments to representatives from international CSOs including International Young Christian Workers (IYCW) and the World Solidarity Movement (WSM), NGO Walk Free, Anti-Slavery International and the Global Alliance Against Traffic in Women (GAATW), International Domestic Workers Federation (IDWF), Human Rights Watch, *ibid*, paras 53-57.

<sup>20</sup> *Ibid*, para. 53. IYCW & WSM.

<sup>21</sup> *Ibid*, para. 54.

<sup>22</sup> *Ibid*, paras 53-57.

<sup>23</sup> ILO, Strengthening action to end forced labour: Report IV(2A), 27 March 2014, p.20, available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_239813.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_239813.pdf).

‘ensuring access to existing compensation schemes, or establishing victim compensation funds in appropriate cases.’<sup>24</sup> Article 1 and Article 4 of the final text of the Protocol show that the discussion of the Committee prevailed with compensation being explicitly listed as an example of a remedy. However, for civil society actors, such as Human Rights Watch, the lack of an emphasis on the requirement of governments to ensure that victims have access to compensation, through the provision of compensation funds, is a missed opportunity in strengthening key protections<sup>25</sup> as is the lack of focus on the diversity of victim’s needs, and the need to secure effective remedies, not just limited to compensation in the final wording in the Protocol and Recommendation.

The drafting process of the Protocol and Recommendation offered the opportunity to strengthen the regulation of businesses to ensure that they take measures to prevent forced labour in their supply chain. This was a notion overwhelmingly supported by workers and government representatives.<sup>26</sup> The proposed Recommendation stated that, as part of preventative measures, Member States should make ‘efforts to reduce the trade in and demand for goods and services that have been produced or delivered using forced or compulsory labour.’<sup>27</sup> However, the extent of the obligations on Member States was weakened following the negotiations in the Committee,<sup>28</sup> and the final Recommendation requires Member States to implement preventative measures, according to their national circumstances, by ‘providing guidance and support to employers and businesses to take effective measures to identify, prevent, mitigate and account for how they address the risks of forced or compulsory labour in their operations or in products, services or operations to which they may be directly linked.’<sup>29</sup> It is clear thus that the final text gives states a large degree of flexibility. Moreover, the obligation is weak as it only calls for guidance and support, which is less rigorous

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<sup>24</sup> ILO, Strengthening action to end forced labour: Report IV(2B), 27 March 2014, p.16, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_239814.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_239814.pdf).

<sup>25</sup> Ibid.

<sup>26</sup> ILO, Strengthening action to end forced labour: Report IV(2A), 27 March 2014, p.52, available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_239813.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_239813.pdf).

<sup>27</sup> ILO, Strengthening action to end forced labour: Report IV(2B), 27 March 2014, p.14, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_239814.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_239814.pdf).

<sup>28</sup> ILO, Provisional Record No.9(Rev.), Fourth item on the agenda: Supplementing the Forced Labour Convention, 1930 (No. 29), to address implementation gaps to advance prevention, protection and compensation measures, to effectively achieve the elimination of forced labour -- Report of the Committee on Forced Labour, Record of Proceedings, 20 June 2014, paras 8678-891, available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_246188.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_246188.pdf).

<sup>29</sup> R203 - Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), Recommendation on supplementary measures for the effective suppression of forced labour.

than for instance change in legislation. Again, for civil society, the final text represented a missed opportunity to secure the accountability of the private sector in ensuring that their supply chains are free from forced labour.<sup>30</sup>

A final element of the negotiations supported by civil society actors was the need to acknowledge the dominance of forced labour in the private economy, particularly amongst informal economic sectors where regulation is absent. This was supported during the consultation by workers organisations.<sup>31</sup> Both the Protocol and Recommendation stipulate that the preventative measures should be broadened to cover ‘all workers in all sectors of the economy’<sup>32</sup> thus implicitly, not making any distinction between formal and informal economic sectors.<sup>33</sup>

This section has shown that the tripartite formation of the ILO ensures that civil society actors are included. The drafting process gives civil society opportunities to feed into the consultations of the ILO. The subsequent conclusions on the role of businesses and the need for increased recognition of the private economy, shows the weight that is given to the issues raised by civil society in this consultative stage. In addition, civil society undertake advocacy and lobbying efforts in advance of the Committee stage. They are then able to maintain a formal role in final drafting proceedings and reinforce the main points that they feel should be considered in these final stages. The focus on the ILO Protocol and Recommendation negotiations demonstrates that CSOs can impact on the direction of law and policy making and have significant visibility in the governance process.

Using the ILO Protocol and Recommendation negotiations as an example of the involvement of CSO in international governance, the involvement at all stages is key to ensuring meaningful participation. An aspect of the role of CSOs that has not been assessed is the impact of their involvement in the implementation of counter-trafficking measures, which, will require synergy from the macro level down to the regional and local level, and will be considered in the following sections.

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<sup>30</sup> Human Rights Watch, Global treaty to protect forced labour victims adopted, 11 June 2014, available at: <https://www.hrw.org/news/2014/06/11/global-treaty-protect-forced-labor-victims-adopted>.

<sup>31</sup> ILO, Strengthening action to end forced labour: Report IV(2A), 27 March 2014, p.25, available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_239813.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_239813.pdf).

<sup>32</sup> Protocol, article 2(c)(i), Recommendation 4(e) R203 - Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), Recommendation on supplementary measures for the effective suppression of forced labour.

<sup>33</sup> ILO, Strengthening action to end forced labour: Report IV(2A), 27 March 2014, p.26, available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_239813.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_239813.pdf).

#### **4. Regional counter-trafficking governance: The European Union's recognition and promotion of civil society organisations as key actors**

The unique perspective and experience of CSOs on the way to address trafficking in human beings has been progressively acknowledged by the European Union (hereafter the EU), and since the early 2000's, there has been a growing consensus on the importance of involving a more diverse group of actors in the EU's counter-trafficking governance. This consensus led to two concrete consequences: the creation of mechanisms through which the EU institutions can interact with CSOs on the one hand, and the insertion of references to CSOs' involvement in EU instruments on the other hand.

Two mechanisms, i.e. the Experts Group on Trafficking in Human Beings, and the EU Civil Society Platform against Trafficking in Human Beings, have been established, allowing the European Commission to involve CSOs in the elaboration of the EU's counter-trafficking policy, and they will be analysed successively.

In 2002, the Brussels Declaration recommended the setting up by the European Commission of an Experts Group, comprising notably representatives from CSOs.<sup>34</sup> The main function of this group is to advise the Commission on the development of EU action in the field of trafficking. The Experts Group publishes reports and issues opinions on various aspects of the EU action against THB and meets yearly with the EU Anti-Trafficking Coordinator and other relevant Commission's services on matters related to THB. Since its creation in 2003, the Experts Group has always counted among its members, representatives of CSOs with an established expertise in the field of THB.<sup>35</sup> In its current composition, the Experts Group counts no less than 5 members with a professional background in CSOs.<sup>36</sup> Although the group is composed of eminent personalities with a certain experience and expertise in the field of trafficking, its role remains purely consultative. Yet some of its Opinions have contributed to substantially shaping the EU's counter-trafficking policy, as for instance in its Opinion 7/2010, in which the Experts Group proposed a European Strategy and Priority Actions on Combating and Preventing THB.<sup>37</sup>

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<sup>34</sup> Brussels Declaration on Preventing and Combating Trafficking in Human Beings, Council Doc. No. 14981/02, 29.11.2002, 22 pages at p. 6.

<sup>35</sup> Decision of 27 August 2003 appointing the members of the Group, OJ C 205, 30.8.2003, p. 3.

<sup>36</sup> For more details, please consult: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2722&Lang=FR>.

<sup>37</sup> Experts Group, Opinion No 7/2010, Proposal for a European Strategy and Priority Actions on combating and preventing trafficking in human beings and protecting the rights of trafficked and exploited persons, 58 pages.

The second mechanism deserving our attention is the EU Civil Society Platform Against Trafficking in Human Beings. This platform is envisaged as a forum for CSOs working at European, national and local levels, enabling the EU institutions to engage in constructive dialogue with them.<sup>38</sup> Its creation was announced in 2012 in the Strategy towards the eradication of trafficking in human beings,<sup>39</sup> and became effective in 2013. Today the platform meets every two years, bringing together over 100 CSOs working in the field of THB in the Member States and in four neighbouring priority countries (Albania, Morocco, Turkey and Ukraine). The meetings take the form of conferences, during which workshops are organised, and address developments in the EU counter-trafficking policy, as well as the emerging trends in the field.<sup>40</sup> In addition, the Commission has created an EU Civil Society e-platform, in order to enable the continuity of the discussions beyond the biannual meetings in Brussels and to broaden the participation of CSOs by including a higher number of organisations.<sup>41</sup>

After few years of existence, one may wonder about the added-value of such platform. Do the CSOs attending these meetings really enjoy an opportunity to voice their opinions and potentially influence the EU counter-trafficking policy? The answer to such question is by definition very difficult to give. It is not only very sensitive, but it is also very subjective. Each CSO/participant would have its own expectations and its own perception about the successes and/or shortcomings of the platform. Nevertheless, researchers, such as Dr. Shaparov, have attempted to find an answer to this crucial question,<sup>42</sup> and have obtained contrasted results. Some participants have expressed a positive feedback, stressing that it provided them several opportunities, such as the possibility to partner other organisations, to contribute to the EU anti-trafficking strategy and policies, or to meet Commission's officials and engage in face-to-face dialogue. In an opposing view, other respondents expressed a more negative feedback: the meetings are described as being about "ticking the 'engagement' box", there was no opportunity to influence the agenda, there is no working plan beyond one meeting, and no concrete

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<sup>38</sup> Commission launches EU Civil Society Platform against THB, 31 May 2013, IP/13/484.

<sup>39</sup> Commission, "*The EU Strategy towards the Eradication of Trafficking in Human Beings, 2012 – 2016*", COM (2012) 286 final, 19.06.2012, p. 12.

<sup>40</sup> During its meeting in October 2015, discussions addressed children as high risk group of trafficking, emerging concerns (Syrian refugee crisis, and sham marriages); and finally demand, reduction and prevention initiatives. Source: <http://www.renate-europe.net/archives/3606>

<sup>41</sup> Commission, *Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings*, 17.10.2014, SWD (2014) 318, p. 13.

<sup>42</sup> His research has been presented in November 2015 during a conference, and the references are made to his Power Point presentation, available at: <https://thbregionalimplementationinitiative.files.wordpress.com/2015/10/sharapov-eu-civil-society-platform-against-trafficking.pdf>.

outcomes resulting from these meetings.<sup>43</sup> Additional research supports the sensitiveness of the appreciation of the platform's added-value. Participants have indeed expressed a more positive assessment, and have reported the coordination of several CSOs to convey agreed messages in the different workshops organised.

It is hard to draw a definitive conclusion on whether or not CSOs play an important part in the policy-making process at the EU level. Contrary to the international level, the European Union remains a bit of a blind spot concerning empirical coherent studies on the influence of CSOs on the counter-trafficking policy. The diversity of the CSOs active in the counter-trafficking field within Europe complicates the analysis: one cannot compare the influence exercised by an CSO representing a network of local and national CSOs, such as la Strada International or Terre des Hommes, and used to interact with institutional partners, with the influence exercised by a CSO operating a shelter for victims and concentrating its actions at the local level.

The recognition of CSOs as key actors in counter-trafficking efforts by the EU has led to a second consequence: the insertion within EU instruments of provisions foreseeing the involvement of CSOs in national counter-trafficking governance. Whereas the next section (section 5) will address in detail how CSOs are involved in a given EU Member State in the implementation of a specific provision, the next paragraphs will examine the provisions in EU instruments on the CSOs' involvement at national level.

As said earlier, for the EU, combatting THB supposes a comprehensive approach, and efforts to that end shall not remain exclusively in the hands of public authorities and shall involve a larger group of actors, including CSOs. The Directive 2011/36/EU<sup>44</sup> invites national authorities to encourage and work closely with CSOs.<sup>45</sup> In addition to their cooperation in prevention of THB,<sup>46</sup> the text also provides for the close cooperation of CSOs with national rapporteurs or equivalent mechanisms.<sup>47</sup> The Directive 2004/81/EC also envisages that CSOs may be entitled to inform third country national victims of THB about the possibility to obtain a residence permit if they cooperate with national competent authorities,<sup>48</sup>

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<sup>43</sup> *ibidem*, slide 10.

<sup>44</sup> 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, *OJ L* 101, 15.04.2011, p. 1.

<sup>45</sup> Directive 2011/36/EU, Preamble, Recital 6.

<sup>46</sup> Directive 2011/36/EU, Article 18 (2).

<sup>47</sup> Directive 2011/36/EU, Article 19. See also Commission, *The EU Strategy towards the Eradication of Trafficking in Human Beings, 2012 – 2016*", *supra*, p. 11.

<sup>48</sup> Directive 2004/81/EC, Article 5.



and to offer them access to their programmes aimed at the recovery of a normal social life by trafficking victims.<sup>49</sup> These provisions share a common characteristic: they are drafted in rather vague terms and are often complemented by guidelines to be found in policy documents, such as the EU strategy.<sup>50</sup>

The European Union may nevertheless distinguish itself through its capacity to fund projects involving CSOs, located within or outside the EU territory, and through programmes established in diverse fields, such as the fight against crime, migration or development cooperation.<sup>51</sup> Although this funding is often (if not always) of a short-term nature, EU-funding allows CSOs to gain a certain independence from national subsidies and it enables them to deepen their expertise on trafficking in human beings.<sup>52</sup> In turn, by expanding their expertise the CSOs are in a stronger position to advocate, influence policy making nationally and regionally and contribute effectively to counter-trafficking measures. Furthermore, the funding also supports the involvement of CSOs in EU governance, since the conduct of joint projects allows CSOs to develop links with partners located in other countries, or active at another level of governance, and to benefit from their experience.

However, the influence of the EU's in promoting the involvement of CSOs is difficult to assess. The obligations of its Member States stem from other sources, such as the Council of Europe's Convention<sup>53</sup> or the United Nations' Protocol,<sup>54</sup> and some organisations monitor more closely than the EU the implementation of these obligations.<sup>55</sup> Provisions addressing the issue are often of a "soft" nature, leaving a broad margin of discretion to the States. In the end, the involvement of

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<sup>49</sup> Directive 2004/81/EC, Article 12 (1).

<sup>50</sup> Commission, EU strategy, *supra*, p. 5 (multidisciplinary policy, including CSOs) p. 6 (national referral mechanisms), and p. 16 (consultation of CSOs by National Rapporteurs). See also the reference to CSOs in the mid-term implementation report of the EU Strategy, 17 October 2014, SWD (2014) 318 final.

<sup>51</sup> Examples of EU funding programmes: Regulation (EU) No. 516/2014 establishing the Asylum, Migration and Integration Fund (...), OJ L 150, 20.05.2014, p. 168 & Regulation (EU) No. 513/2014 establishing as part of the Internal Security Fund the instrument for financial support for police cooperation, preventing and combating crime (...), OJ L 150, 20.05.2014, p. 93.

<sup>52</sup> See for instance the TRACE project (Trafficking as a Criminal Enterprise – [www.trace-project.eu](http://www.trace-project.eu)), funded under the FP7 programme. Two CSOs, La Strada International and the Animus Association, were involved together with universities and public authorities from different EU Member States.

<sup>53</sup> E.g. CoE's convention, Art. 35 and Explanatory report §352-353.

<sup>54</sup> E.g. UN Protocol, Arts. 6 §3 & 9 § 3.

<sup>55</sup> See in particular the monitoring carried out by the GRETA (CoE), which meets representatives of CSOs for the evaluation of each national policy, assesses their involvement and addresses recommendations to States parties. The EU may have one distinctive advantage: the possibility to launch infringement proceedings against Member States that would not correctly transpose and implement the Directive 2011/36/EU.

CSOs in national counter-trafficking efforts depends to a large extent to the national context, and justifies in-depth and precise examples.

## **5. National counter-trafficking governance: The impact of CSOs in securing the protection and non-prosecution of victims**

This section looks at a different level of protection that can be offered by CSOs, namely at a national level. It is rooted in the notion that CSOs can help safeguard the various rights trafficked persons are entitled to and we focus on the principle of non-prosecution or non-application of penalties to human trafficking victims, as an example. The principle is embedded in numerous legal instruments and discourses. From a European Union perspective the right is encoded in Article 8 of Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and protecting its victims:

### **Non-prosecution or non-application of penalties to the Victim**

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

The Council of Europe Convention Against Trafficking in Human Beings also contains a similar clause<sup>56</sup> as does the Association of Southeast Asian Nations (ASEAN) Convention Against Trafficking in Persons, Especially Women and Children.<sup>57</sup> The importance of the principles is well accounted for in numerous documents, however in brief we can recall some of the underpinning arguments. For Hoshi the need to include principles of non-criminalisation arises because of the exacerbated traumatising of a victim, when he/she is treated as criminal.<sup>58</sup> Whilst Piotrowicz rationalises the non-punishment principles by having concern

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<sup>56</sup> The Article stated: 'Each party shall, in accordance with the basic principles of its legal system, provide for the possibility of non-imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.'

<sup>57</sup> Similarly the new legally binding ILO Protocol - ILO Protocol of 2014 to the Forced Labour Convention, 1930 (No. P029) – obliges States to ensure that competent authorities are entitled not to prosecute victims for unlawful activities that they have been compelled to commit. The principle is accounted for by the secondary victimisation that trafficked persons experience when they are prosecuted or penalised

<sup>58</sup> Hoshi, B. (2013). 'The Trafficking Defence: A proposed model for the non-criminalisation of trafficked persons in international law.' *Groningen Journal of International Law*, 1(2), 54-72



for the notion that liability of the victim is: ‘significantly diminished or extinguished because of the personal circumstances, in particular their situation of being under the control of the traffickers.’<sup>59</sup> Indeed we must emphasise that in being compelled to commit crimes by their trafficking situation the victims are not acting as a “free agent” but their acts are controlled by an outside force.

In order to ensure that victims of trafficking are not prosecuted or penalised for crimes related to their trafficking situation, as soon as there is a reasonable suspicion that they might have been trafficked there must be a careful assessment of the circumstances of their case. Relevant authorities ought to consider whether the victim committed the crime as a result of compulsion associated with their trafficking situation. Here, and beyond, CSOs can lend their expertise to law enforcement bodies. Due to their expertise and direct contact with trafficked persons, CSOs are often in an ideal place to help determine if the ethos of non-prosecution or non-application of penalties to the victim should apply in a given case. Yet, their advice is not always sought or even taken on board.<sup>60</sup> Such were the circumstances in the ECtHR case on human trafficking *L.E. v. Greece* (January 2016).<sup>61</sup> On arrest L.E. asserted that she was a human trafficking victim. The prosecution in the Athens Criminal Court overruled this claim. Importantly, in doing so it did not consider a testimony provided by an NGO (Nea Zoi). The ECtHR’s ruling in this case, amongst other things, found that ‘Greece was also found to have failed to conduct an effective investigation; the national court proceedings were also found to be deficient. There were various aspects that were unsatisfactory: the testimony provided by the director of Nea Zoi, who was in continuing contact with the applicant and reported that she was a victim of trafficking, was not initially included in the record...’<sup>62</sup>

To eradicate a problem like prosecuting and punishing victims of human trafficking is a challenging task. It requires a concerted effort that not only includes law enforcement persons but in the opinion of this paper, also civil society. The same logic also applies to other rights that trafficked persons are entitled to such as: compensation, right to assistance and access to justice to name but a few.

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<sup>59</sup> Piotrowicz, R. (2015). ‘Human Trafficking and the Emergence of the Non-Punishment Principle.’ [Forthcoming], p.6

<sup>60</sup> See for example, Group of Experts on Action against Trafficking in Human Beings (GRETA), (2012). *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom*, Strasbourg, paragraphs 90 and 219

<sup>61</sup> *L.E. v. Greece*, Appl. No. 71545/12, 21 January 2016

<sup>62</sup> Stoyanova, V. (2016). ‘L.E. v. Greece: Human Trafficking and States’ Positive Obligations.’ [Online] <https://strasbourgobservers.com/2016/02/02/l-e-v-greece-human-trafficking-and-states-positive-obligations/>

There are numerous factors that make civil society organisations better placed than others bodies in identifying when the principle of non-prosecution or non-applications of penalties ought to apply. Firstly, they may be the only persons who are able to elucidate the entire story from the potential victim. This is on account of the time spent in, for example, a safe house and the ability to establish a deeper feeling of trust. Furthermore, CSOs can be indispensable with regard to victim identification, which is one of the more challenging elements of the successful implementation of the non-prosecution or non-application of penalties principle. The police that come into contact with trafficked persons who commit crime, e.g., those dealing with drug cases, may not be trained to know about trafficking in persons and the specific nuances that make up the crime.<sup>63</sup>

A poor identification process and the failures at first instance to actively consider applicability of the non-prosecution or non-application of penalties principle need to be ameliorated, so that a more victim-centered approach prevails. It is contended that involving and listening to civil society persons, will allow victims a better chance of accessing their rights.

## 6. Conclusion

Overall, this paper has shown that the involvement of CSOs both in decision-making and in the implementation of counter-trafficking policies is of vital importance at all levels.

Globally, nearly 17 years after the adoption of the Palermo Protocol, civil society actors have provided significant input in the drafting of two more extremely significant binding instruments that will have an impact upon the future of counter-trafficking law and policymaking. The input from civil society actors in the drafting of the ILO Forced Labour Protocol and Recommendation has ensured that a number of key provisions are included to ensure that all victims of human trafficking are provided with the support and assistance required of a holistic integrated approach to global counter-trafficking governance.

At a regional level, we have seen positive development with regard to the EU's cooperation with CSOs. First of all, the creation of an expert group partially composed of representatives of CSOs and/or experts with an experience in a NGO active in the fight against THB, plus the EU Civil society. Even though it is difficult to assess whether these mechanisms allow them to exercise any influence on the EU political agenda, it is important to demonstrate that CSOs are recognised as crucial partners, to be consulted. This latter involvement of CSO demonstrates

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<sup>63</sup> Piotrowicz, R. (2013). *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, para.66 p.25

an important recognition of their legitimacy and their expertise in combating trafficking in human beings. However, this paper suggests that more empirical research needs to be undertaken to better understand CSO ability to influence the EU on human trafficking issues.

Secondly the role of CSO involvement can also be demonstrated by the granting of funding (national or EU-funding) to these actors to allow them to carry out their activities. The EU an important contributor here, but not the only one, see for instance USA, through USAID or through Dpt of State, see also the funds provided by individual states to CSOs established in other countries (example of Norway or Switzerland).

In the national context, the influence and degree of involvement of CSOs in counter-trafficking efforts varies. In some countries, their involvement can be a long-standing and well-accepted practice, accompanied with the attribution of regular subsidies. In contrast, in others, CSOs may depend grants from external donors. These parameters impact on their capacity to engage in counter-trafficking activities. They also impact on their ability to influence the national policies and legislations, as well as the actions of international and regional organisations. Best practice to be promoted: the attribution of stable funding solutions for these CSOs, in order to enable them to focus on substantial activities, and not to waste time seeking funds. Further policy goals would be to encourage strong partnerships between civil society and law enforcement, as multi-stakeholder collaboration is required to develop and implement counter-trafficking projects.<sup>64</sup>

Furthermore in the national context this paper recognised the pivotal role that CSOs can play in ensuring that the rights safeguarded in international documents, are achieved in practice. The CSOs have a unique bond with persons, which ideally places them to recognise if they are victims and what assistance and rights they should be given, e.g., the right not to be penalised.

In conclusion, the presence of NGO actors in key decision making meetings, globally at ILO Committee Meetings and regionally at the European Commission Expert group demonstrates the added value of their presence and contribution to the development of anti-trafficking policy. A concrete determination of their added-value will require further study of their involvement and the extent to which their views and positions are taken into consideration.

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<sup>64</sup> COM, mid-term implementation report of the EU strategy, p. 11