**Annex I**

**Gap analysis in the investigation procedure and prosecution of human trafficking cases in court**

**“Strengthening the human rights protection of asylum seekers, migrants and victims of human trafficking in Turkey”**

**Horizontal Facility for the Western Balkans and Turkey II (2019-2022)**

**Terms of Reference**

1. **Background information**

The Horizontal Facility for Western Balkans and Turkey II is a joint co-operation initiative of the Council of Europe (CoE) and European Union (EU), funded by the EU and the CoE and implemented by the CoE. Horizontal Facility (HF) provides tailor-made support to reform processes. Using a flexible and needs-oriented approach, the HF supports beneficiaries to address recommendations emanating from the CoE monitoring and opinion/advisory bodies on ensuring justice, fighting economic crime and combating discrimination, while also supporting beneficiaries’ progress regarding the implementation of the EU acquis where relevant.

The Action HF30 "*Strengthening the human rights protection of asylum seekers, migrants and victims of human trafficking in Turkey*” draws on the recommendations made by the Group of Experts on Action against Trafficking in Human Beings ([GRETA](https://www.coe.int/en/web/anti-human-trafficking/greta)) in its first evaluation report on Turkey.[[1]](#footnote-2)

The duration of the Action is from May 2019 to May 2022.

One of the main components of the HF30 Action includes support to the Turkish authorities in adopting a comprehensive and integrated approach to addressing trafficking in human beings, including through strengthening the *criminal justice response to human trafficking. To achieve these objectives, the Action foresees the following activities:*

* Gap analysis of the investigation procedure and the prosecution of THB cases, with a view to ensuring effective, proportionate and dissuasive convictions;
* A conference to present the results of the gap analysis and discuss ways to improve Turkey’s criminal justice system response to human trafficking;
* Capacity building activities for law enforcement officials, prosecutors and judges on the specificity of THB cases for different purposes of exploitation, the collection of evidence, protection of victims, access to compensation.

1. **Rationale for the gap analysis**

Turkey has been a Party to the CoE Anti-Trafficking Convention since 2016. GRETA published its first evaluation report on Turkey in October 2019.

The GRETA findings confirm that Turkey has taken a number of steps to combat trafficking in human beings. The relevant national legal framework has evolved over the years, in the light of the country’s international commitments. In addition to human trafficking being criminalised under Article 80 of the Turkish Criminal Code (CC), the rights of victims of trafficking to a recovery and reflection period and a renewable residence permit are included in the Law on Foreigners and International Protection. Further, the Regulation on Combating Human Trafficking and the Protection of Victims, which entered into force on 17 March 2016, lays down the rules and procedures concerning the identification and support of victims of trafficking.

Despite these legal developments, important challenges remain, in particular regarding the identification of victims, ensuring the effective protection of the rights of victims, as well as the investigation and prosecution of THB cases for different purposes of exploitation. The great majority of the investigated THB cases (around 94%) have concerned sexual exploitation.[[2]](#footnote-3) There have reportedly been no investigations concerning THB for labour exploitation in recent years. Moreover, the available statistics indicate a high proportion of acquittals in THB cases (between 51 and 72% per year).[[3]](#footnote-4)

According to research of case-law relating to Article 80 of the CC, there are practical difficulties in adjudicating human trafficking cases and distinguishing between THB and related offences, in particular prostitution (Article 227 of the CC).[[4]](#footnote-5) Further, there are difficulties in qualifying cases as THB for the purposes of labour exploitation as opposed to Article 117 (violation of freedom of work and labour). Representatives of the judiciary indicated that cases initiated as THB are sometimes re-qualified at the stage of court proceedings to other offences, usually prostitution (Article 227), which carry lesser penalties[[5]](#footnote-6).

Paragraph 72 of the Explanatory Report of the Council of Europe Anti-Trafficking Convention states that “it is of fundamental importance to use a definition of trafficking in human beings on which there is international consensus.” Article 80 of the Turkish CC refers to the exploitation of prostitution, but not to other forms of sexual exploitation. Further, while Article 80 refers to “slavery or any similar practice”, it does not specifically mention “servitude”. Moreover, not all means contained in the definition of THB under the Convention are specifically mentioned in the Turkish definition of THB, in particular “fraud”, “abuse of a position of vulnerability” and “giving or receiving of payments or benefits to achieve the consent of a person having control over another person”. In addition, the general rules on aggravating circumstances concerning a THB offence being committed against a child applied only to children who are younger than 12 years of age.

Drawing on these findings, GRETA recommended that the Turkish authorities bring the definition of THB in conformity with Article 4 of the Convention, as well as ensuring that all the aggravating circumstances included in Article 24 of the Convention are appropriately taken into account. GRETA also urges the Turkish authorities to adopt such legislative and other measures providing for the possibility to take into account final sentences passed by another Party in relation to THB when determining the penalty.

Moreover, GRETA called the Turkish authorities to “prioritise the identification of gaps in the investigation procedure and the prosecution of THB cases in court, for different purposes of exploitation, with a view to ensuring effective, proportionate and dissuasive convictions “. In addition, it recommended the Turkish authorities to “provide law enforcement authorities with the necessary guidance and tools to detect and investigate THB cases for different purposes of exploitation”.

The Working Group of States Parties to the Trafficking in Persons Protocol to the UN Convention on Transnational Organised Crime (Palermo Protocol) has identified a lack of conceptual clarity with respect to the definition of trafficking as an obstacle to the implementation of the international legal framework around trafficking in human beings, and its national equivalents. This concerns in particular the concepts of “abuse of a position of vulnerability” and “exploitation”, which are relevant to the identification of victims of trafficking and the prosecution of cases. Subsequently, the UN Office on Drugs and Crime (UNODC) produced a series of [issue papers](https://www.unodc.org/unodc/fr/human-trafficking/publications.html#Issue_Papers) and a guidance note to assist criminal justice officials in penal proceedings related to THB:

* *Abuse in a position of vulnerability and other “means” within the definition of trafficking in persons* (2012);
* *Guidance Note on “Abuse of a position of vulnerability (APOV)” as a means of trafficking in persons* (2012);
* *The Role of Consent in the Trafficking in Persons Protocol* (2014);
* *The Concept of Exploitation in the Trafficking in Persons Protocol* (2015).

The issues raised in the UNODC issue papers should be used while analysing gaps in the investigation and prosecution of THB cases in Turkey. In addition, international human rights standards derived from UN human rights treaty and the practice of treaty bodies, as well as of the UN Special Rapporteur on Trafficking in Persons, especially women and children, should be incorporated into the gaps analysis. The requirements of the European Convention on Human Rights and case-law of the European Court of Human Rights, should also be addressed.

As a follow up to GRETA recommendations, a gap analysis was included in the workplan of the HF 30 Action with the aim to assist criminal justice actors in better identifying, investigating, prosecuting THB cases, thus contributing to the objective of building a comprehensive and integrated approach to addressing trafficking in human beings*.*

1. **Objectives and scope of the assignment**

On the basis of available case law, it will identify gaps in the relevant legislation and in the investigation and prosecution of THB cases, and will make recommendations for overcoming them. The purpose of the gap analysis is to **guide the consideration and development of core guiding principles for criminal justice practitioners in Turkey in the investigation and prosecution of THB cases**.

The outcomes of the gap analysis will be used to develop training for law enforcement officials, prosecutors and judges (activities under Outcome 2). They will also help stimulate discussion about legislative and regulatory changes. Furthermore, it shall provide the background necessary to develop guidance for good practice.

1. **Proposed methodology**

The gap analysis will be prepared by a team of one international and two national consultants (ideally a researcher/academic and a legal practitioner). It is expected that the consultants deliver a written analysis in form of a report that includes a summary of findings, recommendations, as well as guidelines for practitioners, including examples of good practice.

**Expected deliverables/output of the gaps’ analysis**

1. **Analysis of the national legal framework relevant to combating THB and its compliance with the international legal framework, including international human rights law and COE human rights and trafficking standards**
2. **Desk research** on related national publications/studies and other relevantdocuments**;**
3. **Development of a questionnaire** as the basis for face-to-face interviews with law enforcement officers (including border guards and officials working in detention centres), prosecutors, judges, lawyers and civil society actors engaged in the action against THB. The questionnaire should allow to gain in particular information for the collation of information in particular on:
4. Roles and responsibilities of different actors, their perception, knowledge and experience of THB cases;
5. Key challenges related to identification of victims of THB, assistance to victims, investigations, prosecution, protection of victims and witnesses, compensation of victims, adjudication of THB cases.
6. **Analysis of cases of THB and related offences, for different forms of exploitation**
7. **Preparation of a final report,** including summary of findings/gaps identified as well as recommendations to overcome obstacles to investigation and prosecution
8. **Presentation of the final report and guidelines** to the Action beneficiaries at the National Conference on THB and the 2nd Action Steering Committee (tentatively in September 2021).

Distribution of the tasks and responsibilities

The research will be prepared by a team of consultants – one or two international and two national - with extensive experience in the area of trafficking in human beings and criminal law.

The international consultant(s) (Service Providers) will carry out the following tasks:

* preparing the introduction to the gaps’ analysis, including the types of THB that occur globally and in Turkey, the summary of findings/gaps identified and recommendations to overcome obstacles to investigation and prosecution;
* working with the national experts to develop areas of focus for the desk research and key questions as the basis for interviews with key informants, including the list of potential institutions/actors for interviews and meetings;
* editing documents drafted by the national experts;
* in co-operation with the national consultants, presenting the report at the National Conference on THB and the 2nd Action Steering Committee (tentative September 2021)

The national consultants (Service Providers) will carry out the following tasks:

* in co-operation with the international consultant, developing a questionnaire as the basis for interviews with key informants;
* developing a list of participants and agenda of interviews with key informants;
* preparing and conducting interviews with criminal justice actors and civil society;
* preparing an analysis of selected cases of THB and related offences;
* in consultation and co-operation with the international expert, drafting the gap analysis;
* in co-operation with international expert, presenting the report at the National Conference on THB and the 2nd Action Steering Committee (tentative September 2021).

The final methodology and distribution of tasks between the two national consultants will be agreed upon following the selection of candidates.

1. **Location and duration**

Due to the pandemic (COVID19) situation, it is expected that the consultants conduct remote consultations with key informants, e.g. via mobile phone and/or internet. The assignment should be completed within total of six-eight (6-8) weeks from the date of the signing of the contract between the Council of Europe and the Service Providers.

1. [The report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Turkey, GRETA (2019)11](https://www.coe.int/en/web/anti-human-trafficking/turkey)  [↑](#footnote-ref-2)
2. See paragraphs 221 and 222 of GRETA’s report on Turkey. [↑](#footnote-ref-3)
3. See paragraph 230 of GRETA’s report on Turkey. [↑](#footnote-ref-4)
4. Yeşim Yɩlmaz, *The Crime Of Human Trafficking and the Issue of Multiplıcity Aggregation*, Marmara University Faculty of Law Journal of Legal Studies, 2017, available in Turkish at: <http://dergipark.gov.tr/maruhad/issue/36611/414852> [↑](#footnote-ref-5)
5. Paragraph 224 of GRETA’s report on Turkey. [↑](#footnote-ref-6)