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Opinion

Feasibility and the legal nature of a Guidance note in the context of the MEDICRIME Convention

prepared by

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DRAFT OPINION ON
THE LEGAL NATURE AND EFFECTS OF GUIDANCE NOTES ISSUED BY
THE COMMITTEE OF THE PARTIES OF THE MEDICRIME CONVENTION¹

This opinion relates to the controversy on the possibility for the Committee of the Parties of the MEDICRIME Convention (MEDICRIME Committee) to issuing guidance notes and the legal nature and potential legally binding effects of such guidance notes.

I. Capacity of the MEDICRIME Committee for issuing guidance notes

The legal machinery developed by the Council of Europe in order to implement human rights treaties adopted therein is well known and highly appreciated in the international legal area. In this regard many of the existing CoE conventions highly specialised in particular matters have set up a Conference/Committee of the Parties (or both of them) as the primary intergovernmental mechanism in order to carry out the follow up of those conventions; therefore, State Parties' representatives are involved in the implementation of each of these particular Conventions. In this regard Art. 23 of the MEDICRIME Convention (hereinafter, the Convention) reads as follows:

"1. The Committee of the Parties shall be composed of representatives of the Parties to the Convention.

2. The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention for the tenth signatory having ratified it. It shall subsequently meet whenever at least one third of the Parties or the Secretary General so requests.

3. The Committee of the Parties shall be assisted by the Secretariat of the Council of Europe in carrying out its functions. (...)"

And, according to Art. 25 of the Convention, the Committee of the Parties shall develop the following tasks:

¹ Council of Europe, *Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health*, CETS No. 211, Moscow, 28 October 2011.

“1. The Committee of the Parties shall monitor the implementation of this Convention. The rules of procedure of the Committee of the Parties shall determine the procedure for evaluating the implementation of this Convention, using a multisectoral and multidisciplinary approach.

2. The Committee of the Parties shall also facilitate the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat the counterfeiting of medical products and similar crimes involving threats to public health. The Committee may avail itself of the expertise of other relevant Council of Europe committees and bodies.

3. Furthermore, the Committee of the Parties shall, where appropriate:

- a. facilitate the effective use and implementation of this Convention, including the identification of any problems and the effects of any declaration or reservation made under this Convention;*
- b. express an opinion on any question concerning the application of this Convention and facilitate the exchange of information on significant legal, policy or technological developments;*
- c. make specific recommendation to Parties concerning the implementation of this Convention.”*

On this mechanism, the Explanatory report to the aforementioned Convention underlines the purpose this follow-up mechanism serves: to strengthen cooperation between the parties, to ensure proper and effective implementation of the Convention (para. 141 of the Explanatory report), and to become as simple and flexible a mechanism as possible, playing a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention (para. 148 & 149) and particularly to play “(...) *a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention, including by making specific recommendations to Parties in this respect*” (para. 149).

The Convention as well as the Explanatory report recall the possibility for the Committee of the Parties to “*avail itself of the expertise of other relevant Council of Europe committees and bodies*”, having been particularly appreciated the role and functioning of the Committee of the Parties of the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS 201), the so called Lanzarote Committee (para. 148).

The MEDICRIME Committee adopted its Rules of Procedure at its 2nd meeting on the 12-13 December 2019.

According to Rule 1 the main function of the MEDICRIME Committee is to monitor the implementation of the Convention, pursuant to Art. 25.1 and 25.3 of the Convention. The monitoring of the implementation of the Convention shall take place by:

- a. Mak(ing) proposals to facilitate or improve the effective use and implementation of the Convention, including the identification of any problems and the effects of any declaration or reservation made under the Convention;*
- b. Express(ing) an opinion on any question concerning the application of the Convention;*
- c. Mak(ing) specific recommendations to Parties concerning the implementation of the Convention*

And in particular Rule 31, concerning General comments and opinions, states:

“1. Having regard to the conclusions of the implementation reports adopted to fulfil its monitoring functions or as a result of any discussion during its work, the MEDICRIME Committee may decide to:

- a. Issue general comments or opinions on its interpretation of the Convention;*
- b. Make and discuss any appropriate proposal for the amendment of the Convention in the light of significant legal, policy or technological developments, in accordance with Article 27 thereof;*
- c. Consider adopting an opinion on any question concerning the application of the Convention, pursuant to Article 25, paragraph 3.b, of the Convention*

(...)

3. Opinions on the interpretation of the application of the Convention may take the form of guidance notes representing the common understanding of the Parties as to the use of the Convention.”

CONCLUSION: Consequently, this is the legal framework for considering the capacity of the MEDICRIME Committee for issuing opinions, declarations, recommendations or any other clarification concerning the daily implementation of the MEDICRIME Convention. According to it the MEDICRIME Committee, by agreement of the Parties stating their will by means of their representatives, can adopt guidance notes representing the common understanding of the Parties as to the use of the Convention.

II. Similarities between the capacity recognised in favour of the MEDICRIME Committee and other CoE monitoring bodies

As the wording of the Explanatory report recalls, the MEDICRIME Committee has been very much inspired by the Lanzarote Committee and intends to play a role as similar as the one by the said Committee. In this regard the Lanzarote Convention foresees the capacity of the Committee for issuing such technical instruments (Art. 41.3), having this power been enshrined in its Rules of Procedure (Rule 30, General comments, proposals and opinions):

“1. (...) the Lanzarote Committee may decide to:
a. issue general comments or opinions on its interpretation of the Convention;
b. discuss any appropriate amendments to the Convention in the light of significant legal, policy or technological developments found during the monitoring round;
c. consider adopting an opinion on any question concerning the application of the Convention, pursuant to paragraph 3.b of Article 41 of the Convention.”

The competences and their description are, as it can be verified, very similar in both conventional texts. According to it, the Lanzarote Committee has adopted by now a number of Opinions concerning different aspects of the Lanzarote Convention (i.e. Interpretative Opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs); Opinion on Art. 23 of the Lanzarote Convention. Solicitation of children for sexual purposes through information and communication technologies (Grooming); Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children).

The same situation has been identified concerning the CoE Convention on Cybercrime (CETS 185; Budapest Convention) where Art. 46.1 provides that:

“(...) the Parties shall, as appropriate, consult periodically with a view to facilitating
a. the effective use and implementation of this Convention, including the
identification of any problems thereof, as well as the effects of any declaration or
reservation made under this Convention;

- b. *the exchange of information on significant legal, policy or technological developments pertaining to cybercrime and the collection of evidence in electronic form;*
- c. *consideration of possible supplementation or amendment of the Convention (...)."*

This task has been implemented by the so-called Cybercrime Convention Committee (T-CY), which at its 8th Plenary (December 2012) decided to issue Guidance Notes aimed at facilitating the effective use and implementation of the Budapest Convention on Cybercrime, also in the light of legal, policy and technological developments as a way of better and faster responding to new technological challenges when implementing the Convention.

The Cybercrime Committee adopted its Rules of Procedure in 2013, that have been updated as for October 2020, Rule 1 establishing as a competence of the T-CY:

"b. (to) adopt opinions and recommendations on the interpretation and implementation of the Convention. If adopted unanimously, these opinions may take the form of Guidance Notes representing the common understanding of the parties as to the use of the Convention".

According to the T-CY, Guidance Notes represent the common understanding of the Parties to this treaty regarding the use of the Convention. As a result of these provisions, the T-CY has adopted eleven Guidance notes on different topics, some of which involve an interpretation of the terms of the Convention (i.e. the concept of "computer system", "transborder access"; "malware" or "identity theft").

The CoE Convention on Action against Trafficking in Human Beings (CETS 197) creates in Art. 36 the Group of Experts on action against trafficking in human beings (GRETA), whose main mission consists of monitoring the implementation of the Convention. Also Art. 37 of the Rules of procedure of the Conference of the Parties envisages this Committee of experts' power. Up to now GRETA has issued two Guidance notes: Guidance Note on preventing and combating trafficking in human beings for the purpose of labour exploitation; and Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection.

CONCLUSION: The MEDICRIME Committee's Rules of Procedure set up its power to adopt guidance notes in similar terms as the powers agreed upon GRETA or the Lanzarote Committee, and in identical terms as for the T-CY. In this regard, and noting that the formula used in each case is worded in almost identical terms and that the competence so established is also identical and serves the same purposes, we could conclude that this way of proceeding for the flexible daily adaptation of the terms of these conventions constitutes a sort of differentiated CoE mechanism meaning an internal practice accepted by CoE Member States, a sort of internal customary system preferred to the more inflexible amendment procedure which is, nonetheless, also contemplated by all those conventions, and which are not intended to be a substitutive of the latter.

III. Legal value of opinions delivered by human rights monitoring bodies

Opinions and guidance notes, according to CoE treaty provisions allowing them to be produced, are but means of interpreting those conventions in a faster and more flexible manner as it is stated by those conventions.

In general terms, interpretation of international treaties is governed by Articles 31 to 33 of the Vienna Convention on the Law of Treaties (hereinafter, VCLT). Article 31 VCLT sets up the general rule on interpreting treaty provisions in stating that:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties”.

In this regard, the commonest wording of the provision allowing the Committee of the Parties of each of the aforementioned CoE treaties precisely points to the guidance notes or opinions as expressing the ordinary meaning to be given to provisions of those treaties in order to keep them permanently updated without being obliged to make recourse to the always longer and less flexible amendment procedure, also foreseen in those treaties. That's the case of Rule of procedure 31.3 VCLT regulating the functioning of the MEDICRIME Committee. And the same could be said of Rule of procedure 1.b regulating the functioning of the T-CY (Cybercrime Committee). Therefore, Guidance notes are a way of interpreting MEDICRIME Convention in full respect of Art. 31.1 VCLT. Moreover, they constitute “the context” of the concerned treaty, according to which the latter has to be interpreted, as Art. 31.3 settles down the obligation of taking into account likewise “any subsequent agreement between the parties”, precisely what guidance notes are *de facto* and *de jure*.

In addition to this reasoning, mention has to be made to the International Law Commission's (ILC) works dealing with “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”. In his fourth report, ILC Special Rapporteur Georg Nolte recalls conclusion No. 8 adopted by the ILC at its sixty-sixth session (2014) as reported to the UNGA at its sixty-ninth session, according to which “*The output of a treaty body composed of States representatives, and which is not an organ of an international organization, is a form of practice by those States that thereby act collectively within its framework*”². Besides, the Special Rapporteur's report clarifies that: “3. *A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.*”³

CONCLUSION: Guidance notes allowed by MEDICRIME Convention and Rules of Procedure of its Committee constitute, according to similar provisions contained in other CoE treaties. Art. 31.3 VCLT and clarifying work drafted by the ILC Special Rapporteur

² UNGA A/CN.4/694, p. 6.

³ ILC, Report on the work of the sixty-sixth session (2014), Chapter VII, Conclusion 10, p. 108.

on the issue, integral part of the context according to which opinions or guidance notes issued by these monitoring bodies should be considered as a power conceded by the parties to the aforementioned CoE Committees.

IV. Legal value of guidance notes issued by CoE human rights monitoring bodies of the aforementioned Conventions, in particular of MEDICRIME guidance notes

Three premises precede the conclusion on whether MEDICRIME guidance notes would enjoy legally binding effects or not.

The first element to be taken into account is the fact that guidance notes would have been consented by all parties to the MEDICRIME Convention, as according to the procedure established by Rule of Procedure 31.3. In this regard, they would count on the approval of States parties to the Convention in order to be considered as the agreement on the meaning to be given to the terms of it, as this provision provides.

The second element to be noted is that, as the Special Rapporteur has also considered generally, as agreement adopted by a treaty organ not being an organ of the CoE as such (according to the classification offered by ILC works on the issue) it could theoretically enjoy some legally binding force. It should be mentioned, moreover, that any declaration/guidance note adopted by any of the aforementioned monitoring bodies whose regulation is reproduced by the MEDICRIME Convention and by the MEDICRIME Committee Rules of procedure has never been opposed by any state party to them.

Third, as explained before, they would constitute a particular practice followed by CoE monitoring bodies, a sort of CoE customary rule created within the CoE framework.

This having been said as a point of departure, not only the practice of States parties would suggest the legally binding nature of such guidance notes/opinions/declarations in as much as they have not been opposed by states parties, but also as long as they have been actively supported by the ECtHR case law.

In this regard mention must be made to the existing instruments similar to those here discussed (on guidance notes) issued in the form of reports, declarations, recommendations or other, by similar aforementioned CoE committees. Thus, GRETA Committee evaluations/opinions are mentioned in case J. AND OTHERS v. AUSTRIA (*Application no. 58216/12*), 17/4/2017, under the specific heading of “Relevant International law and practice” (p. 9), and specifically the judgement refers to GRETA

opinions in pp. 14ff. As for the international obligation to criminalise and prosecute trafficking in human beings paras. 44-52 of the judgment takes into account GRETA evaluation rounds, specifically the one of Austria. It's also referred to as a "source of obligations" in the concurring opinion of Judge Pinto de Albuquerque, joined by Judge Tsotsoria.

In the same way, in the case of *Khan v. France* (*Application no. 12267/16*), 28/5/2019, GRETA opinions are specifically referred to and GRETA evaluations/opinions are conceded legal significance as "DOCUMENTS CONCERNING THE SITUATION IN THE CALAIS HEATH AREA AT THE MATERIAL TIME" (p. 12). And finally, referring to the first evaluation round of GRETA committee, it is referred to in the case of *S.M. v. Croatia* (*Application no. 60561/14*), 25/6/, under the specific heading "International Law and practice" (para. 171, p. 42), so demonstrating their legal binding status as source of International Law.

More precisely, and as for Declarations and reports produced by the Lanzarote Committee, the case of *A and B v. Croatia* (*Application no. 7144/15*), 20 June 2019, they are referred to under the heading "INTERNATIONAL MATERIALS"; particularly para. 80 makes reference to the 1st implementation report on the protection of children. Besides, this report is invoked as a legal source by the Court assessment (para.116). The joint dissenting opinion of Judges Sicilianos, Turković and Pejchal proceed in the same way (paras.10 & 11).

In the case of *X and Others v. Bulgaria* (*Application no. 22457/16*), 2 February 2021, under the heading the *Declaration of the Lanzarote Committee on protecting children in out-of-home care from sexual exploitation and sexual abuse* is specifically quoted (p. 39) under the heading "RELEVANT LEGAL FRAMEWORK AND PRACTICE, II. INTERNATIONAL LAW", as it is by the joint concurring opinion of Judges Turković, Pinto de Albuquerque, Bošnjak and Sabato.

CONCLUSION: The ECtHR takes into account and recognises legally binding effects to instruments issued by CoE aforementioned Committees whose competence has been agreed upon in the same terms and under the same conditions as foreseen in Art. 31.3 of the MEDICRIME Committee Rules of procedure relating to guidance notes.

V. Conclusions

Guidance notes in general shall be considered as legally binding:

1. First: because they provide the ordinary meaning to be given to the terms of the concerned treaty according to the terms of each one of them;
2. Second: because they provide the context according to which treaty provisions have to be interpreted, as they constitute a subsequent agreement by the parties to it on the way the treaty must be understood and applied, in full respect of Article 31 VCLT.
3. Third: because they express the will of the parties as, according to the procedure to be followed in full respect of the rules of procedure, representatives of the parties will agree on the text of the said guidance notes produced for such bodies.

MEDICRIME Committee's Guidance notes should be considered as legally binding:

4. First: because, as expressed with regard to other human rights monitoring bodies examined by the ILC, they are legal instruments that constitute the context within which the MEDICRIME Convention must be interpreted according to the sense to be given to Art. 31.3 VCLT. Additionally, these instruments can be adopted only by consensus among the representatives to the parties to the treaty, therefore, expressing the will of the latter.
5. Second: because, according to the wording of the provision regulating them in the particular case of the MEDICRIME Convention (Art. 25 of the Convention and Art. 31.3 of the Rules of procedure), they are recognized as a mechanism able to flexibly adapt the Convention to the daily needs and to express the normal use to be given to the terms of the Convention.
6. Third: because they are but another expression of a particular CoE customary rule extended to some other monitoring bodies.
7. Fourth: because no opposition has ever taken place against the use of such instruments as a source of rights and/or obligations when issued by Committees whose competence in this regard has been enshrined in similar or even identical terms. In this regard particular importance should be given to the fact of the ECtHR having often quoted many of the ones already produced by other CoE monitoring bodies either in the part of the judgment relating "The facts" or the one relating to "The Law".