HUMAN TRAFFICKING, HUMAN RIGHTS AND THE RIGHT TO BE FREE FROM SLAVERY, SERVITUDE AND FORCED LABOUR

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MARIJA JOVANOVIĆ

Wolfson College

University of Oxford

ABSTRACT

The thesis engages with a dynamic discourse on the human rights approach to human trafficking. Building on the traditional doctrine of human rights, the thesis demonstrates that human trafficking is *not* a human rights violation, save for a state involvement in it, either directly or through a failure to observe its positive obligations imposed by the existent human rights. In situations that do engage human rights law, the thesis defends an argument that conceptually, human trafficking falls within a domain of the right to be free from slavery, servitude and forced labour. This argument is grounded in both a doctrinal and a conceptual analysis. In particular, the thesis conducts a unique conceptual and legal analysis of Article 4 of the European Convention of Human Rights offering an original interpretation of the concept of exploitation in the context of practices associated with trafficking and 'modern slavery'. This type of inquiry is missing in the existent scholarship. The thesis also conducts a detailed analysis of the jurisprudence of the European Court of Human Rights on positive obligations to protect vulnerable individuals arising out of 'absolute' rights. In addition to providing a complete analysis and classification of these positive obligations, the thesis draws attention to the important difference between the scope of the right and the scope of state responsibility in situations of private infringements of 'absolute' rights. Accordingly, the thesis demonstrates that whereas the prohibition contained in these rights is absolute for the state, positive obligations in situations of their infringements by private individuals are of a limited scope. The analysis of the jurisprudence of the Strasbourg Court is supplemented by a comprehensive discussion of the obligations established in the trafficking-specific instruments. The thesis explains how victim protection provisions contained in these instruments may inform human rights obligations, yet, it demonstrates that these do *not* represent such obligations on their own. This analysis provides a roadmap for practitioners and activists when arguing cases before the Strasbourg Court and domestically. In addition to this practical dimension, the thesis intends to provide an important contribution to the scholarship on human rights law, and on human trafficking specifically.

Word count: 103,000.

To my parents,

Nadica and Gvozden Jovanovic

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ATMG	Anti-Trafficking Monitoring Group
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
EC	European Commission
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
GAATW	Global Alliance against Traffic in Women
GRETA	Council of Europe Group of Experts on Action against Trafficking in Human Beings
HRC	United Nations Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICAT	Inter-Agency Coordination Group against Trafficking in Persons
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labour Organisation
IOM	International Organisation for Migration
OHCHR	United Nations Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PACE	Council of Europe Parliamentary Assembly
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency for International Development

TABLE OF CASES

European Court of Human Rights:

Court of Justice of the European Union (CJEU):

Inter-American Court of Human Rights:

International Criminal Tribunal for the Former Yugoslavia:

African Commission on Human and Peoples' Rights:

Economic Community of West African States (ECOWAS):

United Kingdom:

Australia:

The Netherlands:

France:

TABLE OF STATUTES AND INTERNATIONAL INSTRUMENTS

International treaties and conventions:

European Union:

United Kingdom:

CHAPTER 1: Introduction

The thesis sets out to examine an arguably self-evident claim that the practice of human trafficking is a grave human rights violation. Academic debates, legal and policy instruments on both the international and domestic level, and human rights advocates seem to take this claim at face value. However, there is a lack of understanding of both the meaning of human trafficking, and especially of its relationship with human rights law. The thesis, therefore, aims to enrich existing scholarship and contribute to a better understanding of both the phenomenon of human trafficking and human rights law in general. In particular, the thesis responds to the criticism that:

> Where issues of slavery, human exploitation, and the law are concerned, there has been very little serious scholarship (...) I expect the terrain of human exploitation in law to be re-drawn over the next few years in ways that it has not been throughout the twentieth century.[1]

The thesis engages with one particular approach for addressing the problem of human trafficking - the human rights approach. This is by no means the only or the best framework for action against human trafficking. Human rights law, and, especially, justiciable human rights instruments, does however offer a limited, yet significant contribution to this cause.

Human exploitation represents a serious social phenomenon, which goes beyond issues of slavery and human trafficking. Thus, the International Labour Organisation (ILO) emphasizes the difference between forced labour and 'sub-standard

[1] Jean Allain, 'A Response to Anne Gallagher' in Opinio Juris (8 June 2009) <http://opiniojuris.org/2009/06/08/a-response-to-anne-gallagher-by-jean-allain/> accessed on 30 July 2012.

or exploitative working conditions.'[2] Accordingly, the latter practices, serious as they are, occupy the lower end of the exploitation 'continuum'.[3] The right to be free from slavery, servitude and forced labour, however, is concerned only with exploitative situations that reach a certain threshold of severity. Clearly, addressing the full scope of the problem of exploitation, its various forms and levels of severity, underlying causes and consequences requires a broad spectrum of measures that go beyond that protected by the right to be free from slavery. Todres notes that rather than substitute one approach for another, 'a more effective tactic will be to develop a comprehensive strategy that combines the strengths of human rights, labour, public health, international development and other valuable perspectives.'[4] While it is of utmost importance to identify, distinguish and classify the arsenal of measures originating from different legal and policy contexts that ought to be mobilized, this thesis focuses only on the right to be free from slavery, servitude and forced labour and its role in victim protection. This right has been largely neglected in the jurisprudence of international human rights. Indeed, 'an extremely worrying dearth of judgments on these issues' in the Strasbourg jurisprudence[5] is in stark contrast with the scale of the human trafficking problem, which 'continues to be endemic in all parts of the world'.[6]

[2] The International Labour Organisation (ILO), 'Questions and Answers on Forced Labour' (1 June 2012) < http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_181922/lang--en/index.htm> accessed 8 February 2016.

[3] Klara Skrivankova, 'Between Decent Work and Forced Labour: Examining the Continuum of Exploitation' (JRF Programme Paper: Forced Labour, November 2010).

[4] Jonathan Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to a Labor Paradigm for Human Trafficking' (2013) 60 UCLA Law Review, 157.

[5] Alexandra Timmer, 'C.N. v. United Kingdom: the Court Addresses Domestic Servitude' (*Strasbourg Observers*, 20 November 2012) <http://strasbourgobservers.com/2012/11/20/c-n-v-united-kingdom-the-court-addresses-domestic-servitude/> accessed 18 October 2014.

[6] UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo (28 July 2014) A/69/33797, para 48.

The thesis thus seeks to address the obvious need to clarify the scope and normative effect of the right to be free from slavery, servitude and forced labour under the law of the European Convention on Human Rights.

The present introduction outlines the core ideas and arguments elaborated throughout the thesis and explains the structure of the thesis.

1. Framing the debate: human rights law, legal positivism and the 'key distinctions'

1.1. Human rights law and legal positivism

One of the main propositions of the thesis is that there is generally a lack of understanding of the meaning of the human rights approach to human trafficking and its role in the fight against it. This results in confusion about obligations for states arising out of different legal and policy frameworks and their normative strength. Chuang's critique of the anti-trafficking field in general as 'perennially rigor-free',[7] thus, equally applies to the human rights approach developed over the past fifteen years in this field.

The vocabulary of human rights has often been used to attribute a special importance to a particular claim in order to emphasize its higher moral value. This has resulted in continuing pressure to expand the list of human rights claims. Thus, 'many political movements would like to see their main concerns categorized as matters of human rights, since this would publicize, promote, and legitimize their concerns at the

[7] Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) The American Journal of International Law 609.

international level.'[8] A possible result of this 'human rights inflation' is the devaluation of human rights caused by producing too much bad human rights currency.[9]

The thesis argues that the language of human rights also has been manipulated in human trafficking discourse, resulting in conceptual and legal confusion between different legal frameworks that apply to this practice simultaneously. As a consequence, it is particularly important to distinguish between a *rhetorical* and a *legal* use of the term 'human rights', and to focus on the strictly legal aspect of the claim that human trafficking is a (grave) human rights violation.

The thesis considers human rights law from a doctrinal perspective focusing on human rights law as it is, rather than what it ought to be. This reflects the approach of legal positivism,[10]a choice which may appear peculiar given that legal positivism is counter intuitive to the *idea* of human rights, which is said to be firmly grounded in natural law.[11] Nevertheless, the approach of 'prescriptive legal positivism' as outlined by Campbell[12] squares well with the underlying purpose of this project.

Campbell argues that it is illuminating and fruitful to regard legal positivism as a normative theory, which seeks to determine what law ought to be, not with respect to

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[8] James Nickel, 'Human Rights', in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition) <http://plato.stanford.edu/archives/win2014/entries/rights-human/> accessed on 5 May 2015.

[9] James Griffin, *On Human Rights* (OUP 2008).

[10] HLA Hart, Essays in Jurisprudence and Philosophy, (Oxford: Clarendon Press 1983) 57-59; Jules Coleman, 'Negative and Positive Positivism' (1982) 11 Journal of Legal Studies, 139; Lesly Green, 'Legal Positivism', in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition).

[11] John Finnis, *Natural Law and Natural Rights* (Clarendon Law Series 1980). See also John Finnis, 'The Truth in Legal Positivism' in Robert P. George, *The Autonomy of Law* (ed) (Clarendon Press 1996).

[12] Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (UCL 2004) Chapter 1; Tom Campbell, *Rights: A Critical Introduction (*Routlege Contemporary Political Philosophy 2006) 189.

its content but with respect to its form.[13] Hence, his 'prescriptive legal positivism' takes a conceptual analysis to be no more than a tool for moral argument.[14] Importantly, Campbell holds that:

> Ambiguous talk of moral or human rights that run the 'is' and the 'ought' together in ways that suggest that people in some mysterious way do have rights that they do not in practice have, although perhaps they ought to have, is an impediment both to clear thinking about rights and to their effective articulation and implementation.[15]

In this light, the thesis examines the link between human trafficking and the *existent* catalogue of human rights[16] with a view to their effective deployment for the protection of the victims of human trafficking, instead of using human rights law as a rhetorical tool for furthering an anti-trafficking agenda and developing anti-trafficking actions in general. With that aim, the thesis conducts a doctrinal analysis explaining the possibility and implications of grounding human trafficking within general human rights instruments and the catalogue of rights enshrined in these. Not only is it hoped that such an analysis will expand the understanding of the phenomenon of human trafficking, but it is also expected to bring more clarity into the area of human rights law in general.

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[13] Campbell, *Prescriptive Legal Positivism*, (n 12) 21.

[14] ibid 5.

[15] Campbell, *Rights: A Critical Introduction* (n 12) 193.

[16] While Campbell does not reduce the list of human rights to those contained in the international human rights instruments, the thesis chooses to focus on the catalogue of rights enshrined in these takin a cue from Beitz who, similarly to Rawls, deals with human rights only as they have developed in contemporary international human rights practice. See Charles Beitz, *The Idea of Human Rights* (OUP 2009).

1.2. Human rights conceptions

The thesis takes a traditional view of human rights as individual claims against the states for their wrongdoing.[17] The practice of human trafficking, nevertheless, sits uneasily with this view since a state is seldom directly involved. Still, human rights law has developed a way to accommodate this perceived obstacle via the doctrine of positive duties. Accordingly, only when a state is found to be in breach of its positive obligations under human rights law, could we say that human trafficking amounts to a human rights violation, *stricto sensu*. These obligations may arise from various human rights and each situation of trafficking may engage different human rights.[18] Moreover, even states' anti-trafficking measures may give rise to human rights violations.[19] Still, while diverse and shifting *practices* of human trafficking regularly engage different human rights of its victims, it is entirely different to claim that human trafficking is *conceptually* a human rights violation. To exemplify, while rape may well amount to torture, inhuman or degrading treatment, as well as a violation of the right to privacy and many other rights,[20] in law, rape and torture are conceptually different since they belong to different legal contexts even though they originate from the same factual situation. However, the problem with human trafficking is that the same definition[21]

[17] For the contrary opinion that human rights oblige private individuals see Jordan J Paust, 'The Other Side of Right: Private Duties Under Human Rights Law' (1992) 5 Harvard Human Rights Journal 51.

[18] See for example Heli Ascola, 'Article 5 – Prohibition of Slavery and Forced Labour' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (1st edn, Hart Publishing, 2014) 104. See also n 54.

[19] Mike Dottridge, 'Introduction', in *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (Global Alliance Against Traffic in Women, 2007) 1.

[20] *MC v Bulgaria* (2005) 40 EHRR 20; *X and Y v Netherlands* (1986) 8 EHRR 235.

[21] The definition from the Palermo Protocol 2000 has been widely accepted as authoritative for both the criminal justice and human rights law purposes. See Chapter 2.

applies in both contexts being used to describe a crime as well as a human rights violation.[22] Nonetheless, the thesis in Chapter 2 emphasises that the universally adopted definition applies differently in the criminal justice context when assessing individual criminal responsibility than in the human rights context when examining the responsibility of a state. Thus, on the one hand, a criminal conviction for the crime of human trafficking requires establishing all three elements of the trafficking definition *beyond reasonable doubt*. On the other hand, when deciding whether a situation engaged the responsibility of the state in question (whether positive obligations arose), it is sufficient to demonstrate that there were *reasonable grounds to believe* ('credible suspicion') that a person 'had been, or was at real and immediate risk of being, trafficked or exploited.'[23]

1.3. Two faces of the human rights approach

The thesis points out that the role of the human rights approach in the fight against human trafficking is two fold. This argument is best exemplified using the notion of prevention that is considered as one of the cornerstones of the effective strategies to combat trafficking in persons.[24] Such prevention is said to require developing and

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[22] Piotrowicz argues that human trafficking is first and foremost a crime, like rape or robbery, albeit with a human rights dimension in Ryszard Piotrowicz, 'The Legal Nature of Trafficking in Human Beings' (2009) 4 Intercultural Human Rights Law 175.

[23] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [286]. Convention on Action against Trafficking in Human Beings (16 May 2005) CETS 197 (Anti-Trafficking Convention) art 10 (2).

[24] According to the UN Special Rapporteur on Trafficking in Persons, especially Women and Children, effective strategies to combat trafficking in persons need to be based on on '5P's' (protection, prosecution, punishment, prevention and promotion of international cooperation) and '3R's' (redress, rehabilitation/recovery and reintegration of victims to assume a constructive role in the society). See UN OHCHR, Report by the Special Rapporteur on Trafficking in Persons, especially Women and Children, Joy Ngozi Ezeilo (20 February 2009) A/HRC/10/16, 25.

implementing strategies meant 'to address the "root causes" of trafficking, such as poverty, under-development, general lack of economic and migration opportunities and, above all, gender inequality.'[25] These strategies are aimed at decreasing people's vulnerability to trafficking and exploitation.[26] According to the UN Special Rapporteur on Trafficking in Persons

> Violations of human rights are both a cause and a consequence of trafficking in persons (...). Thus, universal respect for human rights must be ensured not only as a goal in itself, but also as a means of preventing trafficking in persons while placing the human rights of trafficked persons at the centre of all prevention efforts.[27]

Chuang, nonetheless, critically notices that 'human rights gains have largely been limited, however, to providing victims post-trafficking rights protections, leaving relatively undisturbed structural vulnerability to trafficking in the first instance.'[28] Thus, human rights attempts to address underlying economic and social rights violations that create vulnerability to trafficking are said to be largely unsuccessful.

However, it needs to be acknowledged that prevention of human trafficking and exploitation has two dimensions – it includes both actions aimed at addressing structural vulnerabilities to human trafficking and exploitation (general prevention), as well as immediate intervention in situations where an individual is at risk of being trafficked/exploited (individual prevention). This distinction has often been diluted in

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[25] Heli Ascola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart Publishing 2007). See also UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro (31 March 2015) A/HRC/29/38.

[26] Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg, Cathryn Costello, Anne CL Davies, Jeremias Prassl (eds) The Autonomy of Labour Law (Hart Publishing 2015).

[27] UN OHCHR, Interim Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, Joy Ngozi Ezeilo (9 August 2010) A/65/288, para 15. See also UN OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add.1, guideline 1); UN OHCHR, *Human Rights and Human Trafficking* (Factsheet No 36, 2014).

[28] Chuang. 'Exploitation Creep' (n 7) 19. See also Costello, 'Migrants and Forced Labour' (n 26).

the discussions. Human rights law plays a role in both approaches but the focus and required actions are different.[29]

The thesis focuses on the role of human rights law and the right to be free from slavery in individual protection (prevention). In particular, the thesis is concerned with state responsibility for the prevention of exploitation of an identifiable individual when the risk is sufficiently real and immediate. Such individual prevention requires an action, judicially articulated by the Strasbourg Court in *Osman*[30] and reinforced in *Rantsev*,[31] to remove a person from a situation where her rights are threatened by actions of private individuals.

On the other hand, general prevention of human trafficking calls for measures that are focused on its root causes such as poverty, discrimination and other factors that make people vulnerable to trafficking in the first place. Consequently, actions required from states to prevent individual instances of human trafficking will be different from those necessary to address its structural causes. Therefore, much of the criticism of the anti-trafficking actions may prove unsubstantiated depending on which one of these two strategies – individual or general - is discussed. Clearly, whereas the role of the law enforcement approach in general (structural) prevention of human trafficking and exploitation is limited, it is indispensable for the prevention of concrete cases.

[29] This view is similar to Wood's powerful argument for drawing a distinction between the two ways in which society might go about protecting people against exploitation. Thus, he claims that 'Either society could make it more difficult for the powerful to use their power to exploit the vulnerable, or it could redistribute power so that people are less vulnerable to use by others, and hence less susceptible to exploitation.' He calls the first way of protecting people 'interference' and the second way 'redistribution.' Accordingly, the society should either prevent others from taking advantage of one's weakness (by means of interference) or else prevent from such weakness from occurring altogether (by means of redistribution). The first way corresponds to the 'individual prevention' view above, whereas the latter way speaks of a more 'general prevention' via structural and systemic societal changes. See Alen W Wood, 'Exploitation' (1995) 12(2) Social Philosophy and Policy 136, 158.

[30] *Osman v United Kingdom* (2000) 29 EHRR 245.

[31] *Rantsev v Cyprus and Russia* (n 23) [282].

Therefore, '[b]oth crime prevention and reduction of vulnerability are valid approaches to combating human trafficking.'[32] However, only the former could give rise to states' responsibility under Article 4 European Convention of Human Rights (ECHR).[33]

While individual cases have proven to be powerful tools for setting standards for assessing future actions and thus, affecting more systemic changes,[34] it is argued that the scope of action necessary to address all aspects of human trafficking and its underlying causes exceeds by far the boundaries of human rights law, and the right to be free from slavery, in particular. What is required therefore is 'integrated and coordinated action in various fields. Counter-trafficking strategies must be developed in, for instance, labour law, external relations, migration, development policies, economics, gender issues and equality.'[35]

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[32] UNODC, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action' (Background paper, 2008) 7. See also Roger Plant, 'Modern Slavery: The Concepts and Their Practical Implications' (ILO Working Paper, 5 February 2015) 21.

[33] Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5 (ECHR).

[34] Thus, for example, the ECtHR has recently introduced the Pilot Judgments Procedure as a tool for addressing a large number of applications with the same root cause. The Rule 61 is included in the European Court of Human Right's Rules of Court as of 31 March 2011 and applies to cases where there is a systemic or structural dysfunction in the country concerned, which has given or could give rise to similar applications before the Court. In these instances, the Court may decide to select one or more of them for priority treatment pointing out to the systemic or structural human rights problem giving rise to repetitive cases requiring from the state to address the situation beyond the individual case concerned. The pilot judgement is, therefore, intended to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue. See Press release issued by issued by the Registrar of the Court no. 256 (24 March 2011)

[35] Conny Rijken and Eefje de Volder, 'The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings: A Call on the EU to Take THB-Sensitive Action in Relevant Areas of Law' (2009) 25(1) Connecticut Journal of International Law, 53. See also Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking' (n 4) 157; Alice Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human rights, Asylum/Migration and Labour' (2007) 36(1) Denver Journal of International Law and Policy 9; Costello, 'Migrants and Forced Labour' (n 26).

1.4. Key distinctions

The thesis draws attention to three ‘key distinctions’, which are used as conceptual tools to discuss human trafficking in the context of human rights law and the right to be free from slavery, servitude and forced labour throughout the thesis.

When the right to be free from slavery and the right to be free from torture are encroached upon by non-state actors, a distinction should be made between the scope of the right and the scope of responsibility of a state in question. This is the first key distinction deployed in this thesis. Accordingly, when assessing allegations of the breaches of these two rights by a non-state actor, two different sets of questions need to be asked. The first set of questions is concerned with *the scope of the right* in question and it asks: Is this slavery? Do factual circumstances meet the definitional criteria of slavery, servitude, forced labour or human trafficking? The affirmative answer leads to the second set of questions concerned with *the scope of state responsibility* asking: is this private act (e.g. enslavement) attributable to the state in question? If so, was the state responsible? The second set of questions is essentially concerned with states’ positive obligations arising out of the right in question, which has been infringed by an action of a private individual. Not every situation that meets the definitional criteria of slavery or forced labour and falls within the scope of this right, will necessarily fall within the scope of the responsibility of the impugned state. Namely, state responsibility would only be engaged if positive obligations were triggered and the state failed to comply with these in the manner required.

Distinguishing between the scope of the right and the scope of state responsibility helps reconcile the ‘absolute’ nature of prohibitions contained in the right to be free from slavery or the right to be free from torture, with the language of proportionality often used when assessing states' responsibility in situations of private violations of these rights. In other words, whereas the prohibition of slavery is absolute, state responsibility for private acts of enslavement is not. State responsibility is only triggered in situations when authorities were, or ought to have been aware (had they exercised due diligence), of such situations. Moreover, state responsibility is limited to 'appropriate measures' which 'do not impose an impossible or disproportionate burden on the authorities.'[36] Therefore, in situations of private violations, the prohibitions contained in the right to be free from slavery and the right to be free from torture are 'relativized'.

The second 'key distinction' is between victim protection measures and human rights. The thesis emphasizes that victim protection measures do not necessarily reflect the human rights of victims. This distinction is relevant for determining the scope of state responsibility and its positive obligations under human rights law. Provisions of the Council of Europe Anti-Trafficking Convention that embed extensive measures of victim protection do not necessarily constitute rights arising out of the ECHR, contrary to what some rights activists may desire.[37] The difference between victim protection and victims' rights is subtle but nonetheless important. The problem of conflating victim protection measures and their human rights is aptly illustrated by Todres who argues that it is unsubstantiated to equate the provision of assistance to victims as establishing a right to assistance.

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[36] *Rantsev v Cyprus and Russia* (n 23) [286]-[287]. See also *Osman v United Kingdom* (n 30) [116].

[37] Thus, it was argued that 'following the Rantsev judgment, it is now possible to argue that many if not all of the victim-protection provisions in the Convention are also covered by the positive obligations States owe victims (or possible victims) of human trafficking under Article 4 [ECHR].' Saadiya Chaudary, 'Trafficking in Europe: An Analysis of the Effectiveness of European Law' (2011) 33 Michigan Journal of International Law 77, 94.

> One only needs to look at US jurisprudence on health rights. Through programs such as Medicare and Medicaid, the US has long provided health-related services to individuals in need, but the existence of these programs has not equated to recognition of a 'right to health' under federal law. In short, when a government elects to provide social services, such action does not necessarily rise to the level of establishing a fundamental right to those services.[38]

While most rights-oriented analyses and policy proposals predominantly focus on victim protection,[39] the purpose of this thesis is to shed more light on human rights protection. Thus, taking into consideration victims' interests and protection needs when developing strategies against trafficking is significantly different from enabling victims to hold states responsible for failing to discharge these obligations. A second aspect of this key distinction is that one should also distinguish between justiciable and non-justiciable human rights that apply to victims of human trafficking. Namely, some victims' interests are protected by rights that ensure their integration and access to the labour market, such as the right to work, just and favourable conditions of work, right to equal pay for equal work, etc. as guaranteed by international and regional human rights instruments.[40] Nevertheless, the difference between obligations originating from these rights and rights entrenched in the ECHR is that only the latter may be *enforced* against states through the individual petition mechanism.

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[38] Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking' (n 4) 150.

[39] European Commission, 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016' (19 June 2012) COM(2012)286; OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary (2010) 3.

[40] Universal Declaration of Human Rights (10 December 1948) 217 A (III) (UDHR) art 23; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); The European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) 529 UNTS 89; Charter of Fundamental Rights of the European Union (26 October 2012) 2012/C 326/02. See also European Commission, The EU Rights of Victims of Trafficking in Human Beings (2013). See Edwards, 'Traffic in Human Beings' (n 35).

Finally, the third 'key distinction' is between human trafficking and the related exploitative practices that represent its end purpose. According to the widely accepted definition of human trafficking,[41] the act of human trafficking consists of three components: an action; the use of certain means; and the purpose of exploitation.[42] All three elements must exist for trafficking to be established.[43] It is important to stress that exploitation, which is the purpose of trafficking, needs not have taken place: it is *intended exploitation* in conjunction with certain action and the means deployed that makes up the trafficking situation.[44]

Accordingly, human trafficking is a *process* leading to exploitation. Such exploitation may take numerous forms. Practices of slavery, servitude and forced labour are listed among others, as examples of actual exploitation, which is the purpose of human trafficking. However, exploitation may also occur without human trafficking. This distinction between human trafficking as a process and exploitation as a condition, which may, but does not necessarily result from trafficking, has often been overlooked in the attempt to submerge all these practices under popular 'umbrella terms' such as 'modern slavery'.[45] Jansson, thus, wrongly assumes that 'since trafficking is considered a modern form of slavery, perhaps it is better if the provisions on trafficking and

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[41] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, (15 November 2000) 2237 UNTS 319 (Palermo Protocol) art 3.

[42] For a discussion about the elements see Parosha Chandran, 'A Commentary on Interpreting Human Trafficking' in Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011) 5.

[43] In the case of children, it is immaterial whether these means have been used.

[44] UNODC 'Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime' (New York 2004) para 33; Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) CETS 197, para 87.

[45] UK Modern Slavery Act 2015.

slavery could be merged into one (where only one or both terms are used). The suggested provision would then focus on the exploitation of the victim.'[46]

1.5. Key questions

Against this backdrop, the thesis explores two questions. First, which, if any, human rights are *engaged* by the crime of human trafficking? The UN Special Rapporteur on Trafficking in Persons thus noted that 'while there was regular condemnation of the human rights violations associated with trafficking, the practice was rarely linked to the violation of a specific right in a specific treaty'.[47]The thesis argues in Chapters 3 and 4 that, whereas human trafficking may and regularly does engage numerous rights, its natural conceptual domain is the right to be free from slavery, servitude and forced labour because of its aim of exploitation. Thus, it has been noted that 'all human trafficking, whether for sexual or labour purposes, is for the "purpose of exploitation".'[48] Whereas the concept of exploitation itself has not been defined in international law, there is a wide agreement on what constitute *examples* of exploitation, with slavery, servitude and forced labour, being the most serious forms. The term exploitation is said to be 'the overarching theme that subsumes all forms of human trafficking, slavery, forced labour, bonded labour, child labour, forced prostitution, economic exploitation, and so on'.[49] Consequently, even though the

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[46] Dominka Borg Jansson, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons* (Brill Nijhoff, 2014) 341.

[47] UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo (28 July 2014) A/69/33797, para 46.

[48] Plant, 'Modern slavery' (n 32) 3.

[49] Johannes Koettl, 'Human Trafficking, Modern Day Slavery, and Economic Exploitation' (World Bank, Discussion Paper No. 0911, May 2009).

practice of human trafficking regularly offends against a number of other rights, violations of these other rights are incidental and usually instrumental to its exploitative aim.

The second question animating this thesis is: what is the scope of state responsibility and the positive obligations on the state arising out of private acts that engage the right to be free from slavery, servitude and forced labour? How in other words are violations of such obligations to be assessed? Part II of the thesis draws on the jurisprudence of the ECtHR and other international and domestic courts, as well as on international conventions, soft law instruments, policy documents and academic analysis to flesh out these obligations and clarify the rules of assessing state responsibility in situations where the right to be free from slavery is engaged by actions of non-state actors.

2. Structure of the thesis

The overarching structure of the thesis reflects the key distinctions and questions laid out here. Based on the first ‘key distinction’ between the scope of the right and the scope of responsibility, the thesis is divided in two parts.

Part I is comprised of four chapters and is focused on the scope of the right to be free from slavery examining concepts and definitions underlying this under-adjudicated and under-theorised right. The discussion in these chapters answers the first identified question: why and how the crime of human trafficking engages human rights law and the right to be free from slavery, in particular. These chapters elucidate the meaning and relationships between both expressly prohibited and implied concepts in order to determine situations in which this right is or is not engaged. Specifically, relying on the third ‘key distinction’ between human trafficking as a process leading to exploitation and the resulting exploitation as a condition, Chapter 3 offers a compelling argument that human trafficking is covered by the right to be free from slavery as a stand-alone prohibition. Namely, drawing a parallel with situations where the right to life or freedom from torture are threatened by actions of private individuals it is argued that being in the situation of trafficking (prior to exploitation) represents real and immediate risk of exploitation materialising, which therefore requires an action from a state.

Part II of the thesis moves the discussion onto the scope of states’ responsibility examining positive obligations imposed upon states in situations that engage the right to be free from slavery, servitude and forced labour, their strength and the ways of assessing breaches. This part contains two chapters, which present a comprehensive analysis of obligations established by the ECHR and the specialized anti-trafficking instruments. Notably, the second ‘key distinction’ between victim protection and victims’ rights serves to explain why the right to be free from slavery, servitude and forced labour might not be able to accommodate all measures of victim protection established under the specialized anti-trafficking instruments. It is argued that victim protection can be achieved in numerous ways without the need to assert that all victim protection measures represent their human rights. Denying them a human rights status, however, is not meant to diminish their importance but to emphasize that a myriad of measures and frameworks need to be juxtaposed in order to produce an adequate response.

The following sections present more detailed outlines of each chapter.

2.1. Human trafficking, human rights law and the right to be free from slavery, servitude and forced labour

Chapter 2 begins with an overview of the phenomenon of human trafficking, its scale, the evolving international interest in the problem and the resulting actions aimed at combatting it. In particular, Chapter 2 is focused on examining the legal nature of human trafficking and discusses the first universally accepted definition of human trafficking in the Palermo Protocol. The chapter points to conceptual problems arising out of the interpretation of this definition. This is particularly pertinent when the definition developed to facilitate transnational law enforcement actions against human trafficking is applied in the human rights context to assess actions of states, as opposed to that of an individual perpetrator.

Importantly, whereas slavery, servitude and forced labour, as some of the specifically listed exploitative purposes of human trafficking, are expressly prohibited by general human rights instruments, human trafficking as such is not.[50] Chapter 2 describes a conceptual shift from framing human trafficking as a matter of transnational criminal law to human trafficking as a human rights issue. This created a problem of applying the tripartite trafficking definition when assessing the responsibility of the state and raised the question of whether trafficking can be seen as a distinct human rights violation. Thus, in trafficking situations prior to exploitation, one might assume that a human rights framework is not applicable because it would require proof of criminal intent of the potential perpetrator (rather than the fact of exploitation) to establish the existence of an act of trafficking and trigger state obligations. The reason for such an assumption may be found in the principle that 'violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability.'[51] This assumption is, however, unfounded because the responsibility of the state, and not the individual perpetrator, is being assessed. In most cases, such a responsibility is established by demonstrating a failure to discharge its positive obligations to protect victims. Still, these duties are triggered not by the proof of the existence of a crime of trafficking but rather by reasonable grounds to believe that a person might have been its victim.[52] Thus, as noted in *Velasquez*

[50] The following instruments make an explicit reference to human trafficking: The Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 6; The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 35; Charter of Fundamental Rights of the European Union (26 October 2012) 2012/C 326/02 art 5 (3).

[51] *Velasquez-Rodriguez v Honduras*, Series C No.4 [1988] IACHR 1 (29 July 1988) [173].

[52] *Rantsev v Cyprus and Russia* (n 23). See also UK Competent Authority Guidance page 16 that underlines that the test to be used for identifying victims, which serves as a trigger for their protection is whether, 'on the balance of probabilities', there are sufficient grounds to decide that the individual being considered is a victim of human trafficking in any UK referral (or slavery, servitude, or forced or

Rodriguez, 'the violation can be established even if the identity of the individual perpetrator is unknown.'[53] Chapter 2, therefore, shows how the same definition of human trafficking applies differently when establishing the responsibility of a state as opposed to that of an individual perpetrator.

Chapter 3 examines, in detail, the possibility and implications of grounding human trafficking in general human rights instruments, and the right to be free from slavery, servitude and forced labour, in particular. Importantly, this chapter acknowledges that human trafficking violates rights beyond the right to be free from slavery, servitude and forced labour. Thus, both human trafficking and states' response to it potentially engage numerous rights (torture, private life, security and liberty, etc).[54] The UN Special Rapporteur on Trafficking in Persons noted that human trafficking 'represents the denial of virtually all human rights.'[55] The chapter, nevertheless, focuses on the more conceptual questions examining whether the *nature and aim* of

compulsory labour where identified in England or Wales). This threshold is said to be higher than the reasonable grounds test, but lower than the criminal standard of proof.

[53] *Velasquez-Rodriguez v Honduras* (n 51) [173].

[54] UN High Commissioner for Refugees, 'Prevent, Combat, Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights Based Approach' (November 2011); OHCHR, Trafficking Principles and Guidelines – Commentary 51. These two documents provide a list of key rights engaged in trafficking in human beings together with treaty sources in which those rights have been enshrined. See also David Weissbrodt and Anti-Slavery International, Abolishing Slavery and its Contemporary Forms (Office of the United Nations High Commissioner for Human Rights, HR/PUB/02/4, 2002) paras 26-29; Marjan Wijers and Lin Chew, *The RighT Guide: A Tool to Assess the Human Rights Impact of Anti-Trafficking Laws and Policies* (Aim for Human Rights, La Strada Czech Republic, La Strada International and SCOT-PEP, 2010); Roza Pati, 'States' Positive Obligations with Respect to Human Trafficking: The European Court Of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia' (2011) 79 Boston University International Law Journal; Lorna McGregor, 'Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings' (2014) 36 Human Rights Quarterly, 210; UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro (31 March 2015) A/HRC/29/38, para 29.

[55] UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, 'Integration of Human Rights of Women and the Gender Perspective' (22 December 2004) U.N. Doc. E/CN.4/ 2005/71, para 9.

human trafficking, associates this practice with the specific right to be free from slavery, servitude and forced labour, and why it ought to be associated in this way.

In order to explain why the right to be free from slavery, servitude and forced labour represents the most natural conceptual domain for human trafficking, Chapter 3 offers the following arguments.

First, back in 1998, the Human Rights Committee described trafficking of women and others for the purposes of prostitution as ‘acts which can be assimilated to slavery and contrary to international and national law.’[56] Thereupon, the first universally endorsed definition of human trafficking in the Palermo Protocol directly associates the practice with slavery, servitude and forced labour that represent, *inter alia*, different forms of exploitation, as the purpose of a trafficking act. Also, the EU Charter explicitly prohibits human trafficking within the same provision that also prohibits slavery and forced labour.[57] Thus, Article 5 of the EU Charter of Fundamental Rights is said to correspond in substance to Article 4 of the ECHR,[58] which may lead to a conclusion that Article 4 too contains a separate self-standing prohibition of human trafficking. What is more, the Rome Statute’s definition of ‘crimes against humanity’ brings together the concepts of enslavement and human trafficking within Article 7.[59] Finally, the ECtHR has chosen to situate ‘trafficking itself, within the meaning of art.3(a) of the Palermo Protocol and art.4(a) of the Anti-Trafficking Convention’ within

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[56] Human Rights Committee, ‘Concluding observations on Italy’ (U.N. Doc. A/53/40, vol 1, 1998); see also Human Rights Committee, ‘Concluding observations on Japan (U.N. Doc. A/54/40, vol 1, 1999).

[57] Ascola, ‘Article 5 – Prohibition of Slavery and Forced Labour’ (n 18) 104.

[58] European Union Agency for Fundamental Rights (FRA), ‘Severe Labour Exploitation: Workers Moving Within or Into the European Union: States’ Obligations and Victims’ Rights’ (2015) 34.

[59] UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art7(2)(c).

the scope of Article 4 of the ECHR,[60] itself one of the most fundamental, yet the least-adjudicated human rights. The domestic courts have largely endorsed such a view.[61] Therefore, the thesis claims that practices of human trafficking, due to their exploitative aim, always fall under the scope of the right to be free from slavery, servitude and forced labour. This, however, does not mean that practices of human trafficking will also always fall within the scope of state responsibility since this depends on circumstances of each case and whether positive obligations were triggered.

Chapter 3 draws attention to an important distinction between human trafficking that represents a *process* and slavery, servitude and forced labour that amount to an (exploitative) *condition*. The exploitative condition often results from the trafficking process, but not always. Highlighting the third 'key distinction' between human trafficking and exploitative conditions enables reading human trafficking into Article 4 ECHR as a stand-alone prohibition. Therefore, whereas concepts of slavery, servitude and forced labour are premised on actual exploitation, human trafficking exists when exploitation has not yet materialized. Thus, an action required from a state in these circumstances by Article 4 is aimed at preventing exploitation from materializing since being in the situation of trafficking means being at real and immediate risk of being exploited. The obligation to protect an individual from imminent or actual exploitation arises in circumstances where authorities were aware or ought to have been aware that an identified individual is subject to exploitation, or the risk thereof. Therefore, it is argued that introducing human trafficking, *sans*

[60] *Rantsev v Cyprus and Russia* (n 23) [282].

[61] *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC).

exploitation, within the human rights context represents a welcome intervention and an improvement of victim protection.

2.2. The scope of Article 4 ECHR and the meaning of exploitation

Chapter 4 focusses on determining the scope of the right to be free from slavery, servitude and forced labour. In particular, the chapter addresses questions that arise out of positioning human trafficking within this right. It elucidates the meaning of, and relationships between, both expressly prohibited and implied concepts. Resolving the conceptual confusion between human trafficking and various exploitative practices represents one of the main challenges faced by academics in this field. Thus, the chapter demonstrates how these concepts have often been used interchangeably or as 'umbrella' terms, depending on the agenda of the specific actor.[62] The situation is exacerbated by the fact that different concepts have been defined by various instruments, or have not been defined at all. Furthermore, most accounts fail to acknowledge the key distinction between human trafficking that represents a *process* leading to exploitative conditions and slavery, servitude and forced labour that are premised on actual exploitation (*condition*). Therefore, it is evident that human

[62] See, for example, Allain, 'A Response to Anne Gallagher' (n 1); Beate Andrees, 'Why Definitions Matter?' (ILO, Special Action Programme to combat Forced Labour, 03 February 2014) <http://www.ilo.org/global/about-the-ilo/newsroom/comment-analysis/WCMS_234854/lang--en/index.htm> accessed 13 May 2015. Allain, thus, warns of the interchangeable use of the terms 'practices similar to slavery' and 'slavery-like practice', which he contends is – in law – wrong. Namely, he notices that the 'practices similar to slavery' are those items set out in the 1956 Supplementary Convention as servitudes to be suppressed (i.e., debt bondage, serfdom, servile marriage and child exploitation). On the contrary, he claims that 'slavery-like practice' is a term of art, coined at the height of the decolonisation process to apply to apartheid and colonialism but which never found its way into the corpus of international law.' Further, Beate Andrees notices that the existence of different legal definitions, which share a great degree of commonality has sometimes created confusion, and that there is a risk that any form of exploitation is now called 'slavery' or 'trafficking'. Such 'exploitation creep', she contends, 'labels certain practices as more extreme than is legally accurate. In other words, not all children who are exposed to hazardous work are "slaves", and not all workers who don't receive a fair wage are forced.'

trafficking *sans exploitation* cannot be interpreted as one of the exploitative practices expressly prohibited by Article 4, as many scholars propose.[63]

Chapter 4 thus examines the meaning of and the relationship between the concepts of slavery, servitude and forced labour explicitly prohibited by Article 4 ECHR and other exploitative practices listed in the definition of human trafficking.[64] The question of their relationship is particularly important in situations when these exploitative practices are not a part of the acts-means-end process, required by the trafficking definition. Thus, it is not clear whether such exploitative practices ought to be interpreted as either slavery, servitude or forced labour, or they too represent implied stand-alone prohibitions within this right. Chapter 4 argues that these exploitative practices alone engage the right to be free from slavery, servitude and forced labour only when they meet the definitional criteria of either one of these three expressly prohibited conducts. Chapter 4 demonstrates how international instruments support the interpretation of each of these practices, except 'the removal of organs', as either servitude or forced labour.

However, one may rightly ask why, if all exploitative practices were to be qualified as slavery, servitude or forced labour, the human trafficking definition did not use only these three. Chapter 4 argues that the Palermo definition of human trafficking conflates *examples* of exploitative practices and their *legal manifestations* elsewhere in international law, and in international human rights law, in particular. Hence, exploitative practices such as forced begging, forced marriage or enforced criminality

[63] Vladislava Stoyanova, 'Dancing on the Borders of Article 4:Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30(2) Netherlands Quarterly of Human Rights 163.

[64] These other exploitative practices include 'at a minimum': 'the exploitation of the prostitution of others or other forms of sexual exploitation', 'practices similar to slavery', 'the removal of organs', 'forced begging' and 'exploitation of criminal activities'.

represent, in fact, examples of different ways in which slavery, servitude and forced labour can manifest. Still, states may choose to criminalise these distinctive practices separately in order to ensure that the prohibitions required by Article 4 are effectively safeguarded in national law. Again, the problem with human trafficking and related practices is that academics, lawmakers and other practitioners often do not recognize their dual nature - as crimes as well as *potential* human rights violations.

Chapter 5 then offers the first extensive analysis of the notion of exploitation in human rights law - the concept that has been used as a backdrop to all discussions on trafficking and slavery and that explains why human trafficking falls under this right even though the practice may infringe upon numerous others. Notably, the analysis in Chapter 5 demonstrates that in the light of an 'absolute' nature of the right to be free from slavery, servitude and forced labour, the exploitation that is prohibited by this right represents only a subset of exploitative practices, which reaches a certain threshold of severity. This by no means implies that other less serious exploitative practices deserve no intervention from the state. Chapter 5 examines the notion of exploitation by surveying the international and domestic legal landscape as well as philosophical discussions that engage with the idea. The analysis leads to identifying three elements that are said to be constitutive of every situation where definitional criteria of slavery, servitude or forced labour were satisfied. These include: a) abuse of power or vulnerability; b) disproportionate benefit/gain acquired through the actions required from an exploitee; c) sustained action (the practice is taking place over a sustained period of time). The chapter shows that these elements distinguish exploitation from other (often related) harm such as abuse, fraud or extortion.

2.3. Preliminary conclusion of Part I: Article 4 ECHR expanded or clarified?

Does reading human trafficking into the right to be free from slavery, servitude and forced labour expand the scope of this right? An answer to this question depends on whether one approaches it by looking at the conduct that falls within the scope of this right, or at positive obligations arising out of it.

As for the question of the scope of the right, Chapter 3 of the thesis argues that being in a situation of human trafficking represents a real and immediate risk of exploitation, and hence, warrants state action even before the actual exploitation takes place. This understanding is in accordance with the ECtHR's jurisprudence on other fundamental rights contained in Articles 2 and 3 that also require states to act preventatively. In addition, Rogers argues that 'a "victim" in ECHR jurisprudence is interpreted widely so as to include someone who has been at risk of suffering the harm proscribed by a Convention Article.'[65] In this respect, therefore, reading human trafficking into Article 4 does not expand its scope. Regarding the exploitative practices alone (non-trafficked), Chapter 4 demonstrates that these need to be interpreted as either of the three explicitly prohibited conducts, which leaves the scope of the right intact.

On the other hand, when it comes to the scope of state responsibility, bringing human trafficking within the scope of Article 4 ECHR enables the Strasbourg Court to draw on obligations established and elaborated in specific trafficking instruments even in cases of (non-trafficked) exploitation. For example, the protection of victims of human trafficking from prosecution and punishment for offences linked to their

[65] Jonathan Rogers 'Applying the Doctrine of Positive Obligations in the European Convention of Human Rights to Domestic Substantive Criminal Law in Domestic Proceedings' (2003) Criminal Law Review 690.

trafficking experience, first introduced by the Anti-Trafficking Convention (Article 26), has been extended to victims of slavery, servitude and forced labour by the recent UK Modern Slavery Act 2015, regardless of whether such victims have been trafficked or not.[66] Whether the Strasbourg Court will choose to follow this lead and read the non-punishment obligation into the ECHR remains to be seen as the case against the UK concerning these matters is currently pending.[67] Therefore, it seems that the scope of the right to be free from slavery, servitude and forced labour ultimately depends on the extent of positive obligations arising out of it, which is yet to be clarified by the Court. The analysis in Part II of the thesis deals specifically with this question. The thesis, therefore, demonstrates that recent developments have prompted a new engagement with Article 4 ECHR creating a pressure to clarify and redefine its scope rather than to broaden it, in the light of the present day needs.

2.4. Human trafficking and positive obligations

The analysis of the concept of exploitation marks the closure of the first part of the thesis that deals with concepts that define the scope of Article 4 ECHR. In particular, this part helps establish which practices potentially engage the right to be free from slavery, servitude and forced labour. The 'key distinction' between the scope of the right and the scope of state responsibility, nonetheless, calls for determining when and how the state may be found responsible for private acts that fall within the scope of this

[66] The UK Modern Slavery Act 2015 Pt 5, S 45 and Schedule 4. See also the CPS Guidance <http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a28 > accessed 10 May 2015.

[67] *R v N* [2012] EWCA Crim 189.

right. This requires examining states' positive obligations arising out of this right, which is the subject of the second part of the thesis (Chapters 6 and 7).

This comprehensive analysis draws on obligations established under various instruments applicable to the problem of human trafficking. Importantly, Part II of the thesis is focused on determining which of these obligations could be accurately described as human rights obligations under Article 4 ECHR, the breach of which would make a state responsible for an individual act of a trafficker.

Chapter 6 starts by engaging with the jurisprudence of the Strasbourg Court. It examines the evolution of positive obligations in general before moving onto those arising out of Article 4 specifically. However, if justifying the prohibition of human trafficking under Article 4 ECHR appeared complex, assessing obligations arising out of it is even more challenging. Article 4 ECHR contains no explicit obligations cast upon states and the Court's jurisprudence on this right is limited. In order to overcome this difficulty, the thesis expands the analysis to include case law on Articles 2 and 3 ECHR, which is used as *tertium comparationis* given the 'absolute' nature of these three rights. The main proposition in Chapter 6 is that positive obligations in situations of private violations ought to be classified into two main categories: general and specific. General duties are thus concerned with the existence of preconditions for the effective protection of fundamental rights from private persons. These assume having in place an adequate legislative and administrative framework capable of providing the effective protection of individual rights accompanied by institutional arrangements to enforce such a legal framework. Specific duties, on the other hand, are concerned with concrete steps that states have taken in individual cases to put those legislative provisions in effect and include a range of measures. These entail both procedural and practical measures taken by authorities. The chapter thus examines the nature and content of these duties as well as the ways for assessing potential violations.

In addition, Chapter 6 also examines the potential of Article 3 ECHR to provide complementary protection in situations where the conditions for engaging Article 4 could not be satisfied, or when the obligations recognised under these two articles do not provide the same level of protection. The latter situation may arise in connection with deportation cases, since the *non-refoulment* obligation has not yet been recognised under Article 4 ECHR.

In addition to the analysis of comparable duties under Articles 2 and 3 ECHR, it is argued that positive obligations established under Article 4 may be informed by duties contained in the trafficking-specific instruments, since the Strasbourg Court has expressly recognized that the ECHR provisions do not apply in a vacuum.[68] Hence, Chapter 7 provides an in-depth analysis of the trafficking-specific instruments – The Palermo Protocol, The Council of Europe Anti-Trafficking Convention and The EU Anti-Trafficking Directive. In particular, the chapter examines the nature and legal effect of these instruments and their potential to inform the articulation of human rights obligations under Article 4 ECHR. Using the second 'key distinction' to separate measures of victim protection and victim rights as an interpretative tool, Chapter 7 demonstrates that the anti-trafficking instruments are not human rights instruments and the obligations they establish do not *necessarily* and *automatically* amount to human rights obligations, even though they provide a relatively strong basis for victim protection. If such duties could be interpreted as human rights obligations arising out of

[68] *Rantsev v Cyprus and Russia* (n 23) [273]; *Loizidou v Turkey* (1997) 23 EHRR 513; *Öcalan v Turkey* (2005) 41 EHRR 45 [163]; *Opuz v Turkey* (2010) 50 EHRR 28 [164].

Article 4 ECHR, they may well become enforced against the states via the Strasbourg Court, thus side-tracking the official enforcement mechanisms of these instruments.[69]

The comprehensive comparative analysis of the obligations contained in the anti-trafficking instruments and those established under the ECHR reveals first, that some of these obligations have been already *recognised* as human rights obligations under the ECHR. Also, the analysis demonstrates obvious potential of the provisions of the Anti-Trafficking Convention to influence the approach of the Strasbourg Court in developing further human rights safeguards under the ECHR. Importantly, it is argued that the ECHR lies down general guidance as to the goals to be achieved, and that the specific content of positive obligations rests on the specialised anti-trafficking instruments and national legislation. This way, it is argued, the two bodies of law create an important synergy that is instrumental for the protection of victims and their interests. Whereas the Strasbourg Court did acknowledge 'the paucity of case law on the interpretation of art.4 in the context of trafficking cases'[70] it did very little to develop and elaborate such obligations. Chapter 7, therefore, offers guidance on how these obligations could be formulated in future.

3. Scope of the thesis

3.1. Focusing on the European Convention on Human Rights

[69] The Anti-Trafficking Convention establishes monitoring mechanism that consists of the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties, the latter being linked directly to the Council of Europe's Committee of Ministers thus adding a political dimension to the evaluation process.

[70] *Rantsev v Cyprus and Russia* (n 23) [200] (emphasis added).

Whereas all general human rights instruments contain the prohibition of slavery, servitude and forced labour right,[71] the analysis throughout the thesis focuses specifically on the European Convention of Human Rights. This is for the following reasons.

First, as already noted, the Strasbourg Court has been the first to explicitly ground human trafficking within this right and Chapter 3 analyses a justification it offers for doing so. Secondly, the European Court of Human Rights, being described as ‘the crown jewel of the world's most advanced international system for protecting civil and political liberties’[72] and ‘the de facto model for developing human rights elsewhere’,[73] offers a concrete tool to victims to act as agents in their own cause through its individual petition system. Finally, such an enforcement mechanism makes states more wary of being found in breach of their obligations by the binding decision of a supranational court, as opposed to their attitude towards obligations arising out of other international instruments. This was pointed out by Durieux, who compared the attitudes of the EU Member States towards the 1951 Refugee Convention and towards the ECHR.[74] Therefore, understanding how to use the protection afforded by this mechanism is likely to have a significant effect on the overall protection of trafficking victims under human rights law more generally. The thesis, however, does not confine

[71] UDHR art 4; ICCPR art 8; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 OASTS No 36, art 6; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (Banjul Charter) art 5.

[72] Laurence R Helfer ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19 (1) European Journal of International Law 125, 159.

[73] Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics* (OUP 2011) 2.

[74] Jean-François Durieux, ‘The Vanishing Refugee’, in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013) 254-255.

the analysis to the ECtHR case law and draws on examples from the jurisprudence of other human rights bodies and domestic courts. The broad choice of jurisdictions beyond the ECtHR is guided only by the extent to which these are relevant to, and shed light upon, the legal issues being discussed.

3.2. Article 4 of the European Convention on Human Rights

The thesis limits the analysis of the role of human rights law in the protection against human trafficking by focusing on one human right under the ECHR. The thesis's argument about the role of the ECtHR and the right to be free from slavery in the fight against human trafficking may attract the criticism of being too minimalistic. The duties outlined may appear too limited and as not going far enough in order to secure the protection of victims. More specifically, the anti-trafficking action and the human rights approach have been criticised for being 'deeply embedded in a criminal law and border control framework'.[75] Such criticism deserves serious engagement.

As for the charge of the anti-trafficking obligations being 'too criminal', one needs to be mindful of two distinct aspects of this criticism. The first aspect refers to the anti-trafficking action *in general* and its unjustified focus on criminal law. This

[75] Judy Fudge, 'The Dangerous Appeal of the Modern Slavery Paradigm' *Open Democracy* (25 March 2015) <https://www.opendemocracy.net/beyondslavery/judy-fudge/dangerous-appeal-of-modern-slavery-paradigm> accessed 15 August 2015. See also Holly Cullen, 'Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights' (2006) 6 Human Rights Law Review 585, 590; Maggy Lee, *Trafficking and Global Crime Control* (Sage 2011) 36; Jonathan Todres,' Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking' (2011) 33 Michigan Journal of International Law, 53; Chuang. 'Exploitation Creep' (n 7); Austin Choi-Fitzpatrick, 'From Rescue to Representation: A Human Rights Approach to the Contemporary Anti-Slavery Movement' (2015) Journal of Human Rights 486; Costello, 'Migrants and Forced Labour' (n 26).

critique is largely undisputed. Thus, it is self evident that a criminal law-centred approach will not address the root causes of trafficking and, as noted by Todres, it is not even designed to do so.[76] Still, even the fiercest critics of the criminal justice approach to human trafficking, which is said to 'prioritize punishment of individual perpetrators and, to a lesser extent, post-hoc protection of victims', admit it is a necessary albeit insufficient tool in the fight against human trafficking.[77]

The second part of the critique concerns human rights law. Thus, in the light of the positive obligations under Article 4 elaborated in Chapter 6, the question is whether the human rights approach, too, focuses disproportionately on law enforcement, as some authors suggest.[78]

It is important to stress that the thesis only addresses human trafficking and exploitation from the perspective of the right to be free from slavery, servitude and forced labour. Consequently, since, as an 'absolute' right, it protects against the most severe cases of exploitation, it requires state intervention by means of criminal law, *as a minimum safeguard*. Criminal law is, therefore, a necessary albeit insufficient method for states to secure this protection. The requirement of criminalization, nevertheless, only indicates the seriousness of these practices and should not be interpreted as the only, or even predominant method of dealing with them, even within Article 4, as *Rantsev* amply demonstrates.[79] Thus, the ECtHR noted that 'the duty to

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[76] Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking' (n 4) 157. See also Pati, 'States' Positive Obligations with Respect to Human Trafficking' (n 54) 82.

[77] Chuang. 'Exploitation Creep' (n 7) 118-119.

[78] Cullen, 'Siliadin v France' (n 75) 590; Costello, 'Migrants and Forced Labour' (n 26).

[79] *Rantsev v Cyprus and Russia* (n 23) [284]: The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, art.4 requires Member States to put in place adequate measures regulating businesses often

penalise and prosecute trafficking is only one aspect of Member States' general undertaking to combat trafficking'.[80]

Moreover, the Strasbourg Court expressly recognized that the extent of the positive obligations arising under Article 4 must be considered within a broader context of legal instruments (the Palermo Protocol and the Anti-Trafficking Convention) acceded to by almost all Council of Europe Member States. The problem, nevertheless, lies in the fact that the Court failed to pronounce which of the numerous obligations established by these instruments are to be included within the ambit of Article 4 ECHR. This obvious shortcoming has prompted the discussion in Chapter 7.

However, while Chapter 7 explores the possibility of framing some of the provisions of the anti-trafficking instruments as human rights obligations under the ECHR, the Strasbourg Court is yet to position itself on this matter. Until then, it is important to reiterate the second key distinction of this thesis: there is a difference between victim-centred protection measures required by various binding and non-binding instruments concerned with this problem on the one hand, and human rights obligations that may be enforced against States, on the other. This distinction is important because mapping out and articulating human rights obligations upon States creates a clearer platform for arguing cases before the ECtHR, even if this would tackle only the most egregious cases of exploitation. In any case, the thesis concludes that states' positive human rights obligations cannot include all measures capable of contributing in some way to the fight against human trafficking and exploitation.

used as a cover for human trafficking. Furthermore, a state's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.

[80] ibid [285].

Is such a view of states' obligations under Article 4 ECHR 'too minimalistic'?

One of the most obvious arguments against reading many, if not all, victim-protection measures from the anti-trafficking instruments, and the Council of Europe Anti-Trafficking Convention in particular, into Article 4 ECHR is that the alternative enforcement mechanism is foreseen by the drafters.[81]Accordingly, it may not be possible or appropriate to 'judicialise' the whole instrument via recourse to Article 4 ECHR, especially, in light of the perceived 'democratic deficit' of the Strasbourg Court.[82]

Nonetheless, Chapter 7 shows that despite the absence of a victim's right of individual petition, victims and their representatives have an opportunity to use the Anti-Trafficking Convention on a national level. Hence, while it is true that no international court can enforce the full scope of measures contained in this instrument, this does not mean that they are devoid of normative power altogether. This is evidenced by the recent developments in the UK jurisprudence.[83] Significantly, the

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[81] It is impossible to find out whether establishing an individual petition system was discussed by the drafters or how they decided on the chosen enforcement mechanism since there are no publicly available *travoux preparatoire* of the Convention. The Convention was prepared by the Ad Hoc Committee on Action against Trafficking in Human Beings (CAHTEH), which was given a mandate by the Committee of Ministers of the Council of Europe. This multidisciplinary body held eight meetings between September 2003 and February 2005 to finalise the text. However, according to Anne Gallagher who acted as legal adviser to a coalition of NGOs interested in the process, these meetings were closed to those without an observer status and attempts by some international non-governmental organisations to gain access failed. Moreover, the reports of CAHTEH's meetings were restricted and, in the early stages, even the drafts of the Convention were not publicly available. The absence of a public scrutiny over the drafting process, which Gallagher describes as 'a more private affair', makes it difficult to ascertain motivations behind some provisions. See Anne Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 European Journal of Migration and Law, 163, 173. See also Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (OUP 2008) 145-146.

[82] Sandra Fredman, *Human Rights Transformed: Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) Chapter 4.

[83] *R (Atamewan) v Secretary of State for the Home Department* [2014] 1 W.L.R. 1959; *FM, R (on the application of) v Secretary of State for the Home Department* [2015] EWHC 844 (Admin) (26 March 2015); *Minh, R (on the application of) v The Secretary of State for the Home Department* [2015] EWHC 1725 (Admin) (18 June 2015).

decisions discussed illustrate an important interplay between the protective guarantees in the ECHR and the Anti-Trafficking Convention, where the former lays down a general guidance and the latter clarifies and specifies this by outlining concrete requirements.[84]

The further reason for limiting the scope of Article 4 ECHR is the fact that this right is not the only source of protection available to victims of trafficking and exploitation within human rights law. Hence, other rights – both justiciable and non-justiciable – may offer alternative and/or complementary protection. This is particularly evident in the case of the rights of victims of trafficking with an irregular immigration status. Chapter 6, thus, argues that the right to be free from slavery, servitude and forced labour is ill-placed to provide adequate protection to the majority of victims with irregular immigration status, except in the most pressing circumstances and only against *non-refoulment*. A *non-refoulment* obligation under Article 4 ECHR is yet to be pronounced by the Strasbourg Court, but it may well be possible to presume that such a duty could be established in future, drawing a parallel with obligations under Article 3.

Notably, Chapter 6 (Section 4) of the thesis argues that in the light of the nature and purpose of the right to be free from slavery, servitude and forced labour, the protection from deportation beyond the reflection and recovery period[85] would only be

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[84] *Minh, R (on the application of) v The Secretary of State for the Home Department* [2015] EWHC 1725 (Admin) (18 June 2015) [63] and EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania v Secretary of State for the Home Department [2013] UKUT 313 (IAC) [64].

[85] The obligation to provide for a reflection and recovery period 'of at least 30 days' is established by Article 13 of the Council of Europe Anti-Trafficking Convention. During this period presumed victims cannot be removed from the member state concerned and are guaranteed measures of emergency assistance contained in Article 12, paragraphs 1 and 2. Whereas the reflection and recovery period is primarily established to prevent the expulsion of victims who are 'illegally present' at the territory of a member state, its overall goal is to enable a presumed victim 'to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities'.

available if there was a real and immediate risk of re-trafficking upon return. The reason for such a narrow protection is because the right to be free from slavery, servitude and forced labour is aimed at protecting against a specific harm – that of exploitation and the risk thereof. On the other hand, Article 3, with its well-articulated jurisprudence on the matter of *non-refoulment*, offers protection from a broader spectrum of harm, which needs to fall under one of the three prohibited practices (torture, inhuman or degrading treatment).[86] Hence, whereas the risk of torture, inhuman or degrading treatment in the returning state may well trigger the non-deportation obligation contained in Article 3, Article 4 offers protection only when deportation would result in the real and immediate risk of exploitation/re-trafficking. Unfortunately, given that it is difficult enough to prove even the (present) status of a victim of exploitation (trafficking), establishing the (future) risk of exploitation (re-trafficking) is next to impossible. Consequently, it may prove more useful for victims to rely on the protection offered by Articles 3 or 8, which apply equally to victims of trafficking as they apply to any other individual facing deportation.[87] Arguably, it is easier to establish the risk of harm that often accompanies human trafficking and exploitation than to prove the risk of the composite human trafficking/exploitation offence. Whereas the analysis in Chapter 7 shows that the Council of Europe Anti-Trafficking Convention offers somewhat better protection against deportation,[88] its enforcement depends on national courts and it remains to be seen whether the

[86] *Sufi and Elmi v UK* (2012) EHRR. 209; *MSS v Belgium* (2011) 53 EHRR 2; *N v UK* (2008) 47 EHRR 39.

[87] Suzanne Egan, 'Protecting the Victims of Trafficking: Problems and Prospects' (2008) 1 European Human Rights Law Review 106, 118.

[88] In particular, the UK Upper Tribunal (Immigration and Asylum Chamber) held that the very high standard set in *N v The United Kingdom* for Article 3 cases may not necessarily be required by the Anti-Trafficking Convention: *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC) [63]-[64]. See the discussion in Chapter 7.

Strasbourg courts will choose to impose the same level of obligation under Article 4 ECHR.

Chapter 6 also considers an argument that victims of human trafficking with irregular immigration status may benefit from refugee law protection as shown by the recent case law of the UK courts.[89] However, even though refugee law provides for an extensive protection mechanism, its enforcement is problematic and for the most part, it relies extensively on the ECHR.[90] In fact, Article 3 has been seen as a safety net in the protection of refugees who have not been identified as such under refugee law.[91] Still, such protection is reduced to protection from *refoulmont.*[92]

Ultimately, the thesis concludes that human rights law, as such, is by no means the most appropriate framework for addressing the complex dynamics of human exploitation that goes far beyond that prohibited by the right to be free from slavery. Fudge and Strauss, for example, are highly critical of the human rights approach that 'hinges on the international instruments against forced labour and trafficking' and is said to 'skew attention towards the worse cases of abuse'.[93]However, it is unfair to

[89] SB (PSG-Protections Regulations-Article 6) Moldova CG [2008] UKAIT 00002; PO (Trafficked Women) Nigeria CG [2009] UKAIT 00046; HC & RC (Trafficked women) China CG [2009] UKAIT 00027 (18 July 2009); AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC) (18 February 2010); AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC) (23 April 2010). See also Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011) Chapter 14. See also UNHCR, Comments on the proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims (COM(2010)95, 29 March 2010); UNHCR Guidelines on International Protection No.7: 'The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked' (7 April 2006).

[90] Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013) chs 1, 9 and 10.

[91] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) ch 3; Case C-465/07, *Elgafaji v Staatssecretaris van Justitie* (CJEU, GC, 17 February 2009); *Bagdanavicious v SSHD* [2003] EWCA Civ 1605.

[92] Durieux, 'The Vanishing Refugee' (n 74).

blame human rights law for 'skewing attention' to the worst cases of exploitation, since this does not prevent addressing 'less extreme but still very real forms of exploitation'[94] by other means, such as good labour laws and effective labour enforcement, as the recent initiatives sought to encourage.[95]

Therefore, while the right to be free from slavery is, understandably, focused on the most serious cases of exploitation, other human rights as well as standards enshrined in other international instruments, especially those adopted within the auspices of ILO, offer protection against lesser forms of exploitation, which also prevents them from escalating into more serious types. Therefore, just and fair working conditions as well as the role of labour administration and labour inspection are crucial in preventing forced labour.[96] Skrivankova and Plant, both working with the idea of a continuum, rightly point out that 'practical responses and policy need to address the problem as a continuum between decent work and forced labour, as an issue of both labour (and human) rights and criminal justice'[97] where 'criminal justice, labour justice and other forms of justice can complement each other'.[98] Human rights, and especially the right to be free from slavery, represent the last resort in this chain of action.

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[93] Judy Fudge and Kendra Strauss, 'Migrant Domestic Workers in the UK' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 174.

[94] Mark Freedland, Cathryn Costello, 'Migrants at Work and the Division of Labour Law' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 12.

[95] FRA, 'Severe Labour Exploitation' (n 58); Costello, 'Migrants and Forced Labour' (n 26).

[96] International Labour Organisation (ILO), 'Report for Discussion at the Tripartite Meeting of Experts Concerning the Possible Adoption of an ILO Instrument to Supplement the Forced Labour Convention, 1930 (No. 29)' (Geneva, 11-15 February 2013) para 15.

[97] Skrivankova, 'Between Decent Work and Forced Labour' (n 3) 17.

[98] Plant, 'Modern slavery' (n 32) 20.

To conclude, protection offered to victims of human trafficking and exploitation by Article 4 of the ECHR is important, if incomplete. Depending on factual circumstances, other human rights may provide more appropriate protection to such victims. Also, their interests may be better safeguarded on a national level in countries that have incorporated the specialized anti-trafficking instruments. Finally, and most importantly, States also need to provide mechanisms for protection from exploitative practices that do not reach the level of severity to trigger Article 4 ECHR. However, the thesis holds that it is wrong to assume that such protection can be enforced through Article 4 ECHR since that right guarantees protection from the most egregious examples of exploitation.

4. Conclusion

Jenny Martinez wrote an insightful account of the international admiralty courts, which adjudicated upon the crews of captured slave ships. She argued that these slave trade courts were the first international human rights courts that laid the foundations of contemporary human rights law.[99] Her work challenges a broad consensus among scholars that 'a self-conscious and broad-based human rights movement focused on international law only began after World War II'.[100] Furthermore, she argues, that the abolition of the transatlantic slave trade remains 'the most successful episode ever in

[99] Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (OUP 2012). She shows that the courts, which were based in the Caribbean, West Africa, Cape Town, and Brazil, helped free at least 80,000 Africans from captured slavers between 1807 and 1871. Her argument is not, however, entirely novel. Thus, other authors also pointed out to the fact that that slavery conventions precipitated the development of international human rights law. See Jan Hendrik Willem Verzijl, *International Law in Historical Perspective* (Springer 1976) 240.

[100] Martinez, *The Slave Trade and the Origins of International Human Rights Law* (n 99) 1.

the history of international human rights law.'[101] While there is no reason to dispute her claims about the roots of the human rights movement, the conclusion about the success of the abolition of the slave trade is vulnerable to serious criticism. Although the abolitionist movement definitely succeeded in making slavery illegal worldwide, *de facto* slavery clearly did not end with abolition in the 19th century.[102]

It has been claimed that there are more people in slavery today than at any time in human history.[103] According to some accounts, not only has slavery persisted until today, but it has also become more profitable. Thus, Kevin Bales shows that whereas in 1850 a slave cost the equivalent of $40,000 of today's money, in many places around the world, people can be bought for less than $100.[104] The alleged numbers of 'modern slaves' as well as their 'market value' are difficult to verify.[105] Equally, Chapter 4 demonstrated that the term 'modern slavery' itself is imprecise and potentially over inclusive. Notwithstanding, it is widely acknowledged that the modern day manifestations of slavery represent 'a widespread and deeply rooted component of contemporary life.'[106]

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[101] ibid 13.

[102] See, for example, Malawi African Association and Others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African Commission on Human and Peoples' Rights, 11 May 2000, [134]; *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008, [80] (unofficial translation by INTERRIGHTS).

[103] See Anti-Slavery web site <http://www.antislavery.org/english/slavery_today/what_is_modern_slavery.aspxlast> accessed 9 December 2015.

[104] Kevin Bales, *Disposable People: New Slavery in the Global Economy* (University of California Press 2012) Chapter 1.

[105] Monti Narayan Datta and Kevin Bales, 'Slavery in Europe: Part 1, Estimating the Dark Figure' (2013) 35 Human Rights Quarterly 817.

[106] Joel Quirk, 'Unfinished Business: A Comparative Survey of Historical and Contemporary Forms of Slavery' (Joint Report of UNESCO and the Wilberforce Institute of Slavery, 2008), 120. See also Jean Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012);

While the anti-slavery movement may well have provided a foundation stone for international human rights law, the thesis shows that human rights are not sufficient, on their own, to bring to an end the most abhorrent practices of human exploitation. Therefore, one of the purposes of this thesis is to demonstrate that justice for victims of trafficking and exploitation requires much more than human rights law is able to offer. As Robert Alexy's 'core thesis' argues:

> Every violation of human rights is unjust, but not every injustice is a violation of human rights. If this is true, human rights represent the core of justice, whereas justice comprises more than human rights.'[107]

The thesis presents a timely and indispensable doctrinal analysis that clarifies conceptual questions emerging from the debates on human trafficking, slavery and exploitation in the context of Article 4 ECHR.

In addition, the thesis elucidates, classifies, and assesses the positive obligations arising out of Article 4 ECHR that may be *enforced* against states, as well as measures of victim protection contained in the trafficking-specific instruments that may inform Article 4 positive obligations. This analysis aims to provide an important interpretative aide to courts, victims' representatives and legal practitioners elucidating the questions to be addressed in examining allegations of Article 4 ECHR violations.

Clarifying this area of law has not been an easy task. In writing, the thesis has followed what could be best described as a moving target. At the very beginning of the project, only two cases before the Strasbourg Court dealt with positive obligations

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Nicholas Lawrence McGeehan, 'Misunderstood and Neglected: The Marginalisation of Slavery in International Law' (2012) 16 International Journal of Human Rights 436.

[107] Robert Alexy 'Law, Morality and the Existence of Human Rights' (2012) 25(1) Ratio Juris 2, 9. An alternative to the core thesis is the thesis that human rights and justice are coextensive. It runs as follows: Every violation of human rights is unjust, and every injustice is a violation of human rights. This thesis might be termed the 'equivalence thesis'.

arising out of the right to be free from slavery, servitude and forced labour and only one of these expressly addressed the issue of human trafficking. Prior to *Siliadin*, case law on Article 4 ECHR had concerned state-imposed obligations that allegedly breached this provision and dealt with applicants who, apart from detainees, could hardly be considered disempowered or vulnerable.[108] However, judgements in *Siliadin*, *Rantsev* and cases that followed shed new light on the relevance of Article 4 - one of the least litigated provisions of the ECHR - in the contemporary world.

This thesis builds upon these developments in offering a conceptual and doctrinal map for future developments in this area of law. Even though the majority of victims will never reach the ECtHR, those who do can act as agents for many potential applicants, prompting the Court to articulate what is expected from states under the ECHR. In light of the scale of 'modern slavery', it is particularly important for the human rights community to submit well-argued cases which challenge the ECtHR to engage with these complex questions. Arguably, closer engagement of the Strasbourg Court with this problem will have a considerable effect on the anti-trafficking actions worldwide and standards set by the Court will constitute a benchmark for states obligations globally. This thesis is offered as a contribution to this cause.

[108] For an overview of the case-law on Article 4 ECHR see Jacobs, White and Ovey (eds), *The European Convention on Human Rights* (5th edition, OUP 2010) 195. See also Alastair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edition, OUP 2012) 232.

PART I

CHAPTER 2: Trafficking in Human Beings – From Law Enforcement to Human Rights

1. Introduction

This chapter portrays the scope of the problem of human trafficking, its main features and manifestations. It also explores rising political and scholarly interest in the topic and the resulting exponential development of initiatives on both international and domestic levels designed to combat this global phenomenon. In particular, the chapter exposes the challenges in the legal framing of the issues raised by human trafficking, which engages several legal frameworks whose objectives are often at tension with one another. The chapter analyses the first universally accepted definition of human trafficking contained in the UN Protocol to the Transnational Organised Crime Convention[1] and explains conceptual problems with its interpretation. Importantly, the chapter addresses the question of state responsibility for human trafficking and highlights the potential issues with the application of the trafficking definition in this context. The chapter argues that the Palermo definition operates differently when establishing the individual criminal responsibility of the traffickers and the responsibility of the state in the human rights context. Finally, the hapter describes the conception of human rights espoused throughout the thesis in order to distinguish it from many other approaches that may be used to analyse this complex phenomenon.

[1] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol).

The chapter thus sets the scene for examining the relationship between human trafficking and human rights law with a view to identifying ways of holding states accountable for this practice.

2. Trafficking in human beings - the challenge of the 21st century

The last two decades have seen increased attention to the phenomenon of trafficking in human beings leading to a number of initiatives on the international, regional and national levels. All of these initiatives seekto prevent the escalation and to alleviate devastating human consequences of human trafficking.[2] Trafficking, therefore, has become a subject of intense and controversial debates among international bureaucrats, politicians, human rights activists and academics of all profiles. A whole array of disciplines have engaged in the discussion, producing rich and insightful material that elucidates its complex and multidimensional nature.[3] Choi-Fitzpatrick observed that

> Interest in the issue, as measured by scholarly and semi-scholarly publications, has exploded a thousand-fold over the past decade. While it may have been possible follow the literature on "contemporary slavery" and "human

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[2] See the initiatives of the international organizations listed in the Appendix.

[3] Marjan Wijers and Lin Lap-Chew, *Trafficking in Women, Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution* (Foundation Against Trafficking 1997); Tom Obokata, *Trafficking in Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers 2006); Maggy Lee (ed), *Human Trafficking* (Willan 2007);Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008); Kevin Bales and Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today* (University of California Press 2009); Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press 2009); Louise Shelley, *Human Trafficking: A Global Perspective* (CUP 2010); Gillian Wylie and Penny McRedmond (eds), *Human Trafficking in Europe Character, Causes and Consequences* (Palgrave Macmillan 2010); Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011); Frances P Bernat (ed), *Human Sex trafficking* (Routledge 2011); Alison Brysk and Austin Choi-Fitzpatrick (eds), *From Human Trafficking to Human Rights: Reframing Contemporary Slavery* (University of Pennsylvania Press 2011); European Journal of Criminology, 7(1) 5–10, Special Issue, Human Trafficking: Issues and Perspectives; Christien van den Anker and Ilse van Liempt (eds), *Human Rights and Migration: Trafficking for Forced Labour* (Palgrave Macmillan 2011); Conny Rijken (ed), *Combating Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011); Michele Ford, Lenore Lyons and Willem van Schendel (eds), *Labour Migration and Human Trafficking in Southeast Asia: Critical Perspectives* (Routledge 2012).

> trafficking" up through 2000, it has since become nearly impossible to keep up with the torrent of academic and near-academic output. This pace shows no sign of slowing.[4]

However, he noticed that it is still unclear what exactly human trafficking is an example of 'since it intersects with a host of issues and agendas and since answers, however provisional, drive policies, funding, advocacy, interventions, and numerous debates'.[5]

Human trafficking is thus said to represent 'an imprecise and highly contested term'.[6] A range of key social, economic, political and legal issues such as globalization, poverty, migration, security, prostitution, organized crime, corruption, armed conflicts, labour conditions, and human rights are used as a backdrop against which this complex phenomenon has been analysed.[7] Paradoxically, the fact that a number of disciplines have embarked on conceptualizing and explaining the problem of human trafficking seems to have brought more confusion than clarity into its understanding. Namely,

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[4] Austin Choi-Fitzpatrick, 'From Rescue to Representation: A Human Rights Approach to the Contemporary Anti-Slavery Movement' (2015) 14 (4) Journal of Human Rights 486, 498.

[5] ibid 499.

[6] Lee, *Human Trafficking* (n 3) refers to a research study, which identified 22 definitions of the concept of trafficking.

[7] Kamala Kempadoo, 'Introduction: Globalising Sex Workers' Rights', in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge 1998); Felicity Rousseaux, 'The Psychological Impact of Sexual Slavery of Trafficked Women: Parallels with Torture, Sexual Abuse and Domestic Violence' (2003) 14 Violence Against Women: An Australian Feminist Journal 4; Ryszard Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2005) 24 Australian Year Book of International Law 159; Kimberley Thachuk (ed), *Transnational Threats: Smuggling and Trafficking in Arms, Drugs, and Human Life* (Praeger Security International 2007); Loring Jones, David W Engstrom, Tricia Hilliard, Mariel Diaz, 'Globalization and Human Trafficking' (2007) 34 (2) Journal of Sociology and Social Welfare 107; Anne Gallagher, *The International Law of Human Trafficking* (CUP 2010); Rianne Letschert and Jan Van Dijk (eds), *The New Faces of Victimhood: Globalization, Transnational Crimes and Victim Rights* (Springer Studies in Global Justice 2011); Maggy Lee, *Trafficking and Global Crime Control* (SAGE 2011); Hila Shamir, 'A Labour Paradigm for Human Trafficking' (2012) 60 UCLA Law Review 76; Jonathan Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to a Labor Paradigm for Human Trafficking' (2013) 60 UCLA Law Review 157; Andrea Di Nicola, 'Trafficking in Persons and Smuggling of Migrants' in Philip Reichel, Jay Albanese (eds), *Handbook of Transnational Crime and Justice* (2nd ed, Sage 2014); Janie A Chuang , 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) The American Journal of International Law 609; Jessica Elliott, *The Role of Consent in Human Trafficking* (Routlege 2015).

though such interdisciplinary cross-fertilization might be valuable for getting a fuller image of the phenomenon in general, it may, nevertheless, result in the misperception of some important issues within each individual discipline. Thus, for example, trafficking has frequently been referred to as 'modern-day slavery'.[8] Admittedly, this parallel to slavery has often been deployed as a rhetorical tool in order to signify the magnitude of human tragedy and not necessarily to *equate* trafficking with slavery as a *legal* concept. The following statement illustrates such a discourse:

> Today, it is estimated as many as 27 million people around the world are victims of modern slavery, what we sometimes call trafficking in persons (...) I mean, trafficking, when I first used to talk about it all those years ago, I think for a while people wondered whether I was talking about road safety – what we needed to do to improve transportation systems. But slavery, there is no mistaking what it is, what it means, what it does. Some, yes, are lured to another country with false promises of a good job or opportunities for their families. Others can be exploited right where they grew up, where they now live.[9]

However, there have also been attempts to interpret legal definitions of slavery to accommodate trafficking and *vice versa* using both concepts as 'umbrella terms', which further confuses the debates about these undoubtedly related phenomena and has generated a strong criticism by some scholars.[10] The conceptual problems with

[8] US Department of State, 'The 2014 Trafficking in Persons Report' (2014); Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) CETS 197 (Explanatory Report) para 15; Scarpa, *Trafficking in Human Beings: Modern Slavery* (n 3); OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 'Combating Trafficking as Modern-Day Slavery: A Matter of Rights, Freedoms and Security' (2010); UN General Assembly Resolution on Strengthening International Cooperation in Preventing and Combating Trafficking in Persons And Protecting Victims of Such Trafficking (A/RES/58/137, 4 February 2004) Preamble; Joel Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking* (University of Pennsylvania Press 2011); Dominika Borg Jansson, Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons (Brill Nijhoff, 2014) 341; UK Modern Slavery Act 2015.

[9] Hillary Rodham Clinton, 'Remarks at release of The 2012 Trafficking in Persons Report' (19 June 2012) <http://www.state.gov/secretary/rm/2012/06/193368.htm> accessed 27 June 2012.

[10] Jean Allain, 'Trafficking in Human Beings: Modern Slavery' (2009) 20(2) European Journal of International Law 447; Anne T Gallagher, 'Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor and Debt Bondage' in Leila Nadya Sadat and Michael P Scarf (eds), *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (Martinus Nijhoff, 2008). See also Mike Dottridge, 'Some

interpreting the legal definition of human trafficking will be discussed in more detail in Sections 3 and 4 of this chapter as well as in Chapter 4.

In essence, trafficking involves exerting power over people with a view of exploiting them for economic gain. The purposes for which people are being trafficked are numerous and cannot be stated conclusively: forced labour or services, sexual exploitation, domestic servitude, forced marriage, forced begging and forced criminality are some of the forms of exploitation that have been recorded so far. In spite of this diversity, there is a common thread that links all these practices into a unique concept: human trafficking represents a profit-driven exploitative practice in which human beings are treated as 'commodities to be bought and sold'.[11] Thus, a recent UNODC Report underlines that '[d]ifferent trafficking operations have one key element in common: the business around the exploitation of the victims.'[12] Hence, the vast majority of trafficking is said to be directed at obtaining economic benefit from the labour and services extorted from the victims. The UNODC Report thus claims that

> The 'loverboy' who exploits his girlfriend in sexual exploitation is leveraging his power over her for profit. The families exploiting domestic help in Africa or housing *restavek* children in the Caribbean are benefiting from the labour of these children. The debt bondage schemes behind some West African or East Asian trafficking networks are leveraging the migration dream of the victims to exploit them in forced labour or in the commercial sex market. Trafficking in persons is motivated by profit maximization and organized by traffickers trying to maximize benefits and minimize costs. The higher the profits, the greater the economic incentives to conduct the trafficking crime.[13]

Piotrowicz also stated that:

Implications of Using the Term "Modern slavery"' (The Trafficking Research Project, 28 February 2014) <https://thetraffickingresearchproject.wordpress.com/2014/02/28/some-implications-of-using-the-term-modern-slavery/> accessed 5 May 2015.

[11] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [252].

[12] UNODC 'Global Report on Trafficking in Persons 2014' (November 2014) 46.

[13] ibid 46-47.

> Traffickers are in it for the money. Their victims are there to be exploited for financial gain; they just happen to be human beings. I am confident that if traffickers could make more money out of selling bars of chocolate or smuggling fruit then they would do it.[14]

Accordingly, owing to its high-profit/low-risk ratio, trafficking has become an attractive venture for organized criminal groups many of which are said to have shifted away from trafficking in arms, drugs and tobacco toward trade in humans.[15] The International Labour Organization thus estimates that forced labour generates annual profits of US$ 150 billion.[16] The UNODC reports that human trafficking is one of the most lucrative illicit businesses in Europe, where criminals are making around 2.5 billion euros per year through sexual exploitation.[17] However, not all traffickers belong to the organized criminal industry that generates enormous profit from trading in humans. In reality, it is often a family member or a person close to a victim who initiates the whole process, making it almost impossible to detect.[18]

Exploitation is facilitated by victims' vulnerability, which stems from poverty, unemployment, lack of socio-economic opportunities, gender-based violence, discrimination and marginalization.[19] Their obedience and 'loyalty' are extracted by

[14] Ryszard Piotrowicz, 'THB in 2016 – Where are we, where have we been and where are we going?' (Council of the Baltic Sea States Task Force against Trafficking in Human Beings, Policy Implications of Future Trends in Trafficking, 29 February 2016) para 11.

[15] Thachuk (ed), *Transnational Threats* (n 7); Donna M Hughes, 'The "Natasha" Trade: The Transnational Shadow Market of Trafficking in Women' (2005) 53 Journal of International Affairs 625; John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking' (1997) 35(4) International Migration 467; Shelley, *Human Trafficking: A Global Perspective* (n 3) 194.

[16] ILO, 'Profits and Poverty: The Economics of Forced Labour' (2014).

[17] UNODC, 'Trafficking in Persons to Europe for Sexual Exploitation' (2010) 7.

[18] UNODC 'Global Report on Trafficking in Persons 2014' (2014). Also, International Organization for Migration (IOM), 'Second Annual Report on Victims of Trafficking in South-Eastern Europe' (2005), shows that in Albania, which is identified as one of the major source countries, nearly half of the women trafficked for sexual exploitation, were recruited by a family member.

[19] United Nations Global Plan of Action to Combat Trafficking in Persons (A/RES/64/293, 12 August 2010) Preamble.

means of physical and psychological coercion (in a broad sense) which, combined with their often 'illegal' immigration status and no means of subsistence, makes victims absolutely dependent on traffickers. It is said to disproportionately affect women and children, both as victims[20] as well in the role of a trafficker.[21] However, a substantial body of research demonstrates a number of examples of men being subject to exploitative practices, mainly for the purposes of forced labour.[22]

Furthermore, as the above examples from the UNODC report illustrate, trafficking is truly a global problem: while the situation is more alarming in some countries than in others, examples of this heinous practice can be found in every part of the world.[23] Although the reasons behind the recent *increased concern* with trafficking are open to debate,[24] there is a widely shared belief that greater mobility of people and a growing discrepancy between rich and poor have fuelled the *increase in trafficking incidents* in the last couple of decades. Thus, the phenomenon is described as 'inexorably linked to the socio-economic impact of globalization, with wealth disparities feeding increased intra- and transnational labour migration as livelihood

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[20] European Commission, 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016' (19 June 2012); UNODC, 'The Globalization of Crime: A Transnational Organized Crime Threat Assessment' (2010).

[21] According to the UNODC 'Global Report on Trafficking in Persons 2014' 27-29, women play a bigger role in trafficking than in other major crimes such as murder or robbery with 38 per cent of suspected offenders and and 28 per cent of convicted traffickers during 2010-2012 being women. Many of these women were acting as guards, recruiters and money collectors, to gain the trust of female victims.

[22] Rebecca Surtees, *Trafficking of Men – A Trend Less Considered: The Case of Belarus and Ukraine* (IOM Migration Research Series 36, 2008); USAID, 'Trafficking of Adult Men in the Europe and Eurasia Region' (2010); Samuel Vincent Jones, 'Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking' (2010) 4 Utah Law Review, 1143; US Department of State, 'Trafficking in Persons Report: Male Victims of Trafficking' (2013).

[23] US Department of State, 'Trafficking in Persons Report' (2014).

[24] Hathaway thus argues that the newfound anti-trafficking campaign provides a context for developed states to pursue a border control agenda under the cover of promoting human rights. See James Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 (1) Virginia Journal of International Law1.

options decrease in less wealthy countries and communities'.[25] In the context of a globalized economy, human trafficking is said to epitomize 'the "commoditization" of human beings to little more than a highly lucrative and durable good exchanged in a world market through trade and for a price.'[26]

It is believed that human trafficking most frequently takes place internationally with traffickers preying on the hopes and dreams of those seeking a better life abroad. Cultural and linguistic isolation of victims and, especially, their likely irregular immigration status, associated with cross-border movement, exacerbate their vulnerability and facilitate control over them.[27] Nevertheless, human trafficking occurs within the borders of one country too. The report of the International Labour Organization reveals that '[c]ross-border movement is strongly associated with forced sexual exploitation. By contrast, a majority of forced labourers in economic activities, and almost all those in state-imposed forced labour, have not moved away from their home areas.'[28]

Importantly, whereas human trafficking is often associated with moving of people, either internally or across borders, opinions are divided on whether movement represents its defining element.[29]

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[25] Marsha Freeman, Christine Chinkin, and Beate Rudolf (eds), *The UN Convention on the Elimination of all Forms of Discrimination against Women: A Commentary* (OUP 2012) 171.

[26] Luz Estella Nagle-Ortiz, 'Selling Souls: the Effect of Globalization on Human Trafficking and Forced Servitude' (2008) 26 Wisconsin International Law Journal 131.

[27] Gallagher**,** *The International Law of Human Trafficking* (n 7) 478.

[28] International Labour Organization (ILO), 'Global Estimate of Forced Labour' (2012) 17.

[29] The US Department of State, 'Trafficking in Persons Report' (2012) 33 notes that 'People may be considered trafficking victims regardless of whether they were born into a state of servitude, were transported to the exploitative situation, previously consented to work for a trafficker, or participated in a crime as a direct result of being trafficked.'. See also UN OHCHR, 'Human Trafficking and Human Rights' (Factsheet 36, 2014). On the contrary, Chuang claims that 'the UN Protocol's *travaux preparatoires* includes several indications that the delegates were operating from the assumption that trafficking entails movement. Indeed, one of the two proposed options for a trafficking definition – retained in the draft Protocol until its near-final form – explicitly required "[t]ransporting a woman to or

Finally, human trafficking is a clandestine social phenomenon for the reasons mainly concerned with victims' position and status before, during and after the trafficking experience. Namely, victims' complex and inter-dependent relationship with traffickers, coupled with severe physical and mental abuse used as a means of control, make them docile and inert, thus reinforcing their social invisibility.[30] Not only does this fact pose a great obstacle for state intervention, but it also presents an insurmountable impediment for researchers exploring the phenomenon. Consequently, available data on the character and scale of trafficking is patchy and is said to represent just a tip of the iceberg.[31] The estimated numbers of victims differ considerably ranging from 800,000 to 27 million people. The lack of conceptual clarity about the object of research makes those figures even more doubtful.[32] As a result, it has been lamented that:

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facilitating her entry into another state." Janie A Chuang , 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) The American Journal of International Law 609 (the quote appears in the long version of the paper available at author's website but not in the published version <https://www.google.com.sg/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwi30OGZ39_KAhXNGY4KHVngBboQFggpMAI&url=http%3A%2F%2Fwww.iilj.org%2Fcourses%2Fdocuments%2FJChuangdraft.pdf&usg=AFQjCNGVL1ZC2KlUDszXqZ-Lz6tDKImdtQ&sig2=xVSo1cIYbAm_irUpsV4FJA&cad=rja> accessed 05 December 2015. See Also Choi-Fitzpatrick, 'From Rescue to Representation' (n 4) 491.

[30] OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 'Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude' (2010) 45; The Anti-Trafficking Monitoring Group (ATMG), 'Wrong Kind of Victim? One Year on: An Analysis of UK Measures to Protect Trafficked Persons' (June 2010) 27-30.

[31] Jo Goodey, 'Sketchy Data and Policy Responses' (2008) 8(4) Criminology and Criminal Justice 421; Andrea Di Nicola, 'Researching into Human Trafficking: Issues and Problems' in Lee (ed), *Human Trafficking* (n 3); Frank Laczko and Elzbieta Gozdziak (eds), 'Data and Research on Human Trafficking: A Global Survey' (Offprint of the Special Issue of International Migration (2005) 43 (1/2)); Monti Narayan Datta and Kevin Bales, 'Slavery in Europe: Part 1, Estimating the Dark Figure' (2013) 35 817-829. International Labour Organisation (ILO), 'Hard to See: Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children' (2012).

[32] Since 2001 The US State Department issues annual reports assessing states' performance in combating trafficking. Until 2009 estimates of the victims' number were based on second hand information, not fully referenced or cited. Since 2009, the State Department has relied on data provided by ILO instead of providing its own estimates. On the occasion of the release of the 2012 TIP Report, Secretary of State, HR Clinton asserted that 'as many as 27 million people around the world are victims of modern slavery, what we sometimes call trafficking in persons' <http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm> accessed 27 June 2012. The Report itself refers to the report of ILO, 'Global Estimate of Forced Labour' (2012), which estimates that 20.9 million victims were in forced labour at any given point in time over the period between 2002-2011(the number includes those trafficked for labour and sexual exploitation

> [T]he knowledge achieved through research seems to be weak or piecemeal; and policies, as a consequence, are sometimes based more on emotions, political or dogmatic bias than on strong and substantiated research work.[33]

In sum, the negligible success of states' actions in combating trafficking, independently and on a global scale, [34] combined with staggering estimates of its extent and brutality suffered by victims, has resulted in its recognition as one of the global challenges of the 21st century.[35]

3. Trafficking in human beings – a legal conundrum

The renewed interest in the problem of human trafficking has been provoked by states' concerns about illegal immigration and transnational organized crime. Thus, as noted by Gallagher, even though 'human rights concerns may have provided some impetus (or cover) for collective action, it is the sovereignty/ security issues surrounding trafficking and migrant smuggling which are the true driving force behind such efforts'.[36]

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but not for the removal of organs or for forced marriage/adoption unless the latter practices lead to a situation of forced labour or service). In 2005, however, The US Report estimated that each year between 600,000 and 800,000 people get trafficked either for commercial sexual exploitation or for labour exploitation, while the ILO report in the same year speaks of 12.3 million people in forced labour worldwide, of which about 2.4 million had been trafficked, both internally and across-borders.

[33] Di Nicola, 'Researching into Human Trafficking' (n 31) 49. See also UNODC, 'Global report on Trafficking in Persons 2009'.

[34] Inter-Agency Coordination Group against Trafficking in Persons (ICAT), 'An Analytical Review: 10 Years on from the Adoption of the UN Trafficking in Persons Protocol' (October 2010).

[35] The European Conference on Preventing and Combating Trafficking in Human Beings: Global Challenge for the 21st Century (18-20 September 2002). See also the Brussels Declaration on Preventing and Combating Trafficking in Human Beings (14981/02, 29 November 2002).

[36] Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', (2001) 23 Human Rights Quarterly, 975, 976. See also Alice Edwards, 'Traffic in

The increased attention to trafficking has not, however, been reflected in the records of the courts at national or international level. The available data reveals that national courts predominantly deal with trafficking through a criminal justice framework. However, compared with the estimated number of victims, prosecution and conviction rates appear disproportionately low.[37]

Nonetheless, there is now a widely shared consensus on the need to develop actions to combat trafficking that go beyond criminal law. Human rights advocates were the first to join the debate. Thus, it is argued that not only is trafficking both a cause and a consequence of grave human rights violations,[38] but also that anti-trafficking actions designed to curb illegal immigration and organized crime have a serious potential to further undermine human rights.[39] Most recently, the labour paradigm has been permeating the debates.[40] The research originally driven by the

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Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor' (2007-2008) 36 (1) Denver Journal of International Law and Policy 9; Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (n 20).

[37] UNODC 'Global Report on Trafficking in Persons 2014' provides an overview of patterns and flows of human trafficking at the global, regional and national levels, notices that between 2010 and 2012, some 40 per cent of countries reported less than 10 convictions per year. Some 15 per cent of the 128 countries covered in the report did not record a single conviction. See also Mike Dottridge, E-notes: Report on the Implementation of Anti-Trafficking Policies and Interventions in the 27 EU Member States from a Human Rights Perspective (2008 and 2009) 77-81; The Dutch National Rapporteur on Trafficking in Human Beings, 'Trafficking in Human Beings: Ten years of Independent Monitoring' (2010).

[38] UN OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) Guideline 1 (Trafficking Principles and Guidelines).

[39] Global Alliance Against Traffic in Women (GAATW), 'Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World' (2007); Marjan Wijers and Lin Chew, *The RighT Guide: A Tool to Assess the Human Rights Impact of Anti-Trafficking Laws and Policies* (2010); Jennifer Chacoón, 'Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement.' (2010) 158 University of Pennsylvania Law Review 1609.

[40] Klara Skrivankova, 'Between Decent Work and Forced Labour: Examining the Continuum of Exploitation' (JRF Programme Paper: Forced Labour, November 2010); Hila Shamir, 'A Labour Paradigm for Human Trafficking' (n 7); Jonnatan Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking' (n 7); Nicola Jägers and Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations' (2014) 12 (1) Northwestern Journal of International Human Rights 47; Chuang, 'Exploitation Creep' (n 7) ; Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg, Cathryn Costello, Anne CL Davies, Jeremias Prassl (eds) The Autonomy of Labour Law (Hart Publishing 2015).

International Labour Organization has exposed forms of labour exploitation that have long been kept hidden behind the predominant focus on trafficking for sexual exploitation. Labour and migration law have been considered vital for creating conditions that either facilitate or impede trafficking and exploitation.[41]

Furthermore, it has been well-documented that trafficking and severe human exploitation flourishes during armed conflicts and humanitarian crises with peacekeeping missions often take an active part in these.[42] Hence, international courts have brought the debate about trafficking and related practices into the international humanitarian law arena, linking trafficking with war crimes and crimes against humanity.[43]

Therefore, it is clear that trafficking figures in a range of different legal contexts, being identified as transnational organised crime, a war crime and crime against humanity, a threat to national sovereignty and security, a migration problem, a labour law issue, a human rights violation, and a combination of these.[44]

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[41]Costello, ''Migrants and Forced Labour' (n 40); Chuang, 'Exploitation Creep' (n 7); Edwards, 'Traffic in Human Beings' (n 36); Julia O'Connell Davidson, 'Troubling Freedom: Migration, Debt, and Modern Slavery' (2013) 1 (2) Migration Studies 176; Dina Francesca Haynes, 'Human Trafficking and Migration' in Alice Bullard (ed) *Human Rights in Crisis*, (Ashgate 2008); Christien van den Anker and Ilse van Liempt (eds), *Human Rights and Migration: Trafficking for Forced Labour* (Palgrave Macmillan 2011).

[42] Jennifer Murray, 'Who Will Police the Peace-Builders - The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina' (2002) 34 Columbia Human Rights Law Review 475; Sarah E Mendelson, 'Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans' (The Centre for Strategic and International Studies 2005).

[43] *Prosecutor v Kunarac, Kovac and Vukovic* Case Nos IT-96-23 and IT-96-23/1-A [2002] ICTY 2 (12 June 2002). See also UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 7(1)c; Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54 International & Comparative Law Quarterly 445-457.

[44] Maggy Lee, 'Introduction: Understanding Human Trafficking' in Maggy Lee (ed), *Human Trafficking* (Willan Publishing 2007) 2.

The vast research reveals the ways in which these various legal frameworks are intertwined in the trafficking process applying simultaneously, and seldom in a synchronized way.[45] The interests of law enforcement, immigration control, and labour and human rights prtection bring different and often irreconcilable perspectives into a debate on how the problem ought to be approached, which is said to have caused normative, conceptual and institutional congestion.[46] The international dimension further contributes to an intricate legal situation combining the rules of various branches of international law.[47]

Many authors have tried to identify *the* approach for addressing the problem,[48] while others advocate the 'integrated' and 'holistic' approach that takes into account the multitude of perspectives and legal contexts and calls for a set of legal and policy measures to be applied across various sectors and through an intense cooperation on all levels.[49]

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[45] Edwards,'Traffic in Human Beings' (n 36); Elizabeth M Bruch 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 Stanford Journal of International Law 1; Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24 (4) Michigan Journal of International Law 1143; Roza Pati, 'States' Positive Obligations with respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v. Cyprus and Russia*' (2011) 29 Boston University International Law Journal 79; Hannah Simon, 'Human Trafficking from an International Protection Perspective: Probing the Meaning of Anti-Trafficking Measures for the Protection of Trafficking Victims, with Special Regard to the United Kingdom' (2010) 28(4) Pennsylvania State International Law Review 633; Sarah H Krieg, 'Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights' (2009) 15 (6) European Law Journal, 775; Choi-Fitzpatrick, 'From Rescue to Representation' (n 4).

[46] Edwards, 'Traffic in Human Beings' (n 36).

[47]Gallagher**,** *The International Law of Human Trafficking* (n 7); Obokata, *Trafficking in Human Beings from a Human Rights Perspective* (n 3)30.

[48] Shamir, 'A Labour Paradigm for Human Trafficking' (n 7) claims that to be a labour law approach, while Choi-Fitzpatrick, 'From Rescue to Representation' (n 4) advocates the 'expanded version of the human rights approach' that includes prevention and protection, in addition to the law enforcement measures. See further Section 6.

[49] Report of the Experts Group on Trafficking in Human Beings (European Commission, 22 December 2004); Obokata, *Trafficking in Human Beings from a Human Rights Perspective* (n 3); Edwards, 'Traffic in Human Beings' (n 36); Skrivankova, 'Between Decent Work and Forced Labour' (n 40); Todres,

Notwithstanding the disagreement on the best strategies and legal frameworks to address the problem, the anti-trafficking debates have been anchored in 'the first agreed, internationally binding definition of the term "trafficking in persons"'[50] contained in the Palermo Protocol to the United Nations Convention against Transnational Organized Crime. The adoption of the Palermo Protocol has triggered a series of important developments, which moved human trafficking from the margins to the centre of international concern.[51] The earlier international responses to human trafficking were limited to trafficking for the purpose of prostitution or sexual exploitation and were confined to (white) women and children.[52] These initiatives had only marginal effects and provided a shallow basis for any substantive engagement with the practice on both a conceptual and practical level.[53] Therefore, the adoption of a comprehensive and universal definition of human trafficking that applies to everyone (not only women and children) and covers all the purposes for which a person may be trafficked (as opposed to just sexual exploitation) received a warm reception in the international community. The following section looks closely at the Palermo definition and questions arising from its application.

'Human Rights, Labor, and the Prevention of Human Trafficking' (n 7); Nicola Jägers and Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations' (2014) 12 (1) Northwestern Journal of International Human Rights 47; Roger Plant, 'Modern Slavery: The Concepts and Their Practical Implications' (ILO Working Paper, 5 February 2015) 21.

[50] Explanatory Report, para 7.

[51] OHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary' (2010) 3 (Trafficking Principles and Guidelines – Commentary).

[52] Chapter 7 discusses these instruments in more detail.

[53] See Chapter 7. See also Janie Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 Harvard Human Rights Journal 65.

4. The Palermo definition and the conceptual problems with its interpretation

The Palermo Protocol, which entered into force in December 2003, brought human trafficking to the forefront of international attention and introduced a modern universal definition of human trafficking that is 'sufficiently broad to embrace all but a very small range of situations in which individuals are severely exploited for private profit.'[54] Article 3 of the Palermo Protocol defines trafficking in the following terms:

> (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
>
> (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

According to the Palermo definition, the act of human trafficking consists of three components: an action; the use of certain means; and the purpose of exploitation.[55] All three elements must exist for trafficking to be established.[56]

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[54] Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) Virginia Journal of International Law 789, 791.

[55] See the definition above. For a discussion about the elements see Chandran, 'A Commentary on Interpreting Human Trafficking' in Chandran (ed) *Human Trafficking Handbook* (n 3) 5.

[56] UNODC 'Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime' (2004) (Trafficking Legislative Guide), para 32; Explanatory Report, para 76.

In the case of children, it is immaterial whether these means have been used. It is important to stress that exploitation, which is a purpose of trafficking, needs not to have taken place: it is *intended exploitation* in conjunction with certain action and the means deployed that makes up the trafficking situation.[57] Hence, it is said that the offence defined in Article 3 of the Protocol is completed at a very early stage.[58]

Since its adoption, the Palermo definition has been transplanted into a series of international and national legal and policy instruments and has become a universal (legal) definition of trafficking in human beings in all contexts and for all purposes.[59] However, Edwards rightly points out that

> [T]he all-inclusive framework begs the question whether all forms of trafficking can be dealt with using the same tools and responses, or additionally, whether it suggests that their origins or root causes are the same. What these different forms of trafficking have in common may be the method of transportation, rather than the type of exploitation; with both these aspects of the trafficking cycle requiring distinct responses and solutions.[60]

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[57] Trafficking Legislative Guide, para 33; Explanatory Report, para 87.

[58] ibid.

[59] Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (Anti-Trafficking Convention) art 4; Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA (5 April 2011) 2011/36/EU (Anti-Trafficking Directive) art 2. See also Gallagher, *The International Law on Human Trafficking* (n 7) 42. On the other hand, 'substantial discrepancies' between EU Member States concerning national legislation to prohibit human trafficking and definitions (or interpretations) of what constitutes trafficking have been demonstrated by Dottridge, 'E-notes' (n 36). See also Michelle Madden Dempsey, Carolyn Hoyle and Mary Bosworth, 'Defining Sex Trafficking in International and Domestic Law: Mind the Gaps' (2012) 26(1) Emory International Law Review 137; Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of The Palermo Protocol' (2014) 7 Albany Government Law Review 111, who argues that States, during their domestic legislating processes, have developed a large range of very diverse readings of what constitutes 'trafficking in persons.'

[60] Edwards, 'Traffic in Human Beings' (n 36) 46.

Accordingly, despite the universal agreement on the definition of a complex legal and social phenomenon such as trafficking, applying this definition in practice to a wide range of different practices has proved to be a serious challenge, mainly because of competing interests intertwined in different legal frameworks that apply simultaneously.

The need to reconcile the objectives of enforcing the law against traffickers, preventing illegal immigration and protecting victims of trafficking has led to an invocation of the well-known mantra about striking the right balance,[61] although no one seems to have found a way to achieve such a balance in practice. Thus, it is pointed out that various actors involved in victim identification have different agendas and tend to interpret the definition differently.[62] Accordingly, governments' prevailing concerns about illegal immigration are said to guide initial responses to potential trafficking victims who are often wrongly perceived as illegal migrants and criminals.[63]

In practice, victims of trafficking are often confused with smuggled migrants, a category formally distinguished by the adoption of the second Protocol

[61] Joint Committee on Human Rights, 'Human Trafficking' (Twenty–sixth Report of Session 2005–06, 13 October 2006) para 6. See also Conny Rijken and Renée Römkens 'Trafficking for Sexual Purposes as a Globalized Shadow Economy: Human Security as the Tool to Facilitate a Human Rights Based Approach' in Letschert and Van Dijk, (eds), *The New Faces of Victimhood* (n 7)74.

[62] OSCE, 'Trafficking in Human Beings: Identification of Potential and Presumed Victims: A Community Policing Approach' (2011) 16.

[63] ATMG, 'Wrong Kind of Victim?' (n 30).

supplementing the Transnational Organized Crime Convention.[64] This misclassification leads to serious consequences for the status and rights of the persons concerned.

However, in spite of a clear conceptual difference, in reality, it is often impossible to distinguish between human trafficking and the smuggling of migrants. Whereas smuggling is confined to the procurement or facilitation of voluntary and illegal cross-border transport of people in return for direct or indirect financial or other material benefit, in human trafficking, the ultimate purpose is the exploitation of the individual concerned.[65] The relationship between smugglers and migrants is said to be qualitatively different and the latter 'may be to some degree complicit in their own smuggling.'[66] Nevertheless, it is known that many victims of trafficking initiate contact with traffickers led by a desire to escape their ordeal.[67] They are seldom aware of the real conditions of their promised life or 'work' before reaching a destination. On the other hand, many smuggled migrants end up in severely exploitative conditions, although not having initially been lured by false pretences. Thus, as noted by Gallagher, people may be smuggled one day and trafficked the other.[68]

[64] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507.

[65] Explanatory Report, para 7.

[66] UNODC, 'Legislative Guide for the Implementation of the Protocol against Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime' (2004) (Smuggling Legislative Guide) para 30.

[67] *W and X* (Leave Stage), Re Judicial Review [2011] NIQB 76 (7 September 2011).

[68] Gallagher, *The International Law of Human Trafficking* (n 7). See also Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2005) 1(2) International Journal of Refugee Law 394.

The interpretation of the elements of the Palermo definition has led to both under- and over-inclusive accounts of the phenomenon. On the one hand, some scholars have understood the term trafficking quite narrowly - as no more than a mere way in which people are brought into exploitative conditions, thus arguably leaving unprotected the majority of 'modern slaves' who do not meet the definition of a trafficked person.[69] According to that account, the newfound commitment to the fight against human trafficking should be criticised for putting too great a focus on the trafficking *process*, which is seen as 'specific forms of dealing which facilitate or lead to exploitation' at the expense of concentrating on the exploitation as such.[70]

On the other hand, the term 'trafficking' has been used to describe the exploitative practices themselves, which may or may not have been preceded by the other two constitutive elements. Thus, for example, the 2012 Trafficking in Persons Report labels trafficking as the 'umbrella' term, which stands for 'all forms of modern slavery'.[71]

Arguably, this confusion is caused by different interpretations of the 'action', 'means' and 'purpose' components of the trafficking act because, the Palermo Protocol does not define these elements.[72] Therefore, it was said that 'harbouring' and 'receipt' could be interpreted to extend to acts of exploiters and cover situations where victims have not been *trafficked into* exploitative circumstances.[73] In other words, the extensive

[69] Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (n 20) 5.

[70] ibid 10.

[71] The US Department of State, 'Trafficking in Persons Report' (2009) 9. See also Gallagher *The International Law of Human Trafficking* (n 7) 47-53.

[72] See the elaboration of these concepts in Chandran (ed), *Human Trafficking Handbook* (n 3) Chapter 1.

[73] Gallagher, *The International Law of Human Trafficking* (n 7).

interpretation of the terms ‘harbouring’ or ‘receipt’ that represent an action element, combined with the ‘abuse of a position of vulnerability’ as a means element, may bring within the scope of the trafficking definition situations where victims’ exploitation was ‘non-trafficked’ in the literal sense. Allowing for such an interpretation would inevitably bring into the scope of human trafficking practices covered by concepts such as slavery, forced labour or services, servitude, etc. Accordingly, the term ‘human trafficking’ would serve to describe a range of situations. First, it could stand for ‘classic’ situations where act-means-end elements were clearly distinguishable, whether or not actual exploitation has started and whichever form it has taken. Secondly, it would amount to situations of actual exploitation where the preceding elements are not clearly discernible, except upon their extensive interpretation.

Gallagher allows for such an expansive interpretation of the elements of ‘action’ and ‘means’ to be grounded in the textual analysis of the Palermo Protocol. [74] Nevertheless, she argues that such an understanding would go beyond the intentions of the drafters. Thus, she claims that the expansive interpretation risks ‘weakening the force of underlying legal prohibition’ and makes a tripartite definition of trafficking redundant.[75] Chuang also notes that

> If trafficking could be so easily conflated with these or any other of the listed exploitative purposes, it is hard to see why States would have invested resources to create a new treaty regime when the target phenomena were already addressed by well-established treaty and customary international law.’[76]

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[74] Gallagher, *The International Law of Human Trafficking* (n 7) 51.

[75] ibid.

[76] Chuang, ‘Exploitation Creep’ (n 7) 41.

Furthermore, when it comes to the exploitative end-purposes of trafficking, the Palermo Protocol does not create obligations to criminalize these taken individually.[77] However, these exploitative practices are said to be 'well-established human rights violations in respect of which a separate obligation to criminalize can generally be found in international human rights law'.[78] Moreover, these exploitative practices that represent the purpose of human trafficking in the Palermo definition are listed in an open-ended way including 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.[79] The definition contained in the recently adopted EU Directive also covers

> [N]ewer types of human trafficking such as forced begging, illegal adoption, forced marriage, the exploitation of criminal activities or the removal of organs for the purpose of trafficking. This highlights the wish of the European Union institutions to keep abreast of the developing forms of trafficking.[80]

However, the problem lies in the fact that neither the Palermo Protocol, nor any other international instrument, specifically defines the underlying concept of exploitation.[81] Consequently, given an open-ended list of exploitative purposes in the trafficking definition, it is difficult, if not impossible, to determine what conducts reach the

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[77] Trafficking Legislative Guide, para 33; Explanatory Report, para 224.

[78] Anne Gallagher and Nicole Karlebach, 'Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-based Approach in the Administration of Criminal Justice' (Background Paper) 6. See also UN High Commissioner for Refugees, 'Prevent, Combat, Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights Based Approach' (November 2011) 33-34.

[79] Those concepts have been defined in other international instruments and further clarified in the case law of different courts. See Chapter 4 for a detailed analysis.

[80] UN High Commissioner for Refugees, 'Prevent, Combat, Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights Based Approach' (November 2011) 104.

[81] The ILO noted that 'exploitation is a concept for which there is almost no juridical precedent which prompts questions for both legislators and judges'. See ILO, 'Forced Labour and Human Trafficking: Casebook of Court Decisions' (A Training Manual for Judges, Prosecutors and Legal Practitioners, 2009) Preface. Furthermore, Plant argues that '[o]f all the concepts now on national and international agendas, certainly the most difficult is that of exploitation. It has never been defined in international law'. See Plant, 'Modern Slavery' (n 49) 3.

threshold to qualify as an exploitative purpose within the human trafficking definition. As a result, the Palermo definition is said to lack terminological clarity.[82] Chapter 5 offers the first extensive analysis of the notion of exploitation - the concept that establishes a direct link between human trafficking and the right to be free from slavery, servitude and forced labour, which creates the possibility of holding states accountable for human trafficking under human rights law. The following section thus opens a debate on the question of state responsibility under human rights law for private acts of human trafficking, which has been discussed in detail in Chapter 3. State responsibility for human trafficking is important because without it human trafficking cannot be considered as a human rights violation *stricto sensu*. Moreover, the possibility of holding states accountable before an international human rights body for acts committed by private individuals is vital for victim empowerment and agency.

5. State responsibility for human trafficking

Human trafficking is predominantly committed by private individuals. However, states may be involved in it, either directly, through its agents, or indirectly, by effectively allowing the practice to flourish in their territories. Thus, the involvement of state officials in committing or tolerating trafficking has been frequently reported.[83] For example, according to the latest US Department of State Trafficking in Persons Report, 'a sitting member of [the Albanian] parliament had prior convictions for trafficking-

[82] Bärbel Heide Uhl, 'Lost in implementation? Human Rights Rhetoric and Violations — a Critical Review of Current European Anti-trafficking Policies', 2010 (2) Security and Human Rights 125.

[83] Leslie Holmes, 'Corruption and Trafficking: Triple Victimisation?' in Cornelius Friesendorf (ed), *Strategies Against Human Trafficking: The Role of the Security Sector* (Vienna, National Defence Academy and Austrian Ministry of Defence and Sport, 2009).

related crimes.'[84] The starkest yet example was documented in Moldova where, according to the 2011 US Department of State Trafficking in Persons Report:

> In March 2011, the government re-opened a high-profile trafficking complicity case involving the former director of a government anti-trafficking agency; however, at the time of the report, he had not yet been arrested and was still receiving a pension from the anti-trafficking unit.[85]

In addition, there was a notorious Montenegrin case of S.Č., a Moldovan woman who had escaped from her captors and gone to the police for help accusing a number of persons of trafficking and physical and sexual abuse, including several Montenegrin officials, in particular the then Deputy State Prosecutor. Despite a huge amount of material collected during the investigation, the investigative judge terminated the investigation. The case was subject to joint Council of Europe/OSCE expert assessment, which found that the case was mishandled at various stages by different actors.[86] This case illustrates the chilling reality of direct involvement of state officials in many countries in trafficking enterprises.

Still, in addition to such direct involvement in criminal activities, states are more often criticised for not doing enough to prevent and prosecute trafficking offences committed by private individuals and organised groups, as well as to provide adequate protection and remedies to victims. Either way, situations of state complicity, recklessness or indolence with respect to the trafficking problem inevitably prompt the question of responsibility. However, it is noted that

[84] US Department of State, 'Trafficking in Persons Report' (2015) 65.

[85] US Department of State, 'Trafficking in Persons Report' (2011) 261.

[86] Joint Council of Europe/OSCE Assistance to Montenegro in the Fight Against Trafficking in Human Beings, 'Independent Experts' Report on their Visit to Podgorica (22-24 July 2003) and Responses of the Government of Montenegro' (SG/INF(2003) 42, 11 December 2003). See also Group of Experts on Action against Trafficking in Human Beings (GRETA), 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Montenegro' (First evaluation round, 13 September 2012) GRETA(2012)9, paras 195-200.

> [T]he law enforcement approach [of the Palermo Protocol] does not contemplate holding the state responsible, either domestically or internationally. Such accountability should be an important component of effectively combating trafficking, but simply cannot be accomplished in a law enforcement context.[87]

On the other hand, human rights law, especially directly enforceable human rights may well provide a useful recourse to victims when states fail to give effect to their law enforcement obligations. Importantly, human rights law has the potential to provide protection to trafficking victims that is more substantial and goes beyond the law enforcement focus of Palermo, as shown in Chapters 6 and 7. Namely, the Palermo Protocol was criticised for placing rather weak demands on the states with respect to victims' protection.[88] More rigorous critics argue that the Palermo Protocol and the resulting anti-trafficking campaign are 'fundamentally in tension with core human rights goals'.[89]

In spite of such a strong criticism, the adoption of the Palermo Protocol created an impetus for a series of initiatives that culminated in the adoption of the Council of Europe Anti-Trafficking Convention, which was described as 'the only international treaty which includes comprehensive protection of the human rights of victims as an integral part of the fight against this criminal activity.'[90] Still, this and other international instruments reproduce the definition of human trafficking from the Palermo Protocol, which has now been largely accepted a universal legal definition of this phenomenon.

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[87] Bruch 'Models Wanted' (n 45) 21.

[88] Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 Human Rights Quarterly 975; Shelley, *Human Trafficking: A Global Perspective* (n 3) 10; Choi-Fitzpatrick, 'From Rescue to Representation' (n 4).

[89] Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (n 20) 5.

[90] Thorbjørn Jagland, the EU Ministerial Conference 'Towards Global EU Action against Trafficking in Human Beings' (Brussels, 19-20 October 2009). See Chapter 7 for a detailed analysis of the Anti-Trafficking Convention.

Notably, the conceptual shift from framing human trafficking as a crime issue to human trafficking as a human rights problem has occurred without much thought being given to consequences of using a one-size-fits-all definition in the criminal law, human rights law, or immigration law context.

Namely, the definition of trafficking is developed in the context of criminal law with a view to facilitate international cooperation in conducting investigations and prosecutions, which are often hampered by diverse legal definitions and rules on a national level. Thus, the definition reflects the concept of trafficking as a *criminal offence*, separate from other crimes that may be associated with similar circumstances. Consequently, while states may also be required to criminalize conduct that refers only to the end-purposes of trafficking such as slavery or forced labour, the Palermo Protocol insists on the obligation to criminalize trafficking 'as a combination of constituent elements and not the elements themselves'.[91] This brings into its scope the earliest phases of the process, such as recruitment, in order to prevent exploitation from materializing. Hence, it seems reasonable to insist on criminal intent as one of its constitutive elements. Seen in this light, the legal regime created by the Palermo Protocol appears to be sufficiently clear and broad to facilitate an effective law enforcement response to the trafficking problem.

However, the same definition may prove problematic in the context of states' responsibility for their own conduct under human rights law. The first problem emerges because it is intended not actual exploitation, which is required to establish the existence of the trafficking act. Thus, in situations where exploitation has not yet taken place, one might assume that a human rights framework is not applicable because it requires proof of criminal intent of the potential perpetrator (rather than the fact of

[91] Trafficking Legislative Guide, para 33.

exploitation) to establish the existence of an act of trafficking and thus trigger state responsibility. The reason for such an assumption may be found in the principle articulated by the Inter-American Court of Human Rights that 'violations of the [human rights] Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability.'[92] This assumption is, however, unfounded because the responsibility of the state, and not the individual perpetrator, is being assessed. Due to the private character of the prohibited acts, state responsibility is established by demonstrating a failure to discharge its positive obligations to protect victims. Still, these duties are triggered not by the *proof* of the existence of a *crime* of trafficking but rather by *reasonable grounds to believe* that a person might have been its victim.[93] This has been acknowledged by the IACtHR, which states that 'the violation can be established even if the identity of the individual perpetrator is unknown.'[94]

Accordingly, on the one hand, states have, as a matter of transnational criminal law, a duty to apply the criminal law definition of trafficking internally, when establishing the perpetrators guilt for the crime.[95] On the other hand, human rights law is mainly concerned with victims' protection, and obliges states to act on early signs before, or even regardless of whether the guilt of the perpetrator has been proved in

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[92] *Velasquez-Rodriguez v Honduras*, Series C No.4 [1988] IACHR 1 (29 July 1988) [173].

[93] *Rantsev v Cyprus and Russia* (n 11). See UK Home Office, 'Victims of Modern Slavery: Competent Authority Guidance' (21 March 2016) 16 that underlines that the test to be used for identifying victims, which serves as a trigger for their protection is whether, 'on the balance of probabilities', there are sufficient grounds to decide that the individual being considered is a victim of human trafficking in any UK referral (or slavery, servitude, or forced or compulsory labour where identified in England or Wales). This threshold is said to be higher than the reasonable grounds test, but lower than the criminal standard of proof.

[94] *Velasquez-Rodriguez v Honduras* (n 92) [173].

[95] For example, in the *Tang* case 'the subjective intention of the defendant was said to be the 'critical element of the offence [of slavery] that had to be established if the [respondent] was to be convicted'. The *Queen v Tang* [2008] HCA 39 (28 August 2008) [37].

criminal proceedings.[96] Therefore, even though using the universal definition of human trafficking in different legal contexts may appear problematic, it is clear that it applies differently when establishing the responsibility of a state when acting to protect victims in the human rights law context as opposed to establishing the guilt of an individual perpetrator in criminal proceedings.

6. The 'best' approach to human trafficking and the role of human rights law

This chapter describes the emerging interest in human trafficking that has become a subject of intense debates amongst scholars and professionals of all backgrounds. In spite of the strong criticism for its overly narrow law enforcement approach, the Palermo Protocol has been commended for introducing the first universal and comprehensive definition of human trafficking that is broad enough to protect against newly emerging exploitative practices and techniques used by traffickers.

Nonetheless, there is a universal agreement about the need to go beyond the criminal law approach, which is at the heart of the Palermo framework, to provide a much needed comprehensive response that would include prevention, prosecution and victim protection, thus addressing both the underlying causes and consequences of human trafficking.[97] Still, authors disagree on the legal framework that is best placed to provide grounds for such a comprehensive response.

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[96] See Chapter 6 Section 3.2.

[97] Tom Obokata, *Trafficking in Human Beings from a Human Rights Perspective* (n 3); Skrivankova, 'Between Decent Work and Forced Labour' (n 40); Shamir, 'A Labour Paradigm for Human Trafficking' (n 7); Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking' (n 7); Chuang, 'Exploitation Creep' (n 7); Austin Choi-Fitzpatrick, 'From Rescue to Representation' (n 4); Cathryn Costello, ''Migrants and Forced Labour' (n 40).

In particular, many authors have recently promoted the labour law approach, which they claim has the capacity to ‘ensure that work relations (...) do not degenerate into forced labour’[98] and 'can help lessen the reliance on ex post strategies by reducing the risk of extreme exploitation in the first place.’[99] The labour law perspective is undoubtedly necessary as a means of reducing vulnerability to trafficking and is said to ‘offer greater hope of long-term prevention and change.’[100] However, Edwards notes that ‘treating trafficking as a [solely] labor issue could potentially result in the minimization of the seriousness of the criminal acts, human rights violations and/or violence being committed during the trafficking cycle, especially by governments that see labor issues as requiring regulation, rather than justice and redress.’[101] Thus, many authors have advocated including the labour perspective *alongside* other frameworks to provide a comprehensive response, acknowledging that the criminal law represents an important element of such a response.[102]

When it comes to the role of human rights law in the fight against human trafficking, opinions are polarised. Shamir sees the human rights framework as part of the problem since, in her view, it provides remedies for only the most extreme cases of exploitation. Namely, she argues that the human rights framework focuses on the post-exploitation situation and is oriented towards ‘victim rescue rather than on transforming structural causes of worker vulnerability’, and should, therefore, be completely

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[98] Costello, ‘'Migrants and Forced Labour’ (n 40) 221.

[99] Chuang, ‘Exploitation Creep’ (n 7) 645. See also Skrivankova, ‘Between Decent Work and Forced Labour’ (n 40); Shamir, ‘A Labour Paradigm for Human Trafficking’ (n 7); Todres, ‘Human Rights, Labor, and the Prevention of Human Trafficking’ (n 7).

[100] Chuang, Exploitation Creep’ (n 7) 644.

[101] Edwards, ‘Traffic in Human Beings’ (n 36) 4.

[102] Skrivankova, ‘Between Decent Work and Forced Labour’ (n 40); Todres, ‘Human Rights, Labor, and the Prevention of Human Trafficking’ (n 7).

abandoned.[103] Costello advances a less radical criticism of the human rights approach 'as currently interpreted', which is said to be 'parasitic on the criminal law approach', and argues for a more progressive interpretation of human rights law that would include 'orthodox labour law' views.[104] Todres offers a more balanced position seeing labour and human rights law as 'complementary' and lists a number of human rights that provide a direct basis for protecting important labour interests.[105] Finally, Choi-Fitzpatrick claims that the 'human rights approach to contemporary slavery is the best framework for addressing this issue'.[106]

But as this thesis argues, when discussing the human rights approach to trafficking, authors often have in mind different human rights conceptions, which have different implications for the required scope of action.

Choi-Fitzpatrick, for example, argues for the 'expanded version of the human rights approach' that includes 'protection and empowerment' of potential victims as well as 'survivors' and requires states 'to prioritize the individual rights of the survivor over a host of other factors, including national security, immigration regimes, exploitative cultural and gender norms, criminal codes, and economic prerogatives.'[107]

However, the view of the role of human rights law in the fight against human trafficking adopted in this thesis is much narrower than the one taken by Choi-Fitzpatrick who claims that

> A human rights approach focuses on the empowerment of enslaved persons in economic, political, and social and cultural systems. This empowerment occurs through access to the political process and representation, economic

[103] Shamir, 'A Labour Paradigm for Human Trafficking' (n 7) 102-103.

[104] Costello, ''Migrants and Forced Labour' (n 40) 191.

[105] Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking' (n 7).

[106] Choi-Fitzpatrick, 'From Rescue to Representation' (n 4) 495.

[107] ibid 495-497.

> opportunity and livelihood, and the recognition of individual dignity, regardless of sociocultural background or status.[108]

Instead, the thesis takes a view of human rights as individual claims arising out of specific human rights instruments, which are sometimes directly enforceable against states. On this view, the integrated and holistic approach to human trafficking which calls for ‘a comprehensive, multidisciplinary and effectively co-ordinated policy that involves actors from all fields concerned’[109] may well exceed the potential of human rights law. Such an approach requires orchestrated actions originating from different legal contexts and it is mistaken to frame all such actions as human rights requirements *in the traditional sense.*

In particular, the discussions on the human rights approach to human trafficking fail to distinguish between, on the one hand, taking victims’ interests and protection needs into consideration when developing strategies against trafficking and, on the other hand, making human trafficking *a distinct human rights violation*, thus enabling victims to hold states *responsible* under general human rights conventions. Importantly, the thesis introduction draws attention to ‘key distinctions’ when discussing the role of human rights law in addressing human trafficking. The second ‘key distinction’ thus warns that not all victim protection measures or prevention policies could be framed as human rights within *existing* human rights instruments. In addition, when it comes to those that are, or could be, framed within the established

[108] ibid 497.

[109] Council of the European Union, Brussels Declaration on Preventing and Combating Trafficking in Human Beings (14981/02, 29 November 2002). See also Report of the Experts Group on Trafficking in Human Beings (European Commission, 22 December 2004); Obokata, *Trafficking in Human Beings from a Human Rights Perspective* (n 3); Edwards, ‘Traffic in Human Beings’ (n 36); Skrivankova, ‘Between Decent Work and Forced Labour’ (n 40); Todres, ‘Human Rights, Labor, and the Prevention of Human Trafficking’ (n 7); Nicola Jägers and Conny Rijken, ‘Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations’ (2014) 12 (1) Northwestern Journal of International Human Rights 47; Plant, ‘Modern Slavery’ (n 49) 21.

human rights, there is a distinction between instruments that contain justiciable and non-justiciable rights. Justiciable rights can be enforced against the states and require immediate action, whereas non-justiciable rights call for progressive implementation in accordance with available resources, which ought to be balanced with other interests.[110] These distinctions (between actions contributing to the promotion of human rights and human rights obligations arising out of the specific human rights instruments, as well as between justiciable and non-justiciable rights) have not often been acknowledged in academic discussions on human trafficking. Accordingly, the dissatisfaction with the human rights approach to trafficking expressed by many authors is a consequence of a particular view of its supposed role and scope.

Obokata explains that '[o]ne reason why it is difficult to promote a human rights approach is that a comprehensive analysis of trafficking and related issues in light of human rights norms and principles established under international human rights law has not been fully developed.'[111] Similarly, the UN Special Rapporteur on Trafficking in Persons noted that 'while there was regular condemnation of the human rights violations associated with trafficking, the practice was rarely linked to the violation of a specific right in a specific treaty'.[112]

This thesis argues that the way to clarify the role of human rights law in the anti-trafficking action is to start exploring and explaining the link between each adopted or proposed policy or legal action and the right that may provide its basis. This

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[110] Christian Courtis, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability' (International Commission of Jurists, 2008).

[111] Obokata, *Trafficking in Human Beings from a Human Rights Perspective* (n 3) 4.

[112] UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo (28 July 2014) A/69/33797, para 46. However, UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, 'Integration of Human Rights of Women and the Gender Perspective' (22 December 2004) U.N. Doc. E/CN.4/ 2005/71, para 9, notes that human trafficking 'represents the denial of virtually all human rights.'

way, human rights law would provide an overarching framework to be further clarified and specified on a national level through criminal, labour and migration laws. Whereas some human rights and the resulting obligations will be directly enforceable against the impugned state, others will provide no more than a rhetorical tool when discussing cases on a national level. Importantly, focusing on the *existing* human rights instruments and specific rights within these does not mean that their *present* interpretations are closed. Rather, relying on Campbell's 'prescriptive legal positivism', which seeks to determine what law ought to be,[113] a doctrinal analysis of the international instruments and jurisprudence of international and domestic courts may serve not only to elucidate rights and obligations as presently interpreted, but also to offer plausible directions for future developments in this area of law. In the light of that, the following chapter examines the relationship between human trafficking and the existing human rights instruments choosing to situate the analysis within the right to be free from slavery.

7. Conclusion

This chapter provided an overview of initiatives against trafficking in human beings that have risen exponentially since the adoption of the Palermo Protocol in 2000. However, as a transnational criminal law instrument, Palermo has offered a limited perspective on this complex phenomenon that raises a number of difficult political, socio-economic and legal questions. As a result, the criminal law approach has been criticised as misplaced and even damaging for understanding and addressing the laws, practices and regulatory gaps that set up vulnerability to trafficking and exploitation.

[113] Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (UCL 2004) 21.

Accordingly, new perspectives and initiatives situated in different legal frameworks have sprung up competing for the role of the 'best' approach to human trafficking. However, instead of seeing criminal law as part of the problem, this thesis considers it as part of the solution. It argues, alongside many other scholars, that different legal and policy frameworks each have a role to play in addressing this complex phenomenon and need to be juxtaposed in order to achieve success.

Regardless of the competing views on the best legal framework to address human trafficking, the Palermo definition has been universally accepted as a valid legal definition of this practice. This chapter, thus, provided a comprehensive analysis of the trafficking definition pointing to the possibilities of different interpretations of its constitutive elements, which may lead to both over- and under-inclusive accounts of the practice. Nevertheless, it demonstrated that the trafficking definition applies differently in different legal contexts. Thus, establishing all three elements of the definition beyond reasonable doubt is an imperative when assessing the perpetrator's responsibility in criminal proceedings. On the other hand, when it comes to examining state responsibility under human rights law, the trigger for action is a reasonable grounds belief that a person may have been trafficked and/or exploited, or at the risk thereof. In these situations, the Court is not bound to prove the intent of an offender.

Significantly, the chapter acknowledges that the all-inclusive nature of the Palermo definition, with its open-ended list of exploitative purposes, may lead to a mistaken view that different trafficking phases and forms of exploitation can be dealt with using the same tools and responses, whereas each of these may well require distinct solutions. While recognising the need for an integrated and holistic approach to the problem of human trafficking, which calls for a plethora of legal and policy actions, the thesis chooses to focus on the role of human rights law. In particular, the thesis proceeds from a specific conception of human rights – one that understands rights as individual claims against a state enshrined in international human rights instruments. However, without suggesting that this is the dominant or the best conception of human rights, the thesis emphasizes the importance of spelling out the perspective from which human rights analysis will be conducted. For it is argued that the assessment of the human rights approach to human trafficking ultimately depends on a particular human rights conception used to anchor the analysis. Accordingly, Chapter 3 proceeds to conduct such a human rights analysis examining the link between human trafficking and the *existent* catalogue of human rights with a view to their effective deployment for the protection of the victims of human trafficking.

CHAPTER 3: Trafficking in Human Beings - The Human Rights Approach

1. Introduction

This chapter starts by analysing the ‘human rights dimension’ of human trafficking. It argues that while human rights do have a role to play in the anti-trafficking action, a claim that trafficking is a human rights violation *per se* requires a critical engagement. The chapter then moves to examine the existing human rights instruments and the possibility of grounding human trafficking within their provisions. While the chapter acknowledges that both practices of human trafficking and states’ responses to these may well encroach upon a number of different rights, it is argued that human trafficking by its *nature and aim* conceptually belongs to the right to be free from slavery, servitude and forced labour. Following a brief explanation of the choice to focus the analysis on the legal instruments on the European level, the chapter offers a detailed analysis of the seminal judgement of the Strasbourg Court in the *Rantsev* case, which situated human trafficking within the right to be free from slavery, servitude and forced labour even though neither this right, nor the ECHR in general, contain an explicit reference to trafficking. What is more, the last section of the chapter offers a compelling argument that human trafficking falls within the scope of this right as a stand-alone prohibition, that is, without the need to be interpreted as either one of the three expressly prohibited conducts.

2. Human rights dimension of trafficking in human beings

Although the universal consensus about trafficking emerged in the context of the fight against organized crime, nearly all discussions about human trafficking *associate* the practice with gross human rights violations of its victims. Still, this human rights aspect appears taken at face value and the explanation of how, exactly, trafficking violates human rights law is not supported by convincing arguments.

The complex legal nature of the act of trafficking is best encapsulated in the statement of Maria Grazia Giammarinaro, the Special Rapporteur on trafficking in persons, especially in women and children that

> Trafficking in human beings must be acknowledged for what it is: massive-scale modern-day slavery, a gross violation of human rights and freedoms, mostly a business of organized crime, which proves highly lucrative, and a serious transnational threat for individual and State security. [1]

The EU Commissioner for Home Affairs describes trafficking in human beings as 'an extremely *serious crime* and a *gross violation of human rights*, which can be classified as a *modern form of slavery*.'[2] The UN Global Plan of Action to Combat Trafficking in Persons declares that trafficking 'constitutes a criminal activity violating human dignity and *has negative effects* on development, peace and security and human rights'.[3] Links between human rights and trafficking are said to be obvious since, 'trafficking goes to

[1] European Council of Refugees and Exiles (ECRE), Interview with Maria Grazia Giammarinaro, OSCE Representative and Co-ordinator for Combating Trafficking in Human Beings (1 April 2011).

[2] Cecilia Malmström (Together against Trafficking in Human Beings) <http://ec.europa.eu/anti-trafficking/> accessed 22 June 2012 (emphasis added).

[3] United Nations General Assembly (UNGA), Global Plan of Action to Combat Trafficking in Persons (A/RES/64/293, 12 August 2010) (emphasis added).

the heart of what international human rights law and mechanisms are trying to prevent.'[4] The UK Joint Committee on Human Rights has considered trafficking as

> [O]ne of the most serious human rights issues in the modern world. Human trafficking is first and foremost a criminal activity perpetrated against its victims, but it also engages a number of crucial human rights obligations which apply to the policies and practices adopted by Governments to combat trafficking and afford protection to victims.[5]

However, exactly how trafficking engages human rights law and what the consequences of such an engagement are, has not been very clear. Apart from exceptional direct involvement of state officials, trafficking is an activity principally committed by private individuals or groups. Therefore, since the existing human rights instruments do not allow for a responsibility for human rights violations of non-state actors,[6] it is not immediately apparent why human trafficking amounts to a human rights violation. On that account, trafficking is simply 'a criminal act, just like murder, rape and theft'.[7]

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[4] The Inter-Agency Coordination Group against Trafficking in Persons (ICAT), 'An Analytical Review: 10 Years on from the Adoption of the UN Trafficking in Persons Protocol' (October 2010) 44.

[5] Joint Committee on Human Rights, *Human trafficking* (Twenty–sixth Report of Session 2005–06, 13 October 2006) 3.

[6] Andrew Clapham, *Human Rights Obligations of Non-state Actors* (OUP 2006) Chapter I. However, see UN Office of the High Commissioner for Human Rights (UNOHCHR), Guiding Principles on Business and Human Rights (2011). These Principles are structured around three pillars: the state duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy. As for the second pillar, the Principles appear to establish a self-standing responsibility of business enterprises to respect human rights, including their duty to act with due diligence to avoid infringing on the rights of others, and to address adverse impacts with which they are involved. However, see UNGA, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, to the Human Rights Council (A/HRC/17/31, 21 March 2011) 12. It is clear from this Report that Principles should not be read as creating new international law obligations, and by no means seek to establish a new order. The Report states that 'The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.'

[7] Ryszard Piotrowicz, 'International Focus: Trafficking and Slavery as Human rights Violations' (2010) 84 Australian Law Journal 812, 814; Ryszard Piotrowicz, 'The Legal Nature of Trafficking in Human Beings', (2009) 4 Intercultural Human Rights Law Review 175.

Nevertheless, it is now a well-established principle that refraining from directly violating human rights does not absolve a state from its responsibility to 'secure to everyone within their jurisdiction the rights and freedoms defined in (…) [the] Convention.'[8] Therefore, a state's responsibility towards victims of trafficking may arise from the way it 'addresses the issue of trafficking in principle and how it responds to actual cases of trafficking in human beings'.[9] Accordingly, being first and foremost a crime, human trafficking nevertheless has a 'human rights dimension'.[10] Still, although every act of human trafficking is a crime, which warrants a criminal law intervention, it is not *automatically* a human rights violation, for which a state can be held responsible.

Namely, the thesis' introduction pointed to the 'key distinction' between the scope of the right and the scope of state responsibility when assessing allegations of the breaches of human rights by a non-state actor. Importantly, not every situation that falls within the scope of the right will necessarily fall within the scope of the responsibility of the impugned state. Within the existing human rights framework, two conditions need to be fulfilled for finding a human rights violation. First, the situation needs to fall within the protective ambit of the right. Secondly, a state must fail to discharge its duties set out by the human rights instruments it is bound by. Thus, state responsibility would only be engaged if positive obligations were triggered and the state failed to comply with these in the manner required. Clearly, states are only responsible for *their own* acts and omissions, not for the *initial harm* done by a crime (unless directly

[8] Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5 (ECHR) art 1. International Covenant on Civil and Political Rights 999 UNTS 171 (16 December 1966) (ICCPR) art 2 (1); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 2(1); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 OASTS No 36 (ACHR) art 1.

[9] Piotrowicz, 'International Focus: Trafficking and Slavery as Human rights Violations' (n 7) 814.

[10] Piotrowicz, 'The Legal Nature of Trafficking in Human Beings' (n 7).

involved in it). It is, therefore, wrong to say that states have a duty to remedy human rights violations done by trafficking (as a crime) because a duty to remedy (a human rights violation) requires a prior violation of the right (through either an action or an omission). Thus, for example, Gallagher argues that states are obliged to provide for 'medical and psychological care as well as legal and social services' or compensation as part of the obligation to provide 'effective remedies' for human rights violations done by trafficking.[11] Similarly, the UN Principles and Guidelines state that 'trafficked persons, as victims of human rights violations have an international legal right to adequate and appropriate remedies.'[12] This shows an essential misunderstanding of the nature of human rights law and its principles.

Instead, what are referred to as remedies, are potentially, *primary obligations* arising out of either specialized anti-trafficking instruments or general human rights instruments. As such, these are owed to *any* victim of trafficking (as a crime) by states that have accepted to be bound by these instruments, provided that other conditions are satisfied. It goes without saying that this applies only to situations where the initial act was committed by non-state actors. Classifying these measures as human rights remedies implies that they are owed only when states have violated some prior duty. While obtaining reparations for injury, loss or harm effectively amounts to a remedy for the initial *harm* done by a criminal act, these are not remedies for *human rights violations*, which can only result from state (in)actions. States may well be obliged to establish an adequate legal and administrative framework and provide for legal and other material assistance to enable victims' access to compensation and other remedies

[11] Anne T Gallagher, 'The Right to an Effective Remedy for Victims of Trafficking in Persons: A Survey of International Law and Policy' (UN OHCHR 2010) 11.

[12] Trafficking Principles and Guidelines (n42) Guideline 9. See also UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, Joy Ngozi Ezeilo (13 April 2011) A/HRC/17/35.

for a crime. Still, such duties may stem from human rights law as well as other legal instruments.[13] If they were recognized as human rights obligations, non-compliance (inadequate legislative framework, inability of victims to claim compensation or other types of reparation for harm) would create a distinctive violation of a human rights obligation resulting in state's responsibility. Clarifying those matters is not relevant just in the context of an academic debate. Obligations that states owe in the context of trafficking are by no means clear and settled, and it is important to identify what victims can legitimately expect and how they can hold states accountable for failing in their obligations. A failure to develop a more nuanced approach to those different legal aspects of trafficking has resulted in a confusion between, on the one hand, positive duties states owed under the existing human rights law (the violation of which leads to states' responsibility and their further duty to remedy such a breach) and, on the other hand, duties that arise from other legal frameworks. These obligations may, and often do, overlap, although they might not be directly enforceable against states in every context. Thus, for example, duties to criminalize trafficking and punish traffickers stem from human rights law, international criminal law and transnational criminal law.[14] However, when it comes to more substantive victim protection measures, the boundaries of states' obligations under the human rights law are yet to be settled.

[13] Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (Anti-Trafficking Convention) art 15; UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147, 21 March 2006).

[14] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol) art 5; Anti-Trafficking Convention art 18; Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA (5 April 2011) 2011/36/EU (Anti-Trafficking Directive) art 2; UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 7(1)c. See Chapters 6 and 7.

Before moving the discussion towards states' obligations under human rights law in Part II of the thesis, a few conceptual issues need to be clarified. First, if we assume that human trafficking may, in certain circumstances, violate human rights law, what human rights are, thus, potentially engaged? Secondly, does trafficking *qua* trafficking fall under any specific human rights provision? This is said to be an important question from both a policy and a practical perspective[15] and yet a clear answer does not appear to have been provided. The UN Special Rapporteur on Trafficking in Persons noted that human trafficking 'represents the denial of virtually all human rights.'[16] Still, ten years since that statement, the UN Special Rapporteur on Trafficking in Persons stated that 'while there was regular condemnation of the human rights violations associated with trafficking, the practice was rarely linked to the violation of a specific right in a specific treaty'.[17]

3. Is there a distinct human right not to be trafficked?

The relationship between human trafficking and human rights law requires identifying provisions contained in human rights instruments that explicitly or implicitly refer to the practice. Trafficking is not specifically mentioned in most of the general human rights instruments. Among those few international instruments that contain explicit reference to human trafficking are the Convention on the Elimination of All Forms of

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[15] Office of the High Commissioner for Human Rights (OHCHR), 'Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary' (2010) 3 (Trafficking Principles and Guidelines – Commentary) 38.

[16] UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, 'Integration of Human Rights of Women and the Gender Perspective' (22 December 2004) U.N. Doc. E/CN.4/ 2005/71, para 9.

[17] UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo (28 July 2014) A/69/33797, para 46.

Discrimination against Women,[18] the Convention on the Rights of the Child[19] and the EU Charter.[20] The American Convention on Human Rights[21] refers to traffic in women (not children or men) within the provision that addresses slavery, servitude and forced labour, while the African Charter on Human and Peoples' Rights[22] prohibits all forms of exploitation and degradation of man without an explicit reference to trafficking. The European Convention of Human Rights,[23] the International Covenant on Civil and Political Rights[24] and the UDHR[25] contain explicit reference only to slavery, forced labour and servitude. In fact, a proposal by France during the negotiations of the ICCPR to substitute 'trade in human beings' for 'slave- trade', to also cover the traffic in persons, was rejected at the time.[26] While trafficking has regularly been referred to as a form of slavery and *vice versa*, the precise contours of that relationship are subject to a fierce debate.[27]

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[18] (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 6.

[19] (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 35.

[20] The Charter of Fundamental Rights of the European Union (18 December 2000) 2000/C 364/01, art 5 (3).

[21] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 OASTS No 36. art 6.

[22] CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (27 June 1981) art 5.

[23] Article 4.

[24] Article 8.

[25] Universal Declaration of Human Rights (10 December 1948) 217 A (III) art 4.

[26] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, 2005 Kehl, Strasbourg, Arlington, N.P. Engel) 200. See also UN General Assembly, Draft International Covenants on Human Rights (Tenth Session, A2929, 10 July 1955)

[27] OHCHR, Trafficking Principles and Guidelines – Commentary 20; Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10(3) Human Rights Law Review 546; Ryszard Piotrowicz,'Trafficking and Slavery as Human Rights Violations' (n 7); James Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 (1) Virginia Journal of International Law 1; Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) Virginia Journal of International Law 78; Nicholas Lawrence McGeehan, 'Misunderstood and Neglected: The Marginalisation of Slavery in International Law' (2012) 16 International Journal of Human Rights 436.

It has been well-documented that both human trafficking and states' response to it potentially engage numerous rights, depending on the factual circumstances.[28] The more pertinent question, however, is whether trafficking *qua* trafficking *violates* any specific right or it needs to be interpreted as one of the explicitly prohibited conducts. In other words, whether a trafficking act amounts to slavery, torture, violation of the right to security etc., or it directly engages responsibility of the state once its definitional criteria have been fulfilled and states obligations have been triggered. In a case of the latter, *any* trafficking act would, under certain conditions, engage human rights law, triggering state positive duties, as opposed to just those that could be proved to have infringed upon other expressly protected rights.

The Commentary to the UN Trafficking Principles and Guidelines offers the following answer to the question of whether international human rights law actually prohibits trafficking:

> Over the past decade it has become possible to cite strong, recent evidence, derived from a range of sources (…) to indicate a general consensus among States that trafficking is, in all its forms, a serious violation of human rights.[29]

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[28] UN High Commissioner for Refugees, 'Prevent, Combat, Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights Based Approach' (November 2011); OHCHR, Trafficking Principles and Guidelines – Commentary 51. These two documents provide a list of key rights engaged in trafficking in human beings together with treaty sources in which those rights have been enshrined. Those involve *inter alia* right to life, right to liberty and security, right not to be subject to torture, inhuman or degrading treatment, right to freedom from slavery, servitude or forced labour, right to health, etc. See also David Weissbrodt and Anti-Slavery International, Abolishing Slavery and its Contemporary Forms (Office of the United Nations High Commissioner for Human Rights, HR/PUB/02/4, 2002) paras 26-29; Mike Dottridge, 'Introduction', in *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (Global Alliance Against Traffic in Women, 2007) 1; Marjan Wijers and Lin Chew, *The RighT Guide: A Tool to Assess the Human Rights Impact of Anti-Trafficking Laws and Policies* (Aim for Human Rights, La Strada Czech Republic, La Strada International and SCOT-PEP, 2010); Roza Pati, 'States' Positive Obligations with Respect to Human Trafficking: The European Court Of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia', (2011) 79 Boston University International Law Journal; Lorna McGregor, 'Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings' (2014) 36 Human Rights Quarterly 210; UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro (31 March 2015) A/HRC/29/38, para 29.

[29] OHCHR, Trafficking Principles and Guidelines – Commentary 38-39. For an argument to the contrary, see Piotrowicz, 'The Legal Nature of Trafficking in Human Beings' (n 7).

In support of this claim, it refers to the Anti-Trafficking Convention and its Explanatory Report, several resolutions of intergovernmental organizations, findings of UN treaty bodies and, finally, the judgement of the Strasbourg Court in *Rantsev*.[30] Still, unlike the Strasbourg Court, which chose to situate its analysis within the right to be free from slavery, servitude and forced labour (Article 4 ECHR), the Commentary presents a list of the key human rights potentially engaged together with treaty sources in which those rights have been enshrined.[31]

This thesis argues that conceptually, human trafficking violates the right to be free from slavery, servitude and forced labour due to its nature and aim of exploitation, which makes violations of other rights incidental but, nonetheless, grave. Moreover, drawing on the second key distinction between human trafficking as a process and slavery, servitude and forced labour as exploitive conditions, it argues that human trafficking represents a stand-alone prohibition and not a part of these expressly prohibited conducts. The latter claim will be elaborated in detail in Section 6.

In order to explain why the right to be free from slavery, servitude and forced labour represents the most natural conceptual domain for human trafficking, the following arguments are offered.

First, back in 1998, the Human Rights Committee described trafficking of women and others for the purposes of prostitution as 'acts which can be assimilated to slavery and contrary to international and national law.'[32] Thereupon, the first

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[30] OHCHR, Trafficking Principles and Guidelines – Commentary 39.

[31] See also, Joint UN Commentary on the EU Directive: A Human Rights Based Approach (November 2011); David Weissbrodt and Anti-Slavery International, 'Abolishing Slavery and its Contemporary Forms' (Office of the United Nations High Commissioner for Human Rights, HR/PUB/02/4, 2002) paras 26-29; UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro (31 March 2015) A/HRC/29/38, para 29.

[32] UN General Assembly, 'Report of the Human Rights Committee' (concluding observations on Italy) U.N. Doc. A/53/40 (Vol. 1) (15 September 1998) para 333.

universally endorsed definition of human trafficking in the Palermo Protocol directly associates the practice with slavery, servitude and forced labour that represent, *inter alia*, different forms of exploitation, as the purpose of a trafficking act. Also, the EU Charter of Fundamental Rights[33] explicitly prohibits human trafficking within the same provision that also prohibits slavery and forced labour.[34] Thus, Article 5 of the EU Charter of Fundamental Rights is said to correspond in substance to Article 4 of the ECHR,[35] which may lead to a conclusion that Article 4 too contains a separate self-standing prohibition of human trafficking. What is more, the Rome Statute's definition of 'crimes against humanity' brings together the concepts of enslavement and human trafficking within Article 7.[36] Finally, the ECtHR has chosen to situate 'trafficking itself, within the meaning of art.3(a) of the Palermo Protocol and art.4(a) of the Anti-Trafficking Convention' within the scope of Article 4 of the ECHR,[37] itself one of the most fundamental, yet the least-adjudicated human rights.[38] Section 5 of this chapter closely examines the Court's reasoning.

Accordingly, the thesis argues that, whereas human trafficking may and regularly does engage numerous rights, its natural conceptual domain is the right to be free from slavery, servitude and forced labour because of its aim of exploitation. Thus, it has been noted that 'all human trafficking, whether for sexual or labour purposes, is

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[33] OJ C 364, (18 December 2000).

[34] Heli Ascola, 'Article 5 – Prohibition of Slavery and Forced Labour' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (1st edn, Hart Publishing, 2014) 104.

[35] European Union Agency for Fundamental Rights, 'Severe Labour Exploitation: Workers Moving Within or Into the European Union: States' Obligations and Victims' Rights' (2015) 34.

[36] UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 7(2)(c).

[37] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [282].

[38] This view is endorsed by the UK courts in *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC).

for the "purpose of exploitation".'[39] The term exploitation is said to be 'the overarching theme that subsumes all forms of human trafficking, slavery, forced labour, bonded labour, child labour, forced prostitution, economic exploitation, and so on'.[40] Consequently, even though the practice of human trafficking regularly offends against a number of other rights, violations of these other rights are incidental and usually instrumental to its exploitative aim. The notion of exploitation within the context of the right to be free from slavery is discussed in detail in Chapter 5.

Importantly, drawing on the first 'key distinction', the thesis argues that even though practices of human trafficking, due to their exploitative aim, always fall under *the scope of the right* to be free from slavery, servitude and forced labour, this does not mean that practices of human trafficking will also always fall within *the scope of state responsibility,* which depends on circumstances of each case and whether positive obligations were triggered.

Before examining the Court's reasoning in *Rantsev* and the second claim that human trafficking offends against this right as a stand-alone prohibition, the following section will explain why the discussion in the thesis is framed with a reference to the legal instruments adopted in the European context.

[39] Roger Plant, 'Modern Slavery: The Concepts and Their Practical Implications' (ILO Working Paper, 5 February 2015) 3.

[40] Johannes Koettl, 'Human Trafficking, Modern Day Slavery, and Economic Exploitation' (World Bank, Discussion Paper No. 0911, May 2009)

4. Human trafficking and the European legal space

Whereas all general human rights instruments contain the prohibition of slavery, servitude and forced labour right,[41] the analysis throughout the thesis focuses specifically on the European Convention of Human Rights.[42] This is for the following reasons.

First, the European Court of Human Rights has been the first to explicitly ground human trafficking within this right and the following section analyses a justification it offers for doing so. Secondly, being described as 'the crown jewel of the world's most advanced international system for protecting civil and political liberties'[43] and 'the *de facto* model for developing human rights elsewhere',[44] the Strasbourg Court offers a concrete tool to victims to act as agents in their own cause through its individual petition system. Finally, such enforcement mechanisms makes states more wary of being found in breach of their obligations by the binding decision of a supranational court, as opposed to their attitude towards obligations arising out of other international instruments. This was pointed out by Durieux, who compared the attitudes of the EU Member States towards the 1951 Refugee Convention and towards the

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[41] Universal Declaration of Human Rights (10 December 1948) 217 A (III), art 4; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 8; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 OASTS No 36, art 6; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (Banjul Charter) art 5.

[42] Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5.

[43] Laurence R Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 (1) The European Journal of International Law 125.

[44] Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics* (OUP 2011) 2.

ECHR.[45] Therefore, understanding how to use the protection afforded by this mechanism is likely to have a significant effect on the overall protection of trafficking victims under human rights law more generally. The thesis, however, does not confine the analysis to the ECtHR case law and draws on examples from the jurisprudence of other human rights bodies and domestic courts. The broad choice of jurisdictions beyond the ECtHR is guided only by the extent to which are relevant to, and shed light upon, the legal issues being discussed.

Moreover, the most comprehensive anti-trafficking instrument so far was also adopted within the Council of Europe, thus purporting belief that 'putting legal instruments in place at regional level valuably reinforces action at world level'.[46] The Council of Europe Anti-Trafficking Convention is the first international instrument to recognize an explicit link between trafficking and human rights law. Already in the Preamble, it is stated that trafficking in human beings constitutes 'a violation of human rights and an offence to the dignity and the integrity of the human being'. Such an account reinforces the already noted failure to distinguish between trafficking as a crime, which states have a responsibility to address (either as a positive human rights duty or because of obligations stemming from other sources), and subsequent human rights violations that may emerge from failing to do so.[47] Nevertheless, in spite of this conceptual confusion, the Anti-Trafficking Convention has been celebrated as 'one of

[45] Jean-François Durieux, 'The Vanishing Refugee', in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013) 254-255.

[46] Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) CETS 197 (Explanatory Report) para 9.

[47] Ryszard Piotrowicz, 'THB in 2016 – Where are we, where have we been and where are we going?' (Council of the Baltic Sea States Task Force against Trafficking in Human Beings, Policy Implications of Future Trends in Trafficking, 29 February 2016).

the Council of Europe's most important achievements in its 60 years of existence'.[48] Its strong human rights focus and a much higher level of obligation than that laid down in the Palermo Protocol are said to be the main added value of this instrument.[49]Accordingly, it entitles victims of trafficking to a wide range of mandatory assistance measures, in particular, physical and psychological assistance and support for their reintegration into society, medical treatment, counselling and information as well as appropriate accommodation.[50] While the Anti-Trafficking Convention does not itself contain human rights, as it will be shown in Chapter 7, it does, however, provide many opportunities for the Strasbourg Court to draw on its provisions in framing positive obligations within the ECHR, which would be 'a welcome use of the principle of interpreting the Convention as a living instrument'.[51] While the Explanatory Report to the Anti-Trafficking Convention was the first to link human trafficking to the prohibition of slavery, servitude and forced labour in Article 4ECHR, the Strasbourg Court has made an important step towards 'judicalising' trafficking under the ECHR in its landmark *Rantsev* case.

5. The legacy of the *Rantsev* case

As already noted, the European Convention on Human Rights, the main human rights instrument of the Council of Europe and one of the most successful human rights

[48] Directorate General of Human Rights and Legal Affairs, 'Practical Impact of the Council of Europe Monitoring Mechanisms in Improving Respect for Human Rights and the Rule of Law in Member States' (Council of Europe 2010) 12.

[49] Explanatory Report, para 46. See a detailed discussion of the Anti-Trafficking Convention in Chapter 7.

[50] Chapter III of the Convention.

[51] Jacobs, White and Ovey (eds), *The European Convention on Human Rights* (6th edition, OUP 2014).

mechanisms globally, does not explicitly refer to trafficking in human beings. While the Strasbourg Court effectively dealt with the treatment associated with trafficking in *Siliadin v. France*,[52] it did not in that case engage with the concept as such. Rather, it decided to address the issue from the perspective of conducts expressly prohibited in Article 4ECHR. Five years later, the Court delivered the ground-breaking decision in the *Rantsev* case where it directly addressed the issue of trafficking.[53] Not only did the Court in *Rantsev* find numerous rights violations emanating from the (potential) trafficking *act*, but it appears that it also ruled that trafficking *qua* trafficking belongs to the scope of Article 4. Moreover, it is alleged that this judgement became 'the key instrument for enforcing the Trafficking Convention' and its comprehensive set of protective duties, which are seen as the most difficult to access and secure by victims.[54]

Alongside great enthusiasm, the decision also attracted strong criticism for failing 'to demonstrate or set out a clear understanding of the substance or content of Article 4.'[55] The Court's decision to assess whether trafficking could fall within the Article 4 prohibition without considering specifically whether the practice was slavery, servitude or forced labour was seen as 'weakness and, perhaps, intellectual incoherence'.[56] Declining to say precisely how trafficking of human beings is a violation of Article 4, the Court left those critics wondering whether '*all* cases of trafficking potentially violate article 4'.[57] Before offering the thesis' view on this

[52] (2006) 43 EHRR 16.

[53] *Rantsev v Cyprus and Russia* (n 37).

[54] Saadiya Chaudary and Adam Weiss, 'ECHR and EU Protection for Victims of Trafficking in the UK' in Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011).

[55] Allain, 'Rantsev v Cyprus and Russia' (n 27) 555.

[56] Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations', (2012) 24(2) International Journal of Refugee Law 181,196.

[57] ibid.

question in Section 6, the following section will first deconstruct the Court's reasoning in *Rantsev*.

The case emerged from the application submitted by a father of a victim, a Russian national who arrived in Cyprus on an 'artiste' visa to work as a cabaret dancer. According to subsequently published reports of the Cypriot Ombudsman and the Council of Europe Commissioner for Human Rights, the word 'artiste' in Cyprus has become synonymous with 'prostitute'. Owing to such an immigration scheme, thousands of women have entered the country to work as artistes, many of whom were forced by their employers into prostitution under cruel conditions.[58] Soon after Ms Rantseva had arrived in Cyprus, she left the apartment provided by her employer where she lived with several other women. A man who managed the cabaret informed the Immigration Office in Limassol that she had abandoned her place of work and residence. According to his statement, he wanted her to be arrested and expelled from Cyprus so that he could bring another girl to work. Yet her name was not entered on the list of persons wanted by the police. Several days later he was informed of her presence in one discotheque and he called the police requiring her arrest. He then went to the discothèque himself, apprehended her and brought her to the local police station. However, having found that Ms Rantseva was not in Cyprus illegally, the police neither arrested nor released her but instead asked him to collect her (together with her passport and other documents) and bring her the next morning for further investigation. Several hours later, she was found dead on the street below the apartment where she had been taken from the police station. Overall, the Court found the application admissible with respect to the rights contained in Articles 2, 3, 4 and 5. This is important as it shows that trafficking and related practices potentially engage numerous

[58] *Rantsev v Cyprus and Russia* (n 37) [80]-[104].

rights. However, the Court's main discussion is built around Article 4 and its relevance for trafficking situations. While the core analysis deals with positive duties imposed upon Member States, which is subject to a detailed scrutiny in Chapter 6 of the thesis, it is nevertheless important to discuss the Court's findings on 'why trafficking falls within the parameters of article 4'.[59]

The Court was called to determine two questions – one conceptual and the other more focused on the circumstances of the present case. First, whether, and how, trafficking fits into the scope of Article 4, given that it was not explicitly mentioned in the Convention text. Secondly, whether and how circumstances of the present case amount to conduct that is prohibited by Article 4, in whichever form. The conceptual question invites the Court to explain two things. First, *why* trafficking *primarily* violates Article 4 and not some other rights? Secondly, it also seeks an answer to a question of whether every situation of trafficking needs to be assessed against standards required for establishing slavery, servitude or forced labour – concepts explicitly listed in the Convention – or, alternatively, whether trafficking can be read into Article 4 alongside these explicitly prohibited conducts? This is effectively concerned with the question of *how* trafficking violates Article 4.

The Court first stated that it 'has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein.'[60] It went on to say that practical and effective protection of individual human rights requires that the Convention is read as a whole and in harmony with of other rules of international law, of which it forms part.[61] Furthermore

[59] Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010)189.

[60] *Rantsev v Cyprus and Russia* (n 37) [273].

[61] ibid [274].

emphasizing the nature of the Convention as 'a living instrument which must be interpreted in the light of present-day conditions' and 'in light of the proliferation of both trafficking itself and of measures taken to combat it' the Court deemed it appropriate to consider the extent to which trafficking *itself* may be considered to run counter to the spirit and purpose of article 4.[62]

The Court started its analysis by referring to the decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kunarac* case,[63] which held that the traditional concept of 'slavery' has evolved to include various contemporary forms of slavery which are based on the exercise of powers attaching to the right of ownership. It moved on to state that trafficking *itself,* 'by its very nature and aim of exploitation', is also based on the exercise of powers attaching to the right of ownership, thus essentially implying that trafficking is a form of slavery, understood in modern terms.[64] Having said that, it moved on to state that it was not necessary to identify whether the treatment complained of constituted any of the explicitly prohibited conducts. Instead, it found that trafficking in *itself*, within the meaning of the Palermo Protocol and the Anti-Trafficking Convention, fell within the scope of Article 4.[65] However, it is not clear whether the Court wanted to say that there was no need to classify the conduct complained of (with strong indicia of trafficking) as either 'slavery', 'servitude' or 'forced labour' *in this particular case* (because, for example, that would not affect the duties of the states) or whether *in general* there was no need to do so (because, again, this would not affect duties owed by states). In the case of the

[62] ibid [277]-[279] (emphasis added).

[63] *Prosecutor v Kunarac, Kovac and Vukovic,* Case Nos IT-96-23 and IT-96-23/1-A [2002] ICTY 2 (12 June 2002) [117].

[64] *Rantsev v Cyprus and Russia* (n 37) [280]-[281].

[65] ibid [281].

latter, this would imply that trafficking stands *alongside* those three explicitly prohibited activities because of ‘its very nature and aim of exploitation’.

Moreover, apart from not giving the explicit answer on how trafficking violates Article 4, the Court neither gave a definite answer as to whether Ms Rantseva herself was actually trafficked or exploited. Rather, it moved straight on to elaborate the duties enshrined in Article 4, whether those duties arose in particular circumstances, and whether and how both states complied with them.

It is regrettable that the Court did not clarify these matters, in spite of having initially said that its judgements served not only to provide individual relief but, more generally, to elucidate, safeguard and develop rules instituted by the Convention, thereby raising the general standards of protection of human rights.[66] The Court has failed to live up to its words when it comes to human trafficking, leaving its legal nature somewhat obscure. This has also created a perfect opportunity for advancing a fierce criticism of the ruling.

Namely, many authors have pointed out the Court’s apparent equating trafficking with slavery, thus ‘not having truly engaged with the legal distinctions that exist between these two concepts.’[67] However, the thesis argues that even though the Court’s choice of words may not have been the most helpful, there may be a more favourable reading of the claim that ‘trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership.’[68] Thus, it is argued here that by giving more weight to the second part of

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[66] ibid [197]; *Ireland v UK* (1978) 2 EHRR 25 [154].

[67] Allain, ‘Rantsev v Cyprus and Russia’ (n 27) 546. See also Vladislava Stoyanova, ‘Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev case’ (2012) 30 Netherlands Quarterly of Human Rights 163; Ramona Vijeyarasa and José Miguel Bello Y Villarino, ‘Modern-Day Slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev’ (2012) 8 Journal of International Law and International Relations 36.

[68] *Rantsev v Cyprus and Russia* (n 37) [281].

the sentence ('exercise of powers attaching to the right of ownership', which describes the concept of slavery), *Rantsev* opponents risk missing out a point that the Court may not have equated trafficking with slavery, but instead wished to stress that both practices belong to the ambit of Article 4 due to their 'very nature and aim of exploitation'.

It is therefore argued here that while the ruling could have been phrased more clearly, the decision is far from being 'deeply flawed' as one of the critics pointed out.[69] This is not to say that its reasoning contains no weaknesses or lacunae. However, these are mostly related to the framing of positive duties in trafficking situations and will be further elaborated in Chapter 6.

The following section aims to offer answers to the apposite questions of how trafficking violates Article 4 ECHR and whether all situations of trafficking do so, which the Strasbourg Court left unresolved.

6. Article 4 ECHR revisited

The thesis agrees with the approach of the Strasbourg Court to use Article 4 ECHR as the primary domain for examining the claim of the alleged act of trafficking. However, the Court is rightly criticised for not having provided a clear account of how exactly human trafficking infringes upon this right and of the relationship between human

[69] Allain, 'Rantsev v Cyprus and Russia' (n 27) 557.

trafficking and the explicitly prohibited conducts, notably slavery, servitude and forced labour.

This section addresses this question and argues, using the ‘key distinction’, that trafficking as a process leading to exploitation should be distinguished from these exploitative practices and should be framed within Article 4 as a stand-alone prohibition.

The text of this article reads as follows:

> 1. No one shall be held in slavery or servitude.
>
> 2. No one shall be required to perform forced or compulsory labour.
>
> …

Article 4 ECHR, together with Articles 2[70] and 3[71], is said to enshrine one of the basic values of the democratic societies making up the Council of Europe.[72] Thus, it makes no provision for exceptions and no derogation from it is permissible under article 15(2), even in the event of a public emergency threatening the life of the nation.[73] Still, neither the ECHR nor any other major human rights instruments define slavery, servitude or forced labour. Instead, these concepts have been defined in specialised conventions and further developed in jurisprudence of national and international courts.[74]

Furthermore, Article 4 has been one of the least litigated provisions of the ECHR. Prior to *Siliadin*, most of the cases examined under this provision had concerned state-imposed obligations that allegedly breached this provision and dealt with applicants who, apart from detainees, could hardly be considered disempowered or

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[70] Right to life.

[71] Freedom from torture, inhuman and degrading treatment.

[72] *Siliadin v. France* (n 52) [82] and [112].

[73] *Rantsev v Cyprus and Russia* (n 37) [283].

[74] See discussion in Chapter 4.

vulnerable.[75] However, judgements in *Siliadin*, *Rantsev* and other Strasbourg cases[76] shed new light on the relevance of Article 4 in the modern world.

The following chapter will focus more closely on the meaning of slavery, servitude, forced labour and other exploitative practices listed in the trafficking definition as well as on conceptual controversy that surrounds them. The aim of this section, however, is to answer the question of whether human trafficking falls within the ambit of Article 4 ECHR independently from explicitly prohibited practices of slavery, servitude and forced labour. The opinions on this matter are divided.

On the one hand, many have viewed trafficking as an 'umbrella term', which covers both a tripartite process that includes specific acts, means and the end purpose consisting of various exploitative practices, as well as these exploitative practices alone.[77] This would imply that the term human trafficking not only replaces the concepts of slavery, servitude and forced labour but it also qualifies these notions with new requirements (specific act and means). Also, the open ended list of exploitative purposes in the trafficking definition that includes new forms of exploitation alongside slavery, servitude and forced labour, risks widening the scope of Article 4 'by providing for issues beyond slavery, servitude and forced labour, to be considered within the purview of the ECHR'.[78]

Due to these reasons, others have argued that in the context of human rights law, it is better to rely on well-established concepts of slavery, servitude and forced

[75]For an overview of the case-law on Article 4 see Jacobs, White and Ovey, *The European Convention on Human Rights* (6th edn, OUP 2014) 195. See also Alastair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edition, OUP 2012) 232.

[76] *M and Others v Italy and Bulgaria* (Application no 40020/03) (31 July 2012); *CN and V v France* (Application no 67724/09) (11 October 2012); *CN v United Kingdom* (2013) 56 EHRR 24.

[77] Koettl, 'Human Trafficking, Modern Day Slavery, and Economic Exploitation' (n 40); US Department of State, 'What is Human Trafficking' in Trafficking in Persons Report (2012). For the analysis of the newly coined 'umbrella term' 'modern slavery' see Chapter 5 Section 4.

[78] Allain, 'Rantsev v Cyprus and Russia (n 27) 557.

labour, the 'progressive' interpretation of which may well accommodate the new forms of exploitation, as defined by trafficking purposes.[79] Thus, it is claimed that 'the ECtHR does not need the human trafficking framework and the definition of human trafficking in order to address abuses'.[80] According to this argument, assuming that 'exploitation' inherent in the concept of human trafficking is a form of abuse of a lower threshold as opposed to slavery, servitude and forced labour, which in turn, would warrant the inclusion of human trafficking in Article 4, using the Court's well-known interpretative tools - the principle of effectiveness and the notion of the Convention as a 'living instrument' - the same result could have been achieved by simply using the

> [T]he above-mentioned means of progressive interpretation to decide that Article 4 covers lesser forms of abuses than the potentially high standards established with the concepts of slavery, servitude and forced labour (...)The Court did not have to go through the concept of human trafficking in order to expand the material scope of Article 4.[81]

This proposal, however, is not without problems, especially given the fact that the concept of human trafficking, unlike that of slavery, servitude and forced labour, does not require actual exploitation to have taken place. According to this argument, then, only those victims that have actually been exploited, would fall under the protective ambit of Article 4.

The thesis offers a middle-ground approach arguing that neither human trafficking should absorb and replace the notions of slavery, servitude and forced labour, nor are these concepts suitable for describing the practices of human trafficking. Instead, the thesis argues that human trafficking falls under Article 4 ECHR independently of slavery, servitude and forced labour. To support this argument, the

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[79] Vladislava Stoyanova, 'Dancing on the Borders of Article 4' (n 67) 184.

[80] ibid 171.

[81] ibid 185.

thesis uses the ‘key distinction’ between human trafficking as a process leading to exploitation, and slavery servitude and forced labour, as exploitative conditions that may not always result from trafficking. As already explained in Chapter 2, according to the widely accepted definition of human trafficking, the act of human trafficking consists of three components: an action; the use of certain means; and the purpose of exploitation.[82] Whereas all three elements must exist for trafficking to be established, it is important to stress that exploitation, which is the purpose of trafficking, needs not have taken place: it is *intended exploitation* in conjunction with certain action and the means deployed that makes up the trafficking situation.[83] Accordingly, human trafficking is a process leading to exploitation. Such exploitation may take numerous forms. Practices of slavery, servitude and forced labour are listed, among others, as examples of actual exploitation, which is the purpose of human trafficking. However, exploitation may also occur without human trafficking.

This distinction between human trafficking as a process and exploitation as a condition, which may, but does not necessarily result from trafficking, has often been overlooked in the attempt to submerge all these practices under popular ‘umbrella terms’ such as ‘modern slavery’.[84] Jansson, thus, wrongly assumes that ‘since trafficking is considered a modern form of slavery, perhaps it is better if the provisions on trafficking and slavery could be merged into one.’[85]

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[82] For a discussion about the elements see Parosha Chandran, ‘A Commentary on Interpreting Human Trafficking’ in Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011) 5.

[83] UNODC, ‘Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime’ (New York 2004) para 33; Explanatory Report, para 87.

[84] Modern Slavery Act 2015.

[85] Dominka Borg Jansson, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons* (Brill Nijhoff, 2014) 341.

Furthermore, since the threat of exploitation in trafficking situations is 'real and immediate',[86] it warrants a state action in order to prevent exploitation from materialising. Chapter 6, which discusses Strasbourg case law on positive obligations under Articles 2-4 ECHR, shows that the obligation to protect an individual arises in circumstances where authorities were aware or ought to have been aware that an identified individual is subject to, or is at a 'real and immediate' risk of the conduct that impairs the guaranteed rights. Thus, in cases engaging the right to life and freedom from torture, inhuman or degrading treatment, states are found to have a duty *to prevent* imminent violations, if other conditions are satisfied (proximity of risk, state's awareness).

Similarly, victim situation during the trafficking process before any actual exploitation has started indicates a 'real and immediate' risk of exploitation, and as such warrants a preventative action. Therefore, human trafficking is capable of engaging Article 4 regardless of any actual exploitation and is, as such, independent a concept from slavery, servitude and forced labour. Introducing human trafficking *sans* exploitation within the human rights context represents a welcome intervention and an improvement of victim protection. The decision in *Rantsev* seems to support such a conclusion, although it arguably takes this position to the extreme by extending the scope of Article 4 to situations of (future) risk of trafficking rather than the (present) risk of exploitation that stems from the current trafficking situation.[87]

The proposed approach could be supported by the Court's claim that 'in assessing the scope of art.4 of the Convention, sight should not be lost of the

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[86] *Rantsev v Cyprus and Russia* (n 37) [286]. See also *Osman v UK* (2000) 29 EHRR 245 [116]; *Opuz v Turkey* (2010) 50 EHRR 28 [129].

[87] This will be elaborated in detail in Chapter 6 Section 3.2.2.b.

Convention's special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions.'[88] The present day conditions evidently call for developing new strategies and techniques, both legal and operational, to adequately respond to new challenges. While the Strasbourg Court has, demonstrably, recognized this call by bringing human trafficking within its remit in *Rantsev*, this has been done with more enthusiasm than rigour.

This interpretation of Article 4 may also be supported by the position taken in the EU Charter of Fundamental Rights, which prohibits human trafficking *alongside* slavery, servitude and forced labour within the same Article (Article 5), but in a separate paragraph.

Importantly, reading human trafficking into Article 4 ECHR as a standalone prohibition does not affect using the explicit prohibitions as a vehicle for advancing complaints against states, when exploitation has in fact materialised. Namely, when exploitation had allegedly taken place, victims may choose either to advance their complaint to Strasbourg using the notions of slavery, servitude or forced labour, or to rely on the prohibition of trafficking, depending on the circumstances of each case. At the moment, there is no evidence that one option is better than the others in terms of succeeding before the Court.

The problem with reading human trafficking into Article 4 ECHR, nevertheless, may occur in situations when exploitation materialised in one of the forms other than slavery, servitude or forced labour due to an open-ended list of exploitative purposes. The question, therefore is, would forced begging be prohibited by Article 4 ECHR even though a victim has not been 'trafficked into' the exploitative

[88] *Rantsev v Cyprus and Russia* (n 37) [277].

circumstances? The following chapter examines the relationship between these 'other' exploitative practices with slavery, servitude and forced labour.

7. Conclusion

This chapter established that human trafficking is not *per se* a human rights violation. Thus, it is shown that human trafficking is principally a serious crime with respect to which states have obligations under human rights law. Only when such obligations have been infringed does trafficking become a human rights violation. Furthermore, the chapter explained that while not being expressly prohibited by majority of general human rights instruments, human trafficking does potentially engage a number of rights.

Nonetheless, the chapter provides strong arguments to support a view that conceptually human trafficking violates the right to be free from slavery, servitude and forced labour due to their common nature and aim of exploitation. The discussion of these issues is contained within the European legal space because of the significance and potential impact of the Strasbourg jurisprudence and of the recent Anti-Trafficking Convention to influence the interpretation and practice on this topic globally. The chapter concludes by defending an argument that human trafficking violates the right to be free from slavery as a stand-alone prohibition using the 'key distinction' between trafficking as a process leading to exploitative conditions, and slavery, servitude and forced labour as exploitative conditions themselves. Drawing a parallel between this and other 'absolute' rights that warrant pre-emptive state intervention, it is argued that trafficking triggers state obligations before exploitation has commenced and, as such, ought to be framed within this right independently. The following chapter brings forward the discussion of the scope of the right to be free from slavery, servitude and forced labour by examining the relationship between concepts explicitly prohibited by this right, and those exploitative practices listed in the open-ended trafficking definition.

CHAPTER 4: The Scope of the Right to be Free from Slavery, Servitude and Forced Labour

1. Introduction

The right to be free from slavery explicitly prohibits practices of slavery, servitude and forced labour. In addition, as demonstrated in Chapter 3, the Strasbourg Court has recently included human trafficking, arguably as a standalone prohibition, using a definition established by the Palermo Protocol. Borrowing a definition from another international instrument is not a novel or controversial action of the Court since the same was done with concepts of slavery, servitude and forced labour, neither of which has been defined by any of the general human rights instruments containing this right.[1] However, unlike slavery, servitude and forced labour, human trafficking has not been explicitly mentioned in the text of the Article 4 ECHR. As a result, reading human trafficking into the right to be free from slavery has opened a number of questions, which the Strasbourg Court has, regrettably, failed to resolve. This calls for engaging with the relationship between, on the one hand, human trafficking and, on the other hand, the practices of slavery, servitude and forced labour, on the other.

Chapter 3 drew attention to an important distinction between human trafficking as a *process*, and slavery, servitude and forced labour that amount to an (exploitative) *condition*, which may result from the trafficking process, but not necessarily. This 'key distinction' helps understand why human trafficking should be

[1] Council of Europe, European Court of Human Rights, 'Guide on Article 4 of the Convention: Prohibition of Slavery and Forced Labour' (2014) ('ECtHR Guide on Article 4 of the Convention').

read into Article 4 ECHR as a stand-alone prohibition. Namely, being in the situation of trafficking means being at real and immediate risk of being exploited, which calls for a state action aimed at preventing exploitation from materializing. This view challenges Stoyanova's proposition that 'the human trafficking framework could be discarded and instead the legal and factual analysis should be centered on the practices already prohibited by Article 4 of the ECHR.'[2]

Reading human trafficking into the right to be free from slavery triggers important conceptual questions, which this and the following chapter identify and engage with. In particular, the present chapter examines the relationship between the concepts of slavery, servitude and forced labour with other exploitative practices listed in the definition of human trafficking among its end purposes. These other exploitative practices include 'at a minimum': 'the exploitation of the prostitution of others or other forms of sexual exploitation', 'practices similar to slavery', 'the removal of organs', 'forced begging' and 'exploitation of criminal activities'.[3] This question is particularly important in situations when these exploitative practices do not result from human trafficking. Thus, it is not clear whether they ought to be interpreted as either slavery, servitude or forced labour, or they too represent stand-alone prohibitions within this right. The chapter will argue that these practices need to be qualified as either slavery, servitude or forced labour in order to engage this right.

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[2] Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30 (2) Netherlands Quarterly of Human Rights 163, 180.

[3] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol) art 3; Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (Anti-Trafficking Convention) art 4; Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA (5 April 2011) 2011/36/EU (Anti-Trafficking Directive) art 2.

In addition, the chapter elucidates and engages with ‘slippery slopes’ that emerge from academic and political debates on these important problems, which dilute the scope of Article 4 ECHR.

2. The lack of conceptual rigour in the anti-trafficking discourse: definitions and slippery slopes

Academic, legal and policy discussions on human trafficking and associated practices, commonly referred to as ‘modern slavery’, reveal confusion and absence of clear conceptual and legal boundaries between these similar, but arguably distinctive phenomena.[4] Chuang rightly notices that:

> Notwithstanding the seeming global consensus that trafficking is something to be rid of, the anti-trafficking field is a strikingly ‘rigor-free zone’ when it comes to defining the concept’s legal parameters.[5]

Some of these legal parameters have explicit and clear legal interpretation grounded in international and human rights law, whereas others have been invoked customarily, ignoring the fact that no discernible definition has be established. Examples of the former are the concepts of slavery, servitude, or forced labour.[6] On the contrary, in spite of their common use in the debates on human trafficking, notions such as ‘modern slavery’, ‘exploitation’ or ‘labour exploitation’ have not been defined in the existing

[4] Sandhya Drew, ‘Human Trafficking: A Modern Form of Slavery?’ (2002) 4 European Human Rights Law Review 481; Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (OUP 2008); Virginia Mantouvalou, ‘Modern Slavery: the UK Response’ (2010) 39 (4) Industrial Law Journal 425; Roger Plant, ‘Modern Slavery: the Concepts and Their Practical Implications’ (ILO Working Paper, 5 February 2015).

[5] Janie A Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108 (4) The American Journal of International Law 609.

[6] See the discussion in Section 3.

legal instruments.[7] Moreover, some concepts have been used as ‘umbrella terms’ thus further obscuring the definitional boundaries. Accordingly, it is concluded that there is no consistent use of the term human trafficking and no consensus on what the term comprises or how it relates to issues of forced labour, slavery, and exploitation.[8] Arguing for more clarity in definitions, Andrees warns that:

> The existence of different legal definitions, which share a great degree of commonality, however, has sometimes created confusion, and there is a risk that any form of exploitation is now called ‘slavery’ or ‘trafficking’. Such ‘exploitation creep’, as legal scholar Janie A. Chuang put it, labels certain practices as more extreme than is legally accurate. In other words, not all children who are exposed to hazardous work are ‘slaves’, and not all workers who don’t receive a fair wage are forced.[9]

Similarly, the High Court of Australia in the *Tang* case notes that the term ‘slave’ is sometimes used in a metaphorical sense but warns against debasing the currency of language by giving slavery ‘a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention.’[10]

Consequently, it was noted that ‘particularly in the international sphere, where diverse cultures are involved, where positivist underpinnings are shaky, and where implementation mechanisms are fragile, definition can be crucial.’[11]

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[7] See the discussion in Sections 4 and 5.

[8] Johannes Koettl, ‘Human Trafficking, Modern Day Slavery, and Economic Exploitation’ (World Bank, Discussion Paper No. 0911, May 2009) 5.

[9] Beate Andrees, ‘Why Definitions Matter?’ (ILO, Special Action Programme to combat Forced Labour, 03 February 2014). On the contrary, Roger Plant emphasises the importance of a pragmatic approach to these questions. In his paper, he concludes that rather than seeking an exact consensus over definitions, the focus should be on identifying the most appropriate forms of action. See Plant, ‘Modern Slavery’ (n 4).

[10] *The Queen v Tang* [2008] HCA 39 (28 August 2008) [32].

[11] Jerome J Shestack, ‘The Philosophic Foundations of Human Rights’, (1998) 20 (2) Human Rights Quarterly 202**.**

Therefore, in order to establish clear boundaries of Article 4 ECHR, it is necessary to determine the meaning and the relationship between the concepts explicitly mentioned in it as well as those concepts engaged in the trafficking definition. In doing so, the thesis points out to the two slippery slopes that contribute to the perceived conceptual and legal incoherence.

3. Types of exploitation within the human trafficking definition

The definition of human trafficking in the Palermo Protocol provides a list of exploitative purposes that include 'at a minimum': the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The EU Anti-Trafficking Directive has expanded this open-ended list by explicitly listing forced begging and the exploitation of criminal activities in order to 'keep abreast of the developing forms of trafficking.'[12]

Unfortunately, neither the Palermo Protocol nor the anti-trafficking instruments that followed define either of these diverse practices. What is more, these practices have not been defined in any *single* instrument on an international level. Thus, a conclusive answer as to their meaning and more importantly, the relationship with each other, requires a meticulous conceptual analysis of different international instruments and jurisprudence.[13]

[12] UN High Commissioner for Refugees, 'Prevent, Combat, Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights Based Approach' (November 2011) 104.

[13] For a detailed analysis of concepts of slavery, servitude and forced labour see David Weissbrodt and Anti-Slavery International, Abolishing Slavery and its Contemporary Forms (UN OHCHR 2002); Jean Allain, 'Definition of Slavery in International Law' (2009) 52 Howard Law Journal 239; Jean Allain, 'R

When it comes to interpreting Article 4 ECHR, in the light of its view that the Convention should 'so far as possible be interpreted in harmony with other rules of international law of which it forms part',[14] the Strasbourg Court relied on the 1926 Slavery Convention,[15] Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,[16] International Labour Organisation (ILO) Convention No. 29 (Forced Labour Convention)[17] and the Anti Trafficking Convention.[18]

Thus, slavery was defined in the 1926 Convention as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'[19] This traditional concept of slavery, often referred to as 'chattel slavery,' is said to have evolved to encompass 'various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership'.[20] However, Allain is critical of 'attempts (...) to obfuscate the term "slavery" and to distance its legal definition from a definition that might instead be consonant with any type of exploitation.'[21] Thus, he argues that:

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v Tang: Clarifying the Definition of 'Slavery' in International Law' (2009) 10 Melbourne Journal of International Law 246; Jean Allain, 'On the Curious Disappearance of Human Servitude from General International Law' (2009) 11 Journal of the History of International Law 303; Andrea Nicholson, 'Reflections on Siliadin v. France: Slavery and Legal Definition' (2010) 14(5) The International Journal of Human Rights 705.

[14] ECtHR Guide on Article 4 of the Convention, paras 5-6.

[15] *Siliadin v. France* (2006) 43 EHRR 16 [122].

[16] *CN and V v France* (App no 67724/09) (11 October 2012) [90].

[17] *Van der Mussele v. Belgium* (1983) 6 EHRR 163 [32].

[18] *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [282].

[19] The Slavery Convention (25 September 1926) 212 UNTS 17, art 1(1).

[20] *Prosecutor v Kunarac, Kovac and Vukovic,* Case Nos IT-96-23 and IT-96-23/1-A [2002] ICTY 2 (12 June 2002) [117]; *The Queen v Tang* (n 10) [21].

[21] Jean Allain, 'Definition of Slavery in International Law' (2009) 52 Howard Law Journal 239, 242.

> Individuals interested in ending exploitation in the guise of forced, bonded, or indentured labor or sexual exploitation have muddied the waters of what slavery means and sought to intimate that slavery persisted beyond the 1926 Convention's definition, even where the "powers attaching to the right of ownership" were not at issue.[22]

Similarly, the Australian High Court noted that it is important not to 'banalise crimes against humanity' by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention and 'to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery'. [23] When it comes to determining what counts as slavery, domestic and international courts have outlined the so-called 'indicia of enslavement'.[24]

In contrast with the expansionist tendencies, the Strasbourg Court is criticised for its overly narrow interpretation of the definition of slavery as 'a genuine right of legal ownership over her'.[25] Thus, it is argued that the Court failed to distinguish between 'powers attaching to the right of ownership' as opposed to 'right of ownership'.[26] The difference between the two is said to be as between slavery *de jure* and slavery *de facto*, both being covered by the terms 'status or condition' in the 1926 definition. Despite the controversy about the scope of the term (or because of it), the ECtHR has not, so far, found a violation of the prohibition of slavery.

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[22] ibid.

[23] *The Queen v Tang* (n 10) [32].

[24] The International Criminal Tribunal for the former Yugoslavia elaborated the meaning of enslavement under its Statute in the case *Kunarac et al.* (n 20) [119]–[120]. The ICTY Appeals Chamber thus pointed to 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.' as 'indicia of enslavement'. See also *The Queen v Tang* (n 10) [50]; *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008, [72]-[89] (unofficial translation by INTERRIGHTS).

[25] *Siliadin v. France* (n 15) [122].

[26] Allain, 'Definition of Slavery in International Law' (n 13) 261-262.

Like slavery, servitude has not been defined in the ECHR, nor in fact, by any other international instrument. Nevertheless, it is said to have been given content through the pronouncement of bodies supervising human rights treaties.[27] According to Allain, servitude should be understood as human exploitation falling short of slavery. Similarly, the Strasbourg Court has seen servitude as 'a particularly serious form of denial of liberty',[28] which means 'an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of "slavery".'[29] Moreover, the Court held that:

> [I]n addition to the obligation to perform certain services for others, the notion of servitude embraces the obligation for the "serf" to live on another person's property and the impossibility of altering his condition.[30]

Thus, the Court established that that servitude corresponds to a special type of forced or compulsory labour or, in other words, 'aggravated' forced or compulsory labour,[31] where the fundamental distinguishing feature between servitude and forced or compulsory labour lies in the victim's feeling that their condition is permanent and that the situation is unlikely to change. Consequently, as Cullen noticed, the Strasbourg Court 'retained the classic distinction between slavery and forced labour, allowing the

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[27] Allain, 'On the Curious Disappearance of Human Servitude from General International Law' (n 13) 304. He argues that 'the "practices similar to slavery" are no different than "servitude" in their nature, but in law they have been divided, with the former forming part of general international law as manifest in the 1956 Supplementary Convention, the latter in international human rights law as "servitude" left undefined.' Similarly, during the negotiations of the Palermo Protocol, the United Nations High Commissioner for Human Rights commenting on one of the initial drafts noted that 'the term "servitude", when used in this context, should be understood to include practices that have been defined elsewhere as "contemporary forms of slavery", such as forced prostitution.' See Fourth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime Vienna, 28 June - 9 July 1999, Informal Note by the High Commissioner for Human Rights (A/AC.254/16, 1 June 1999) [12].

[28] *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 [78]–[80].

[29] *Siliadin v. France* (n 15) [124].

[30] *Van Droogenbroeck v Belgium* (n 28) [79]; *C.N. and V. v. France* (n 16) [90].

[31] *C.N. and V. v. France* (n 16) [91].

concept of servitude to fill any gap between the two'.[32] This seems to have created a hierarchy (of a descending level of severity) between the three explicitly prohibited practices.[33] Similarly, the Court of Appeal of England and Wales noticed that concepts enshrined in Article 4 ECHR form 'a hierarchy of denial of personal autonomy'.[34]

Forced Labour is defined in Article 2 (1) of ILO Convention No. 29 of 1930 as 'all work or service which is exacted from any person under the menace of any penalty, against the will of the person concerned and for which the said person has not offered himself voluntarily'. The Strasbourg Court has taken this definition as a starting point for its interpretation of Article 4 ECHR.[35] The Court, thus, clarified that there has to be work 'exacted ... under the menace of any penalty' and also performed against the will of the person concerned, that is work for which the said person 'has not offered himself voluntarily'.[36] When it comes to the notion of 'penalty', the Court considered that it is used in the broad sense, as confirmed by the use of the term 'any penalty'. Thus, it noted that the 'penalty' may go as far as physical violence or restraint, but it can also take subtler forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities when their employment status is illegal.[37] As to the second criteria, in deciding whether the applicant offered himself voluntarily for the work in question, the Court took into account, but did not give decisive weight, to the

[32] Holly Cullen, 'Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights' (2006) 6 Human Rights Law Review 585, 592.

[33] Stoyanova, 'Dancing on the Borders of Article 4 (n 2) 181.

[34] *R v SK* [2011] EWCA Crim. 1691 [24],[39].

[35] *Graziani-Weiss v Austria* (App 31950/06) (18 October 2011) [36]-[43]; *Stummer v Austria* [GC] (2012) 54 EHRR 11 [118].

[36] *Van der Mussele v Belgium* (n 17) [34].

[37] ECtHR Guide on Article 4 of the Convention, para 25. See also *CN and V v France* (n 16) [55]; ILO, 'The Cost of Coercion' (International Labour Conference 98th Session 2009).

element of the applicant's prior consent to the tasks required.[38] Rather, it is said that the Court would have regard to all the circumstances of the case in the light of the underlying objectives of Article 4 when deciding whether a service required to be performed falls within the prohibition of forced or compulsory labour.[39]

In addition to these three types of exploitation explicitly prohibited by Article 4 ECHR, the Palermo definition lists other practices among the end purposes of human trafficking including at least: the exploitation of the prostitution of others or other forms of sexual exploitation, practices similar to slavery, the removal of organs, forced begging, and the exploitation of criminal activities. The analysis so far has demonstrated that Article 4 is engaged first, when these practices were part of the human trafficking process, since the risk of exploitation in trafficking situations is real but it is, nevertheless, impossible to establish in advance what form it would take. As noted by the High Court of Australia in *The Queen v Tang*, 'those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy'.[40] Secondly, Article 4 is engaged in situations of non-trafficked slavery, servitude and forced labour in their current interpretations of the Court. However, it is not clear whether the remaining exploitative purposes engage this right in and of themselves, especially in the light of their open-ended taxonomy. The remaining part of this section examines those concepts more closely.

[38] *Van der Mussele v. Belgium* (n 17) [36]; *Graziani-Weiss v. Austria* (n 35) [40].

[39] ECtHR Guide on Article 4 of the Convention, para 29.

[40] *The Queen v Tang* [2008] HCA 39 (28 August 2008) [29].

Forced begging was added to the list of exploitative purposes by the EU Anti-Trafficking Directive, which considered it as a type of forced labour or services.[41] Furthermore, in the light of the recent initiatives to normalize sex work and classify it as a labour issue, rather than a crime issue,[42] 'the exploitation of the prostitution of others or other forms of sexual exploitation' may also be qualified as forced and compulsory work or services, especially since this exploitative purpose has not been defined in any international instrument.[43] Hence, both practices would engage Article 4 ECHR if they could satisfy *at least* the criteria of forced labour identified above.

Furthermore, when it comes to 'practices similar to slavery', these are defined in the 1956 Supplementary Convention to include debt-bondage, serfdom, servile marriage and child exploitation.[44] Allain argues that these practices represent, in fact, 'servitude'.[45] He claims that the reason why States avoided using the term 'servitude' in the 1956 Supplementary Convention, instead calling them 'institutions or practices similar to slavery' was because they 'were unwilling to go as far as the 1948 Universal

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[41] Anti-Trafficking Directive art 2(3). See also Iveta Cherneva, 'Human Trafficking for Begging' (2011) 17 Buffalo Human Rights Law Review 25.

[42] Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance and Redefinition* (Routledge 1998); Prabha Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* (Princeton University Press 2011).

[43] The Preamble to the recent Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 103rd ILC session, 11 Jun 2014) (entry into force: 09 Nov 2016) explicitly recognized that sexual exploitation falls within trafficking in persons for the purposes of forced or compulsory labour. See also ILO, *Forced Labour and Human Trafficking, Casebook of Court Decisions* (A Training Manual for Judges, Prosecutors and Legal Practitioners 2009) 9.

[44] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3 art 1.

[45] Allain, 'On the Curious Disappearance of Human Servitude from General International Law' (n 13) 312. In analysing the drafting history of Article 4 of the Universal Declaration of Human Rights and its impact on the negotiations of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, he points out that the latter instrument was originally drafted in 1954 as the Draft Supplementary Convention on Slavery and *Servitude.*

Declaration of Human Rights which stated that 'no one shall be held in servitude'.[46] Instead, States wished to act ‘progressively and as soon as possible’ to abolish servitude. That way, they were not to be seen as back-tracking on their pledge that no one should be held in servitude.[47]

Therefore, it appears that only the removal of organs, and exploitation of criminal activities, as exploitative practices specifically mentioned in the anti-trafficking instruments, could not be *straightforwardly* interpreted as either servitude or forced labour. Still, according to Van Krimpen, the Dutch case law considers ‘criminal exploitation’ as a type of ‘labour exploitation’, the term that she uses to describe all types of exploitation outside the sex industry and apart from forced organ removal.[48] Accordingly, it may well be argued that enforced criminality (‘criminal exploitation’) too would engage Article 4 ECHR if it satisfied the definitional criteria of forced labour (‘all work or service which is exacted from any person under the menace of any penalty, against the will of the person concerned and for which the said person has not offered himself voluntarily’.)

On the other hand, when it comes to trafficking for the purposes of organ removal, this thesis argues that such practices represent a unique form of maltreatment that do not share many similarities with the rest of exploitative practices enlisted in the trafficking definition. Thus, the recent UNODC study, which examines the concept of exploitation in the context of the Palermo Protocol finds that ‘”[r]emoval of organs” is

[46] ibid.

[47] ibid.

[48] Linda van Krimpen ‘The Interpretation and Implementation of Labour Exploitation in Dutch Case Law’ in Conny Rijken (ed), *Combating Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011) 496. However, see Section 5 of this Chapter for the critique of the use of the term ‘labour exploitation’.

unique among the stipulated forms of exploitation in that unlike slavery, servitude, exploitation of prostitution and sexual exploitation, it does not constitute a practice that may be considered inherently exploitative.'[49]Significantly, the first EU instrument on human trafficking, preceding the Anti-Trafficking Directive, deleted organ removal from its definition of trafficking. [50]

The analysis in Chapter 5 that examines the notion of exploitation identifies necessary and sufficient elements common to practices that reach the level of severity to trigger the right to be free from slavery, servitude or forced labour, distinguishing exploitation in the context of this right from other (often related) wrongs such as abuse, fraud or extortion. These elements include: a) abuse of power or vulnerability; b) excessive (disproportionate) gain acquired through the actions required from an exploited person; c) sustained action (the practice is taking place over a sustained period of time). In the light of these elements, it is clear that forced organ removal is materially different from other exploitative practices, all of which require subjecting people to an on-going treatment (conditions) rather than a one-off transaction/conduct. Thus, Kevin Bales notes that 'indeterminate temporal nature is one of the defining characteristics of the crime of slavery.'[51] Therefore, whereas *tactics* used to subjecting people to forced organ removal may well be the same as in cases of trafficking for other purposes, *conceptually*, it represents a distinctive practice that may well square better with the concepts of inhuman and degrading treatment than exploitation. Accordingly, Alice Edwards rightly notes that:

[49] UNODC, 'The Concept of Exploitation in The Trafficking in Persons Protocol' (2015) 8.

[50] Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), OJ L 203.

[51] Monti Narayan Datta and Kevin Bales, 'Slavery in Europe: Part 1, Estimating the Dark Figure' (2013) 35 Human Rights Quarterly 817, 821.

> [T]his all-inclusive framework provokes the question whether all forms of trafficking are of a similar nature and are therefore well-suited to conjoined regulation. What these different forms of trafficking have in common appears to be the method of transportation, clandestine movement, or the form of coercion or deception employed, rather than the type of exploitation or the causes of that trafficking.[52]

A possible explanation for this conceptual confusion could be found in differences between the criminal law responses to these practices and their human rights law counterpart. Therefore, whereas adequate criminal justice responses to these practices might be similar, their human rights reflection may well engage different human rights. The example of forced organ removal, thus, perfectly illustrates the conceptual opacity that surrounds the legal interpretation of human trafficking that was created first and foremost as a transnational crime.

Moreover, event though attempts have been made to distinguish between organ trafficking (or trafficking in organs)[53] and trafficking in persons for organ removal,[54] the recent Council of Europe Convention against Trafficking in Human Organs [55] does not seem to draw a bright line between the two. Namely, Article 4 (1) of the new Convention requires from states to criminalize 'the removal of human organs from living or deceased donors' when 'the removal is performed without the free,

[52] Alice Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration And Labor' (2007-2008) 36 (1) Denver Journal of International Law and Policy 9,

[53] Silke Meyer, 'Trafficking in Human Organs in Europe ' (2006) 14 (2) European Journal of Crime, Criminal Law and Criminal Justice 208; Nancy Scheper-Hughes, 'Illegal Organ Trade: Global Justice and the Traffic in Human Organs' in Rainer WG Gruessner and Enrico Benedetti (eds), *Living Donor Organ Transplantation* (McGraw-Hill 2008); UN.GIFT, *Human Trafficking for the Removal of Organs and Body Parts* (Background Paper, Vienna Forum to Fight Human Trafficking, 13-15 February 2008).

[54] Arthur Caplan and Others, 'Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs' (Joint Council of Europe/United Nations Study, 2009); Organization for Security and Co-operation in Europe (OSCE), 'Trafficking in Human Beings for Purposes of Organ Removal in the OSCE Region: Analysis and Findings' (2013).

[55] CETS 2016 (adopted 9 July 2014, not yet in force).

informed and specific consent of the living or deceased donor 'or when 'in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or comparable advantage'. Moreover, Article 7 (1) requires that states punish 'the solicitation and recruitment of an organ donor or a recipient, where carried out for financial gain or comparable advantage for the person soliciting or recruiting or for a third party.' Therefore, it is very difficult to imagine how trafficking for the purpose of organ removal is different from the removal of organs by 'the solicitation and recruitment' of the donor and 'without [his] free, informed and specific consent'. Thus, it was noted that 'while in theory, the differences between trafficking in persons and trafficking in human organs might be clear, the crimes might not be that easy to distinguish in practice.'[56]

In light of the forgoing analysis, it seems plausible to claim that the scope of Article 4 ECHR is determined by the reference either to the three explicitly prohibited conducts, or to human trafficking, as a process leading to exploitation. Stoyanova, on the other hand, argues that the Strasbourg Court should focus only on clarifying the scope and the thresholds of slavery, servitude and forced labour, which would effectively make the concept of human trafficking redundant.[57] Nevertheless, her proposed 'progressive interpretation' of slavery, servitude and forced labour obviously neglects the fact that human trafficking does not require that actual exploitation materialized. Instead, being in the situation of human trafficking prior to exploitation

[56] UNODC, 'Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal' (Vienna 2015) 19. See for example Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 'Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo', Draft Report, Dick Marty, Rapporteur, AS/Jur (2010) 46, 12 December 2010. Even though the report addresses the issue of 'illicit trafficking in human organs' what it describes fits more into the definition of trafficking in people for organ removal. Thus paragraphs 3 and 4 state that 'numerous concrete and convergent indications confirm' that people were held prisoner in secret places of detention in northern Albania, were subjected to inhuman and degrading treatment, before ultimately disappearing and that organs were removed from some of them to be taken abroad for transplantation.

[57] Stoyanova, 'Dancing on the Borders of Article 4 (n 2) 185.

creates a real and immediate risk of its materializing and thus, warrants intervention. Clearly, not only actual but also potential exploitation warrants state intervention required by Article 4 ECHR, and situations of human trafficking fall neatly into that space.

However, it remains unclear why, if all exploitative practices were to be qualified as slavery, servitude or forced labour, the Palermo definition did not use only these. A possible answer to this could be found in the fact that the definition does not distinguish between *examples* of exploitative practices and their *legal manifestations* in human rights law. Accordingly, examples of exploitative practices such as forced begging, forced marriage or enforced criminality need to satisfy the definitional criteria of slavery, servitude and forced labour (or human trafficking including acts and means elements) to fall within Article 4 ECHR. On the other hand, nothing stops states from creating as many different *criminal offences* to cover all these diverse practices and ensure that the prohibitions required by Article 4 are effectively safeguarded in national law. Again, the problem with human trafficking and related practices is that academics, lawmakers and other practitioners often do not recognize their dual legal nature - as crimes as well as human rights violations.

In sum, non-trafficked exploitative practices included in the Palermo definition need to satisfy the definitional criteria of slavery, servitude or forced labour to trigger the protection offered by Article 4 ECHR. On the other hand, these practices may well be framed on a national level as distinct criminal offences and also addressed within other legal frameworks.

Before engaging with a conceptual inquiry into the notion of exploitation in the context of practices prohibited by Article 4 ECHR, which is presented in Chapter 5, the remaining two sections explore a worrying trend of rebranding different exploitative practices under 'umbrella terms' creating 'meaningless hyperbole'[58] that cannot be relied upon in a court of law to hold states responsible. The thesis labels these as slippery slopes and identifies two that are legally and conceptually most problematic. They are 'modern slavery slippery slope' and 'forced labour slippery slope'.

4. The 'modern slavery' slippery slope

The term 'modern slavery' has been often used as an 'umbrella term' to describe the entirety of diverse exploitative practices documented in the modern era.[59] For example, the Anti-Slavery International warns that slavery did not end with abolition in the 19th century, but continues today in one form or another in every country in the world. It lists the following practices as forms of this 'contemporary slavery': bonded labour, child slavery, early and forced marriage, forced labour, descent-based slavery, trafficking.[60] Similarly, on the occasion of the release of its 2012 Trafficking in Persons Report, the US Secretary of State, Hilary Clinton asserted that 'as many as 27 million people around the world are victims of modern slavery, what we sometimes call

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[58] Allain, 'Definition of Slavery in International Law' (n 13) 241.

[59] Koettl, 'Human Trafficking, Modern Day Slavery, and Economic Exploitation' (n 8) 5. See also US Department of State, 'The 2011 Trafficking in Persons Report' (2011); Sandhya Drew, 'Human Trafficking: A Modern Form of Slavery?' (2002) 4 European Human Rights Law Review 481; Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (OUP 2008).

[60] Anti-Slavery International, 'What is Modern Slavery?' <http://www.antislavery.org/english/slavery_today/what_is_modern_slavery.aspx.> accessed 3 November 2015. See also David Weissbrodt and Anti-Slavery International, Abolishing Slavery and its Contemporary Forms (OHCHR, HR/PUB/02/4, 2002).

trafficking in persons.'[61] Whereas the language of modern slavery regularly permeates political and popular debates,[62] even some academics are not prone to this slippery slope.[63] What is more, the UK has recently passed a 'historic law to end modern slavery',[64] the term that according to the legislator was comprised of practices of slavery, servitude and forced or compulsory labour and human trafficking.[65]

Even the International Labour Organisation somewhat inconspicuously switched from 'forced labour' to 'modern slavery' discourse.[66] It is noted on their webpage:

> As the concepts of forced labour, human trafficking and slavery are closely related the ILO data initiative has been designed as a multi-stakeholder process involving all relevant organisations to agree on definitions for statistical purposes. In this context, the chapeau of "modern slavery" is used to cover all those practices.'[67]

On the other hand, some authors have questioned the usefulness of this new discourse.[68] Dottridge thus observes that:

> In the UN and elsewhere, there were plenty of complaints that the term 'contemporary forms of slavery' created almost as much confusion as before,

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[61] Hillary Rodham Clinton, 'Remarks at release of The 2012 Trafficking in Persons Report' (19 June 2012) <http://www.state.gov/secretary/rm/2012/06/193368.htm> accessed 27 June 2012.

[62] <http://www.theguardian.com/world/slavery> accessed 10 May 2015.

[63] Scarpa, (n 59); James Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 (1) Virginia Journal of International Law 1, 5.

[64] UK Home Office, Karen Bradley MP and The Rt Hon Theresa May MP, 'A landmark Bill to help eradicate modern slavery received Royal Assent today' (26 March 2015) <https://www.gov.uk/government/news/historic-law-to-end-modern-slavery-passed> accessed 30 March 2015.

[65] Modern Slavery Act 2015.

[66] ILO Data Initiative on Modern Slavery, 'Better Data for Better Policies' (27 April 2015) <http://www.ilo.org/global/topics/forced-labour/publications/WCMS_364025/lang--en/index.htm> accessed February 2016.

[67] ibid.

[68] Plant, 'Modern Slavery' (n 4).

> especially when the UN human rights specialists involved started hearing evidence about problems as diverse as apartheid and incest.[69]

He rightly questions whether invoking the power of the word ‘slavery’, albeit good for campaigners, is the right course for governments and the statute book.[70]

This section argues that the term ‘modern slavery’, first, obscures an important distinction between human trafficking on the one hand, and exploitative practices that result from it, on the other. Secondly, a more problematic aspect of using this term lies in the fact that it is insuficiently precise to provide criteria for delimiting the scope of Article 4 ECHR.

As already noted in Chapter 3, a distinction must be made between human trafficking as a *process* leading to exploitation, and different exploitative practices that may or may not stem from human trafficking. Thus, whereas human trafficking, as a *process* is complete without its end purpose - exploitation - being materialized, practices of slavery, servitude, forced labour and other examples of exploitation listed as the end purposes of human trafficking, represent holding people in exploitative *conditions* regardless of how they have arrived into such conditions.[71] This has been rightly acknowledged by the recent report of the EU Fundamental Rights Agency (FRA) on severe labour exploitation, which, despite its numerous conceptual flaws, notices that:

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[69] Mike Dottridge, ‘Some Implications of Using the Term “Modern slavery”’ (The Trafficking Research Project, 28 February 2014) <https://thetraffickingresearchproject.wordpress.com/2014/02/28/some-implications-of-using-the-term-modern-slavery/> accessed 5 May 2015 (citing David Weissbrodt and Anti-Slavery International, ‘Abolishing Slavery and its Contemporary Forms’ (Office of the United Nations High Commissioner for Human Rights, HR/PUB/02/4))

[70] ibid.

[71] Klara Skrivankova uses the term ‘situation of exploitation’. Klara Skrivankova, ‘Between Decent Work and Forced Labour Exploitation: Examining the Continuum of Exploitation’ (Joseph Rowentree Foundation 2010).

> There are different ways for people to end up in situations of severe labour exploitation. A person may by his or her own initiative move to another country and consequently be exploited. Other persons may have relied on the services of recruitment agencies, or may have been trafficked.[72]

Whereas some authors claim that ‘the whole process is exploitative, although this is not always evident, especially at the initial stages of the process’,[73] the thesis argues that in situations when exploitation has not yet started, a trafficked person is facing a real and imminent risk of exploitation. This, consequently, warrants a state intervention, as a matter of human rights law. Obscuring this distinction may lead to offering protection only to people who have in fact been exploited, whether such exploitation resulted from human trafficking or not. This is evident in the 2015 Modern Slavery Act with respect to the non-punishment principle.[74] Jansson is, thus, wrong to argue that ‘since trafficking is considered a modern form of slavery, perhaps it is better if the provisions on trafficking and slavery could be merged into one (where only one or both terms are used). The suggested provision would then focus on the exploitation of the victim.’[75]

Secondly, the definition of human trafficking lists exploitative purposes in an open-ended way without offering criteria for inclusion. As a result, using the the term ‘modern slavery’ to describe all such practices results in an ambiguity as to the definite scope of Article 4 ECHR. What is more, the term seemingly puts all exploitative practices on equal footing, whereas their hierarchy is recognized by both Strasbourg

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[72] European Union Agency for Fundamental Rights (FRA), ‘Severe Labour Exploitation: Workers Moving Within or Into the European Union: States’ Obligations and Victims’ Rights’ (2015).

[73] Skrivankova, ‘Between Decent Work and Forced Labour Exploitation’ (n 71) 8.

[74] Modern Slavery Act 2015, pt 5 s 45.

[75] Dominka Borg Jansson, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons* (Brill Nijhoff, 2014) 341.

and national courts.[76] Evidently, the language of modern slavery is conceptually and legally problematic.

5. The 'forced labour' slippery slope

The analysis in Section 3 revealed that the majority of exploitative purposes listed in the trafficking definition (except 'practices similar to slavery', which are said to fall under the notion of servitude, and 'the removal of organs'), could be interpreted as forced labour without major *conceptual* problems.[77] However, the thesis argues that while focusing on exploitation in the labour context is important, it also creates the 'forced labour slippery slope', which carries a risk of diluting and even broadening the scope of Article 4 ECHR.

Importantly, the 'forced labour slippery slope' should be distinguished from Chuang's 'forced labour creep'.[78] Namely, she describes the forced labour creep as a practice of sweeping all forced labour practices under 'trafficking', which 'though doctrinally problematic', has permitted application of a labor paradigm to anti-trafficking analysis. She argues that:

> In so doing, it has added depth to otherwise shallow understandings of how coercion operates in practice, to underscore how coercion is produced by the structures governing labor relations and global labor markets. Moreover, even the superficial labeling of trafficking as related to 'labor' (as opposed to, as previously, just sex) has opened the door to an array of workers' rights groups, unions, labor scholars to anti-trafficking field, enabling fruitful collaboration

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[76] See text with notes 33 and 34.

[77] However, Choi-Fitzpatrick argues that 'the forced labor model's clearest strength— the protection of workers—is actually its Achilles heel. While forced labor may appear to be the strongest candidate for an organizing model for antislavery efforts, its focus on dignifying individual efforts with the term "labor" is unacceptable to an important contingent of the movement', which includes those who do not accept prostitution as labour. Austin Choi-Fitzpatrick, 'From Rescue to Representation: A Human Rights Approach to the Contemporary Anti-Slavery Movement' (2015) Journal of Human Rights 486, 492.

[78] Chuang, 'Exploitation Creep' (n 5).

> between labor and human rights advocates at the grassroots level. Through such collaboration and joint advocacy, human rights and labor advocates have brought long-overdue attention to the underlying structures (e.g. visa requirements) that leave workers vulnerable to extreme exploitation.[79]

Thus, she concludes that forced labour creep 'holds deep transformative potential that may actually be worth its doctrinal trade-offs'.[80]

However, the forced labour slippery slope identified in this thesis speaks of the opposite practice – of a tendency to interpret all exploitative practices as forced labour or, even more problematically, as 'labour exploitation', a term not defined in international law.

The impulse for 'forced labour slippery slope' came, unsurprisingly, from the International Labour Organization (ILO) that views forced labour and slavery as the larger issue, with human trafficking as 'a smaller and purely transnational subset of forced labour.'[81] Thus, at its opening web page, the ILO states that 'forced labour takes different forms, including debt bondage, trafficking and other forms of modern slavery',[82] suggesting that trafficking represents but one form of forced labour.[83] Thus, while recognizing elsewhere on their webpage that '[f]orced labour, contemporary forms of slavery, debt bondage and human trafficking are closely related terms though not identical in a legal sense',[84] the ILO claims that:

> [T]he definition of forced labour is sufficiently broad to encompass most forms of slavery, with the possible exception of a form of slavery consisting of

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[79] ibid 35.

[80] ibid 7.

[81] Koettl, 'Human Trafficking, Modern Day Slavery, and Economic Exploitation' (n 8) 6.

[82] <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> accessed 15 February 2016.

[83] See also Nicola Jägers and Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations' (2014) 12 (1) Northwestern Journal of International Human Rights 47, 49.

[84] ILO, 'The Meanings of Forced Labour' (10 March 2014) <http://www.ilo.org/global/topics/forced-labour/news/WCMS_237569/lang--en/index.htm> accessed 15 February 2016.

> ownership in which the slave is not under any obligation to perform work or services. Similarly, the definition of forced labour covers most forms of trafficking, including sexual exploitation (since it is a form of labour), but would probably not extend to forced organ donation.[85]

These statements are problematic for two main reasons. First, similarly to the 'modern slavery' slippery slope, the ILO statement that 'the definition of forced labour is sufficiently broad to encompass most forms of slavery, (...) [and] most forms of trafficking' disregards the important distinction between the process (human trafficking) and the resulting condition (exploitation).[86]

Secondly, and more importantly, these statements reveal a tendency to also confuse the exploitative conditions alone and absorb them by the 'umbrella' terms.

Nonetheless, even though the narrative of forced labour rightly highlights the importance of a labour paradigm in the debates on human trafficking and exploitation, the main criticism to the 'forced labour slippery slope' is that it somewhat 'smuggles in' the term 'labour exploitation', which risks obscuring the boundaries of Article 4 ECHR. Hence, it is argued that it allows reading into it practices that may not reach the required level of severity thus compromising its protective ambit.

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[85] ILO, *Forced Labour and Human Trafficking, Casebook of Court Decisions* (A Training Manual for Judges, Prosecutors and Legal Practitioners 2009) 9. Similarly ILO, Report for discussion at the Tripartite Meeting of Experts concerning the possible adoption of an ILO instrument to supplement the Forced Labour Convention, 1930 (No.29) (Geneva, 11–15 February 2013) para 17, claims that 'For the purposes of this report, and consistent with the comments of the Committee of Experts, the term "trafficking" is understood as being encompassed by the definition of forced or compulsory labour in Convention No. 29.'

[86] Recently, UNODC however, noticed that '[p]ractitioners found it difficult to distinguish "forced labour" as a stand-alone concept or offence from "trafficking for forced labour". This is understandable as the concept of forced labour necessarily includes a means element (use of force/coercion) and implies one or more of the stipulated acts. In practice there appears to be little or no difference between the two concepts, which means that cases of forced labour can readily be prosecuted as trafficking for the purpose of forced labour.' UNODC, 'The Concept of Exploitation in The Trafficking in Persons Protocol' (2015) 109. However, this only stands for those cases where exploitation (in the form of forced labour) did in fact materialise.

Namely, there have been increasing references to 'trafficking for forced labour and labour exploitation'[87] or 'severe labour exploitation'[88] that neglect the fact that, unlike the definition of forced labour that has a clear basis in international law, the term 'labour exploitation' has no such grounding. In fact, it is astonishing that a series of publications engage with the term 'labour exploitation' without an attempt to define it.[89] For example, in her analysis of the Dutch case law on 'human trafficking for the purpose of labour exploitation', Linda van Krimpen tells us that her discussion uses 'the international term "labour exploitation" - meaning all types of exploitation outside the sex industry and apart from forced organ removal.'[90] However, she does not identify any international instrument that provides a *legal* definition of this term. As Costello rightly notices, 'care should be taken to distinguish between the political term "unfree labour" and the legal term "forced labour".'[91] What is more, the drafters of the Palermo Protocol expressly rejected the proposal to include the term 'labour

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[87] Anniina Jokinen, Natalia Ollus and Kauko Aromaa (eds), *Trafficking for Forced Labour and Labour Exploitation in Finland, Poland and Estonia* (European Institute for Crime Prevention and Control, Helsinki, Publication Series No. 68, 2011).

[88] FRA, 'Severe Labour Exploitation' (n 72).

[89] ILO, 'Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement, Special Action Programme to Combat Forced Labour' (2005); Organisation for Security and Cooperation in Europe (OSCE), 'A Summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region' (2006); Jill E.B. Coster van Voorhout, 'Human Trafficking for Labour Exploitation: Interpreting the Crime' (2007) 3 (2) Utrecht Law Review 44; ILO, *Forced Labour and Human Trafficking, Casebook of Court Decisions* (A Training Manual for Judges, Prosecutors and Legal Practitioners 2009) 9; ILO, 'Concealed Chains: Labour Exploitation and Chinese Migrants in Europe' (Special Action Programme to Combat Forced Labour, Geneva, 2010); Skrivankova, 'Between Decent Work and Forced Labour Exploitation' (n 71); ILO, Report for discussion at the Tripartite Meeting of Experts concerning the possible adoption of an ILO instrument to supplement the Forced Labour Convention, 1930 (No.29) (Geneva, 11─15 February 2013) FRA, 'Severe Labour Exploitation' (n 72); Jägers and Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations' (n 83).

[90] Van Krimpen 'The Interpretation and Implementation of Labour Exploitation in Dutch Case Law' (n 48) 496.

[91] Mark Freedland and Cathryn Costello, 'Migrants at Work and the Division of Labour Law' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014) 19. See also Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg, Cathryn Costello, Anne C L Davies, Jeremias Prassl (eds), Autonomy of Labour Law (Hart Publishing 2015) 198-199.

exploitation' among the explicitly listed forms of exploitation in the trafficking definition.[92] Still, terms forced labour and labour exploitation are often used interchangeably,[93] in spite of the ILO's warning that 'clear guidance is needed, to determine the often thin dividing line between labour exploitation and forced labour.'[94]

Illustrative of the absence of such a dividing line is the recent recent FRA report on 'severe labour exploitation'.[95] As already noticed, neither the term 'exploitation', nor 'labour exploitation' or 'severe labour exploitation' have an agreed international definition. Interestingly, the online ILO Thesaurus - 'a compilation of more than 4000 terms relating to the world of work',[96] does not include the word 'exploitation'. Still, according to the FRA report:

> The term 'exploitation' denotes work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal regulations, concerning in particular remuneration, working hours, leave entitlements, health and safety standards and decent treatment.
>
> The term 'severe' refers to forms of exploitation of workers which are criminal under the legislation of the EU Member State where the exploitation occurs. Hence, severe labour exploitation includes *coercive forms of exploitation, such as slavery, servitude, forced or compulsory labour and trafficking* (Article 5 of the Fundamental Rights Charter), as well as *severe exploitation within the framework of an employment relationship*, in particular employment situations covered by Article 9 (1) of the Employer Sanctions Directive.

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[92] UNODC, 'The Concept of "Exploitation" in the Trafficking In Persons Protocol' (2015) 7.

[93] Mijke Houwerzijl and Conny Rijken explain that explain that 'in this report we will more often use the term labour exploitation than forced labour. With Skrikankova, we define forced labour as an extreme form of labour exploitation' but they overlook the fact that unlike forced labour, labour exploitation is not a legally defined term. Mijke Houwerzijl and Conny Rijken, 'Responses to Forced Labour in the EU: Country Report of the Netherlands' (JRF, 5 June 2013) 2.

[94] ILO, 'From Labour Exploitation to Forced labour: A Fine Line' (11 May 2009) <http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_106207/lang--en/index.htm> accessed 5 May 2016.

[95] FRA, 'Severe Labour Exploitation' (n 72).

[96] <http://www.ilo.org/thesaurus/default.asp>accessed 10 July 2015.

The report claims that various forms of labour exploitation 'form a continuum of severity of abuses spanning from slavery to relatively less serious forms of exploitation which fall short of constituting severe labour exploitation and a criminal offence.'[97] While using the metaphor of continuum may well be useful for describing various levels of severity of exploitative practices,[98] the method applied in the report to draw a line between severe and other forms of labour exploitation is dubious. Namely, the report uses criminal law of Member States as a starting point in reaching such a conclusion rather than setting a definition that would require from Member States to criminalize practices that fall within it.[99] Hence, the Report implies that what constitutes severe labour exploitation in one EU Member State may not in another, which represents one of its most obvious flaws.

However, the report does seem to provide a gist of what would qualify as 'severe labour exploitation.' Namely, in addition to 'coercive forms of exploitation, such as slavery, servitude, forced or compulsory labour and trafficking' contained in Article 5 of the Fundamental Rights Charter, the term is said to include situations referred to by Article 9(1)(c) of the Employer Sanctions Directive - the employment of a worker in an irregular situation under 'particularly exploitative working conditions.'[100] According to the Employer Sanctions Directive, this includes 'working conditions, (...) where there is a striking disproportion compared with the terms of

[97] FRA, 'Severe Labour Exploitation' (n 72) 34.

[98] Skrivankova, 'Between Decent Work and Forced Labour Exploitation' (n 71); Costello, 'Migrants and Forced Labour' (n 91).

[99] FRA, 'Severe Labour Exploitation' (n 72) 12. The report states that '[t]he term "severe labour exploitation" refers to all forms of labour exploitation that are criminal under the legislation of the EU Member State where the exploitation occurs. Hence, what constitutes severe labour exploitation in one EU Member State may not in another.'

[100] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (Employer Sanctions Directive).

employment of legally employed workers which, for example, affects workers' health and safety, and which offends against human dignity'.[101] This wording is said to reflect Article 31 of the EU Charter of Fundamental Rights, according to which workers have a right to working conditions, which respect their health, safety and dignity.

The FRA report, ultimately, stresses that:

> The term 'severe labour exploitation' denotes work situations that deviate significantly from standard – fair and just – working conditions as defined by labour laws and other binding legal regulations concerning, in particular, remuneration, working hours, leave entitlements, health and safety standards, and decent, respectful treatment of workers. Hence, they violate a worker's right under Article 31 of the EU Charter of Fundamental Rights to fair and just working conditions, and they are thus criminalised.[102]

While the FRA Report should be commended for its efforts to shine light on the important question of 'human dignity of workers moving to another country in the hope of making a living, but ending up in situations of severe exploitation,'[103] it nevertheless, has serious flaws that further obscure, rather than clarify, the debates on exploitation. Several objections could be raised in regard of its approach.

First, the last sentence of the above quoted statement is ambiguous and may mean two things. It could imply, first, that Member States are in fact required to criminalize significant deviation from standard working conditions in breach of Article 31 of the EU Charter. Alternatively, it could mean that only those deviations that a Member State chooses to criminalize would represent cases 'severe labour exploitation', which is a much more problematic proposition, as explained above.

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[101] Employer Sanctions Directive art 2 (i).

[102] FRA, 'Severe Labour Exploitation' (n 72) 13.

[103] ibid 11.

Secondly, through a deliberate use of the term 'severe labour exploitation', the report seems to have engaged in a transformative exercise in order to illuminate exploitative practices that go beyond concepts covered by Article 4 ECHR and the human trafficking definition, which the Report labels as 'coercive forms of exploitation'. Thus, in addition to these 'most severe forms of labour exploitation'[104] contained in Article 5 of the Fundamental Rights Charter (that mirrors Article 4 ECHR), severe labour exploitation is also said to include 'severe exploitation within the framework of an employment relationship, in particular employment situations covered by Article 9 (1) of the Employer Sanctions Directive.' Evidently, the FRA is attempting to expand the focus to include 'particularly exploitative working conditions' as defined by Article 9(1)(c) of the Employer Sanctions Directive, perhaps because of an assumption that these may not be interpreted as either type of 'coercive forms of exploitation' covered by Article 5 EU Charter and Article 4 ECHR. Nevertheless, while this transformative exercise is not objectionable *per se*, as long as it leaves the boundaries of Article 4 ECHR intact, the approach used in the report, which focuses exclusively on employment relations, may have an inadvertent effect of obscuring rather than clarifying important conceptual and legal questions. This leads to the third criticism.

Namely, using the term 'severe labour exploitation' as an 'umbrella term' for most, if not all, forms of exploitation is problematic because it may lead to a conclusion that exploitation only takes place in the context of employment relations.[105] The focus

[104] ibid 34. Similarly, the earlier OSCE report argued that, according to the Palermo Protocol, '[l]abour exploitation is stated to include at minimum: forced labour or services, slavery or similar practices and servitude.' OSCE, A Summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region (Vienna 2006) 6.

[105] Employment Sanctions Directive is concerned with 'employment situations'. The employment situation is an autonomous concept of EU law and refers to any instance where a person performs services for and under the direction of another person in return for remuneration. See Recital 7 of the

on the labour context in the report is certainly legitimate since the problem of exploitative conditions of migrant workers is pertinent.[106] However, an attempt to describe various forms of exploitation purely in the terms of labour exploitation risks narrowing the debate in the similar way as it was previously the case with trafficking for sexual exploitation. Thus, Baerbel Uhl notes that:

> The focus on 'labor exploitation' as one form of human trafficking seems to exclude the phenomenon of trafficking into the sex sector as the recent conference agendas and reports indicate. They predominantly refer to forced labor or slavery like practices in economic sectors such as agriculture, construction sites and textile industry.[107]

She suggests instead that the current discussion on exploitation should cease to distinguish between labor and sexual exploitation because it is 'misleading' for two reasons: 'Firstly, labor standards should apply to all sectors and, secondly, crimes against the sexual, physical and psychological integrity of a person should not be marginalized within a framework that focuses on economic dimensions as the language on 'exploitation' suggests.'[108]

In addition, Alice Edwards notices that:

> One danger of focusing too narrowly on labor aspects of trafficking is that it can result in conceptions of trafficking as principally a question of forced or exploitative labor, rather than other forms of abuses, such as sexual violence, multiple rapes, torture, cruel, inhuman or degrading treatment, arbitrary detention, or slavery. A labor framework is particularly problematic in relation to trafficking for forced prostitution or sexual slavery, and moreover, where it affects children. A labor framework may neither adequately reflect or incorporate the range of harms that occur during the trafficking cycle, nor be

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Employment Sanctions Directive. See also Case C-66/85 *Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 2121.

[106] Costello, 'Migrants and Forced Labour' (n 91).

[107] Baerbel Heide Uhl, 'Terminology Matters: What do we Mean when we Refer to 'Exploitation'? (24 February 2011) <http://rightswork.org/2011/02/terminology-matters-what-do-we-mean-when-we-refer-to-exploitation%E2%80%99/> accessed 20 July 2012.

[108] ibid.

> suitable to all forms of trafficking, including because demand is distinct between trafficking for sexual slavery of women and children, compared with trafficking to offset labor shortages. This is not to suggest that labor exploitation is not a serious human rights issue, but rather to point out that there are different gradations or types of harm involved in different forms of trafficking.[109]

Therefore, it is important to acknowledge that exploitation often takes place in circumstances that could hardly be qualified as ‘employment relations’, which the FRA report is focused on, especially since a person can be exploited even in the context of the ‘work’ that is illegal or even criminal.[110]

However, it is worth noticing that the approach taken in the FRA report is not entirely novel. Thus, Skrivankova has previously engaged with the notion ‘labour exploitation’ using the concept of continuum to describe the complexity of the exploitative environment that brings the concept of decent work, as the desired standard, and forced labour into juxtaposition.[111] Hence, labour exploitation is presented as a continuum ranging from the positive extremity of decent work[112] to the negative extremity of forced labour (most serious form of labour exploitation). Nevertheless, Skrivankova was careful to stress that in the absence of a clear definition of exploitation it is difficult to draw the line between exploitation in terms of violation of labour rights and extreme exploitation amounting to forced labour. Moreover,

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[109] Edwards, ‘Traffic in Human Beings’ (n 52) 48-49.

[110] Ryszard Piotrowicz and Liliana Sorrentino, ’Human Trafficking and the Emergence of the Non-Punishment Principle’ (2016) Human Rights Law Review (forthcoming).

[111] Skrivankova, ‘Between Decent Work and Forced Labour Exploitation’ (n 71). See also Costello, ‘Migrants and Forced Labour’ (n 91).

[112] According to the FRA report, ‘decent work’ ‘refers to fair and just working conditions, as protected under Article 31 of the EU Charter of Fundamental Rights’. FRA, ‘Severe Labour Exploitation’ (n 72) 9 (Glossary).

defining labour exploitation as ‘work under conditions that violate international and European labour standards, as related to labour and/or human rights’[113] she admits that:

> [T]he concept is not designed to provide an accurate legal definition, but to understand the individual reality, identify the most appropriate remedy and to probe structural causes and underlying problems that allow for various forms of exploitation to occur.[114]

Thus, the sole purpose of her conceptual exercise seems to be to show that approaching situations of forced labour solely from the perspective of criminal law is rather limiting. This is by no means a controversial claim and many have pointed out to the need for ‘integrated and coordinated action’ in various fields including labour law, external relations, migration, development policies, economics, gender issues and equality.[115] Hence, she argues that of a myriad of situations on the axis between decent work and forced labour, some will fall under the scope of the criminal law, while others will fall under the realm of labour law. Accordingly, in the light of her qualification of labour exploitation as ‘work under conditions that violate international and European labour standards’, the threshold for the intervention is reached the moment when some of these standards have been infringed. That does not mean, nevertheless, that all these actions are required as a matter of human rights law, let alone Article 4 ECHR.

Therefore, while this and the FRA’s study may well be useful for developing an overarching strategy to tackle the problem of below-standard working conditions, it

[113] Skrivankova, ‘Between Decent Work and Forced Labour Exploitation’ (n 71) 18.

[114] ibid 21.

[115] Conny Rijken and Eefje de Volder, ‘The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings: A Call on the EU to Take THB-Sensitive Action in Relevant Areas of Law’ (2009) 25(1) Connecticut Journal of International Law 49, 53. See also Judy Fudge, ‘The Dangerous Appeal of the Modern Slavery Paradigm’ (*Open Democracy*, 25 March 2015) <https://www.opendemocracy.net/beyondslavery/judy-fudge/dangerous-appeal-of-modern-slavery-paradigm> accessed 15 August 2015; Cullen, ‘Siliadin v France’ (n 32) 590; Maggy Lee, *Trafficking and Global Crime Control* (Sage 2011) 36; Jonathan Todres,’ Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking’ (2011) 33 Michigan Journal of International Law 53; Chuang, ‘Exploitation Creep’ (n 5); Choi-Fitzpatrick, ‘From Rescue to Representation’ (n 77).

is questionable whether such a broadly defined term ‘labour exploitation’ has any relevance in the context of international human rights law, and the right to be free from slavery, which is, arguably, reserved for the most serious abuses.

Moreover, Skrivankova acknowledges that even in the most extreme situations that qualify as forced labour, the regulatory framework that could in theory provide a multiplicity of remedies to those subject to aggravated exploitation does not in fact apply to those most vulnerable because of their often irregular immigration status. This is the point where Skrivankova may have been rather pessimistic.

Namely, the UK Supreme Court recently upheld the claim for the statutory tort of discrimination committed in the course of dismissal and ruled that that the rights of victims and the interests of preventing human trafficking should outbalance the public policy concerns that underpin the common law doctrine of illegality.[116] The *Hounga* case concerned a young Nigerian woman, Miss Hounga, who came to the UK under the arrangements made by the family of the respondent, Mrs Allen. She was a minor at the time of her travel and it was agreed that she would live and work within the respondent’s household in return for bed and board, and that she would be paid 50 pounds per month in addition. She was also promised to be sent to school in the UK. The original visa for her travel was based on the false information that she would be visiting a family member, and upon its expiry after six months, her stay and work in the UK was illegal, of which, the court established, she was fully aware. Following years of mistreatment and abuse from the respondent, Miss Hounga was dismissed from her ‘job’ and thrown out of the house, which prompted the original claims to the Employment Tribunal on her behalf. It was established that she was never enrolled in a school and, although she was provided with bed and board, she was never paid £50 per

[116] *Hounga v Allen & Anor* [2014] UKSC 47 (30 July 2014).

month or any wages at all. The appeal to the Supreme Court proceeded on the basis that, by dismissing her, the respondent discriminated against Miss Hounga in that on racial grounds, namely on ground of nationality, she treated Miss Hounga less favourably than she would have treated others. The Court noted that:

> [O]f the various claims and complaints made by Miss Hounga against Mrs Allen in the tribunal, the only one to reach this court is the complaint of discrimination in relation to her dismissal. This particular complaint may well be said not to capture the gravamen of Miss Hounga's case against Mrs Allen. (...) But, while the facts upon which the present appeal is founded may not represent Miss Hounga's essential case against Mrs Allen, the clean legal issue remains: was the Court of Appeal correct to hold that the illegality defence defeated the complaint of discrimination? [117]

In essence, the Court was engaged with the question whether in the light of the fact that it was unlawful (and indeed a criminal offence under section 24(1)(b)(ii) of the Immigration Act 1971) for Miss Hounga to enter into the contract of employment with Mrs Allen, the defence of illegality in principle precluded her from enforcing it.[118]

The Supreme Court rejected the proposition that the illegality of the contract of employment defeated the complaint of discrimination, and that to uphold such complaint would be to condone the illegality. It held that ‘the decision of the Court of Appeal to uphold Mrs Allen's defence of illegality to her complaint runs strikingly counter to the prominent strain of current public policy against trafficking and in favour of the protection of its victims.’[119] Importantly, while no preceding tribunal established conclusively that human trafficking had taken place, the Supreme Court found that the respondent’s ‘cruel misuse of Miss Hounga's perceived vulnerability arising out of the illegality’, by making threats about the consequences of her exposure to the authorities,

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[117] ibid [23].

[118] ibid [24]

[119] ibid [52].

represented 'an indicator that Miss Hounga was the victim of forced labour'.[120] It also ruled that 'it is hard to resist the conclusion that Mrs Allen was guilty of trafficking within the meaning of the definition in the Palermo Protocol. '[121]

Moreover, in spite of their misplaced view of Miss Hounga's liability for immigration offences, judges held that there was insufficiently close connection between these immigration offences and her claims for the statutory tort of discrimination, 'for the former merely provided the setting or context in which that tort was committed, and to allow her to recover for that tort would not amount to the court condoning what it otherwise condemns.'[122]

Still, whereas her original claim before the Employment Tribunal contained both the contract claims and the discrimination complaints[123], the Supreme Court only discussed the latter, albeit mainly due to the fact that the appellant did not challenge the conclusion of the Employment tribunal, upheld by the appeal tribunal, that the defence of illegality indeed precluded Miss Hounga's claim for unfair dismissal. Equally, there was no challenge to the dismissal on that same basis of her claim for unpaid wages even though the majority noted that 'the considerations of public policy (...) might conceivably have yielded a different conclusion.'[124]

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[120] ibid.

[121] ibid [40]

[122] ibid [67].

[123] The former included claims for unfair dismissal, breach of contract, unpaid wages and holiday pay. The latter were brought under the Race Relations Act 1976 ("the Act") and comprised complaints of racial discrimination both in the form of harassment prior to Miss Hounga's dismissal contrary to section 3A of the Act and in relation to the dismissal itself contrary to section 4(2)(c) of the Act.

[124] *Hounga v Allen & Anor* [2014] UKSC 47 (30 July 2014) [24].

The minority, nevertheless, considered correct the rejection of her claim to recover for unfair dismissal, breach of contract, unpaid wages and holiday pay by the Employment Tribunal, given that such claims were said to depend on a lawfully enforceable contract of employment and 'her whole employment was forbidden and illegal.'[125]

This case sets an important precedent by establishing that the rights of victims and the interests of preventing human trafficking should outbalance the public policy concerns that underpin the common law doctrine of illegality.[126] Nevertheless, it is highly unlikely that this would provide any protection to victims of trafficking for enforced criminality, which can under no circumstances qualify as employment, although it may well constitute 'forced services' within the concept of forced labour.

6. Conclusion

The discussion in this section highlighted conceptual problems surrounding the definition of human trafficking and its application in the context of human rights law. In particular, it pointed out to the attempts to use 'umbrella terms' that create slippery slopes, which risk further diluting the boundaries of Article 4 ECHR. Thus, it is argued that the term 'modern slavery' confused human trafficking, as a process aimed at exploitation, and various exploitative practices as conditions that may or may not result

[125] ibid [59].

[126] Some authors are still warry of the real change this would create for illegal workers protection. See Alan Bogg and Tania Novitz, 'Links between Individual Employment Law and Collective Labour Law: Their Implications for Migrant Workers', in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) Chapter 19.

from human trafficking. Furthermore, 'modern slavery' is legally unprecise a term and therefore, useless in the context of human rights law since it does not set clear criteria as to what practices reach the level of severity to be included in Article 4 ECHR. Furthermore, the discussion on the 'forced labour slippery slope' demonstrated that whereas the ILO attempted to label most exploitative practices as forced labour, as defined by the 1930 Forced Labour Convention, the approach taken by the European Fundamental Rights Agency goes further by qualifying all exploitation as (severe) labour exploitation. This is said to skew attention to an important, but not the only aspect of serious exploitative practices. Moreover, the term 'severe labour exploitation' is over-inclusive for the purpose of Article 4 ECHR since it covers practices that ought to be tackled by other means.

The chapter, thus, established that in order to reach the threshold of Article 4 ECHR, different exploitative practices listed in the open-ended trafficking definition need to satisfy the definitional criteria of either human trafficking or non-trafficked slavery, servitude and forced labour. The chapter pointed out to the possible confusion in the trafficking definition between *examples* of exploitative practices and their *legal qualifications* in different legal contexts. According to this view, states may *criminalise* separately examples of exploitative practices such as forced begging, forced marriage or enforced criminality, alongside slavery, servitude and forced labour, in order to ensure that the prohibitions required by Article 4 ECHR are effectively safeguarded in national law. However, when it comes to the human rights analysis, the definitional criteria of slavery, servitude and forced labour need to be met to engage state responsibility under Article 4 ECHR. It is argued that the problem with human trafficking and related practices is that academics, lawmakers and other practitioners often do not recognize their dual nature - as crimes as well as human rights violations.

Furthermore, while clarifying the scope of Article 4 ECHR is clearly needed for practical reasons, it is equally important to examine its conceptual grounds. Thus, the following chapter engages with the notion of exploitation that serves as a common denominator for diverse exploitative practices prohibited by this right. The notion of exploitation is, arguably, instrumental in explaining why human trafficking falls within the scope of the right to be free from slavery, servitude and forced labour. Hence, even though the practice regularly offends against a number of rights, violations of other rights are often incidental and usually instrumental.

Finally, it is important to stress that, being committed by non-state actors, human trafficking engages Article 4 ECHR by means of positive duties owed by states, which are analysed in Chapters 6 and 7. Accordingly, while legal qualification of a specific conduct is relevant for determining whether the right is engaged and responsibility of a state triggered, the scope of state responsibility for such conducts is determined by its positive obligations. McGregor, thus, reminds of the need 'to refocus efforts on the development of the state's duty to prevent and protect individuals from violence by non-state actors rather than the characterization of the underlying acts alone.'[127]

[127] Lorna Mc Gregor, 'Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings' (2014) 36 Human Rights Quarterly 210, 216.

CHAPTER 5: The Meaning of Exploitation within the Right to be Free from Slavery, Servitude and Forced Labour

1. Introduction

Chapter 3 questioned the reasons why human trafficking engages the right to be free from slavery, servitude and forced labour right. It was argued that the concept of exploitation figures as a plausible connection between diverse practices covered by the broad definition of human trafficking, which incorporate slavery, servitude and forced labour among others. Thus, it was noted noted that 'the very purpose and core of trafficking, is exploitation.'[1] Similarly, the discussion paper commissioned by the World Bank argues that exploitation represents 'the overarching theme that subsumes all forms of human trafficking, slavery, forced labour, bonded labour, child labour, forced prostitution, economic exploitation, and so on'.[2]

However, a definition of exploitation does not exist in international law. It was noted that:

> Of all the concepts now on national and international agendas, certainly the most difficult is that of exploitation. It has never been defined in international law. However, it is a broad concept that underpins the notion of 'purpose' in

[1] UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, 'Key Concepts of the Trafficking in Persons Protocol, with a Focus on the United Nations Office on Drugs and Crime Issue Papers on Abuse of a position of Vulnerability, Consent and Exploitation' (25 August 2015) CTOC/COP/WG.4/2015/4, para 20.

[2] Johannes Koettl, 'Human Trafficking, Modern Day Slavery, and Economic Exploitation' (World Bank, Discussion Paper No. 0911, May 2009)

> the definitional article of the Trafficking Protocol. All human trafficking, whether for sexual or labour purposes, is for the ‘purpose of exploitation’.[3]

Instead of defining the concept of exploitation itself, the widely accepted Palermo definition of human trafficking lists *examples* of exploitation. However, what something *refers to* is distinct from what it *means*. Thus, Wolff pointed out to a notable difference between how a word is to be used and how it is to be understood.[4] According to his view:

> To give a complete explanation of how a term is to be used is to fix the reference: it is to give an infallible way of picking out that object or those objects to which the term refers. In itself doing this may convey little understanding, or only partial understanding. Another task is to give, or we might better say explain, the meaning of the term.[5]

The Palermo Protocol’s ‘definition’ of exploitation, unfortunately, fails to deliver on both accounts. Not only does it fail to offer any particular insight into the nature and meaning of exploitation itself, but it fails to provide a ‘reference-fixing’ definition as ‘a way of picking out all and only cases of where exploitation takes place’.[6] In other words, the open-ended list of exploitative practices does not provide an obvious way of selecting other acts that may be classified as such in future. Accordingly, in the absence of a definition of the term ‘exploitation’ in international law, the Palermo definition of trafficking is said to lack terminological clarity.[7]

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[3] Roger Plant, ‘Modern Slavery: the Concepts and Their Practical Implications’ (ILO Working Paper, 5 February 2015) 3.

[4] Saul Kripke, *Naming and Necessity* (Oxford: Basil Blackwell, 1980), 53–58.

[5] Jonathan Wolff ,‘Marx and Exploitation’ (1999) 3 (2) The Journal of Ethics 105, 108.

[6] ibid 118.

[7] Bärbel Heide Uhl, ‘Lost in implementation? Human Rights Rhetoric and Violations — A Critical Review of Current European Anti-trafficking Policies’, 2010 (2) Security and Human Rights 125.

The UN Working Group on Trafficking in Persons thus noted that 'it is important to clearly define either the term exploitation or individual forms of exploitation in order to ensure uniformity of interpretation'.[8] In order to address the perceived gap, this chapter offers the first extensive analysis of the notion of exploitation - the concept that has been used as a backdrop to all discussions on trafficking and slavery and that explains why human trafficking falls under this right even though the practice may infringe upon numerous others.

Notably, the analysis demonstrates that exploitation is a broad concept and exploitation that is prohibited by the right to be free from slavery, servitude and forced labour represents only those practices at a certain level of severity that require an action *as a matter of this right* (and Article 4 ECHR more specifically). This, however, does not preclude addressing other 'less extreme but still very real forms of exploitation'[9] using other human rights and other legal and policy instruments.

The notion of exploitation is examined by surveying the international legal discourse as well as philosophical discussions that engage with the idea. The analysis identifies three elements common to practices that reach the level of severity to trigger the right to be free from slavery, servitude or forced labour. These include: a) abuse of power or vulnerability; b) excessive (disproportionate) gain acquired through the actions required from an exploited person; c) sustained action (the practice is taking place over a prolonged period of time). The chapter shows that these elements distinguish exploitation in the context of Article 4 ECHR from other (often related) wrongs such as abuse, fraud or extortion.

[8] Working Group on Trafficking in Persons, 'Key concepts of the Trafficking in Persons Protocol' (n 1) para 23.

[9] Mark Freedland and Cathryn Costello, 'Migrants at Work and the Division of Labour Law' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 12.

2. Exploitation in general, philosophical and legal discourse

2.1. Exploitation in international legal discourse

In everyday discourse, it is frequently claimed that some act, practice, or transaction is exploitative, and the concept of exploitation is typically invoked without much analysis or argument, 'as if its meaning and moral force were self-evident.'[10] Thus, Susan Marks rightly wonders:

> When activists invoke international law to challenge exploitation, when lawyers advise on rights and duties regarding exploitation under international law, and when academics discuss the theme of exploitation in international legal writing, what is it that they have in mind?[11]

Her analysis is focused on comparing the Marx's account of exploitation with different references to exploitation in international law. Her analysis of international legal instruments thus points to references to exploitation in both the 'positive or neutral sense' (the exploitation of oil and gas, the exploitation of fish stocks and forests, the exploitation of patents, trade marks and copyright, etc.) and in a 'pejorative sense', to name a problem and to secure the redress of something considered bad.[12]

In the latter sense, Marks notices that exploitation features most prominently in international legal provisions concerning children,[13] instruments associated with

[10] Alan Wertheimer and Matt Zwolinski, 'Exploitation' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition) <http://plato.stanford.edu/archives/sum2015/entries/exploitation/> accessed 20 November 2015.

[11] Susan Marks, 'Exploitation as an International Legal Concept' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008) 293.

[12] See also Judy Pearsall and Bill Trumble (eds), *Oxford English Reference Dictionary* (2nd edn, Oxford University Press 1996).

[13] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 10(3); Convention on the Rights of the Child (adopted 20

human trafficking,[14] and in the work of International Labour Organisation (ILO) focused on preventing the exploitation of different categories of vulnerable workers (indigenous people,[15] people with disabilities,[16] migrants,[17] etc.). Interestingly, she notes that '[a] final category of international norms and standards which is widely understood to touch on issues of exploitation, even if (...) *the term is not actually used,* has to do with slavery, forced labour and pay and conditions at work.'[18]

Nevertheless, in attempting to outline an answer to the question 'What do people engaged with international law talk about when they talk about exploitation?', she concludes that 'ultimately no available meaning is foreclosed.'[19] Thus, she argues that a new kind of engagement with the problem of exploitation needs to be developed in international law.

November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 19(1); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227 art 3(1).

[14] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 21 March 1950, entered into force 25 July 1951) 96 UNTS 271 art 1; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 6; Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol) art 3; Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (Anti-Trafficking Convention), art 4.

[15] She notes that '[t]he earliest ILO instrument in which the term 'exploitation' does actually appear is concerned with indigenous peoples.' See ILO Recommendation R104: Indigenous and Tribal Populations Recommendation (40th Conference Session Geneva 26 June 1957) para 36(g).

[16] ILO Recommendation R168: Vocational Rehabilitation and Employment (Disabled Persons) Recommendation (69th Conference Session Geneva 20 Jun 1983) para. 11(m).

[17] ILO Recommendation R169: Employment Policy (Supplementary Provisions) Recommendation (70th Conference Session Geneva (26 Jun 1984) para. 43(b). Also, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

[18] Marks, 'Exploitation as an International Legal Concept' (n 11) 298 (emphasis added).

[19] ibid 299.

When it comes to the concept of exploitation in the context of human trafficking specifically, the United Nations Office on Drugs and Crime (UNODC) has recently published a study on the *concept* of exploitation in the Palermo Protocol.[20] The paper represents the third in a series of studies aimed at addressing '[t]he risk that important concepts contained in the [Palermo] Protocol are not clearly understood and, therefore, are not consistently implemented and applied.'[21] This comprehensive study includes an overview and analysis of the international legal and policy framework around exploitation with a particular focus on the Trafficking in Persons Protocol, a survey of national law and practice of States representing different regions and legal traditions, and a guidance on policy and practice for further consideration.

The paper notes that the concept of exploitation as it appears in the Palermo Protocol did not arise in a vacuum with a range of disciplines – from law to philosophy, from economics to politics – having long been occupied with examining and seeking to establish what it means, or should mean. However, the study concludes that 'this has not resulted in agreement and the concept remains ambiguous.'[22]

Disappointingly, despite its promising title, the study is overly focused on explaining the examples of exploitation, at the expense of elucidating the elements of the concept itself, for which, according to the study, 'there was no apparent appetite' to be defined during the negotiations of the Palermo Protocol. Instead, the paper claims that '[t]he forms of exploitation listed in the Trafficking in Persons Protocol are an integral part of its substantive content.'[23] Consequently, it argues that the substance and

[20] UNODC, 'The Concept of Exploitation in The Trafficking in Persons Protocol' (2015).

[21] ibid 6.

[22] ibid 21.

[23] ibid 27.

scope of these forms of exploitation, taken together, ought to provide the minimum parameters of the notion of exploitation. While this is an interesting proposal, the study does not proceed to distil those essential elements that characterise all the examples of exploitation that it had meticulously described.

Thus, the only reference to the meaning of the concept itself states that exploitation, as it relates to trafficking, 'appears to be broadly consistent with its general meaning of one person taking unfair advantage of another person, their vulnerability or their situation.'[24] Furthermore, while the UNODC study notes that Member States were concerned 'to not unduly narrow the exploitative purpose of trafficking' by providing a non-exhausting list of exploitative purposes, it is acknowledged that there are limits in terms of the potential for expansion. These limits 'may potentially include a threshold of seriousness that operates to prevent the expansion of the concept of trafficking to less serious forms of exploitation such as labour law infractions.'[25] However, the paper concludes that the Palermo Protocol does not clearly establish any such threshold. Similarly, Gallagher argues that 'most activists and scholars appear to accept the validity of some kind of a "seriousness" threshold'[26] but does not provide any reference to support her claim. Thus, in the absence of the severity threshold, the open-ended list of exploitative practices from the Palermo definition, does not provide any guidance for defining the concept itself.

Furthermore, following a review of national legislation, which includes 12 national jurisdictions worldwide, the UNODC report concludes that only Canada offers

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[24] ibid 39.

[25] ibid 8.

[26] Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 49.

a stand-alone definition of exploitation in its legislation.[27] Thus, the remaining surveyed States follow the approach taken by the Palermo Protocol: offering a list of exploitative forms, rather than defining exploitation itself and the stipulated forms of exploitation are shown to vary from country to country.

Therefore, one of the 'key findings' of the study is '[t]he absence of clear definitions in the law (both of exploitation and of stipulated forms of exploitation) (...), providing individuals with a measure of interpretative discretion that can lead to inconsistency.'[28] Unfortunately, while the study is useful in elucidating these problems, it does very little to remedy the situation by offering specific guidance as to how the concept ought to be framed in international law and national legislation. Rather, the study questions whether there could be a universal understanding of what constitutes exploitation for purposes of trafficking and whether it would be possible to provide guidance that could be useful for all States and national contexts in the light of substantial differences (economic, cultural, etc.) between States.

However, it may well be that such a universal guidance needs not establish definite rules on when a situation would constitute exploitation. Instead, it could identify the required elements of the concept that are to be specified and clarified on a national level. As Section 3 of this chapter shows, certain elements of the concept of exploitation in the context of human trafficking may be discernible from the exploitative practices that constitute examples of exploitation within the human trafficking definition. Still, while international law and human rights law, in particular, may be well-placed to articulate such elements in the attempt to define the concept of

[27]UNODC, 'The Concept of Exploitation in The Trafficking in Persons Protocol' (2015) 98-103.

[28] ibid 11.

exploitation, it is for national legislatures and judiciaries to give them a specific meaning in a domestic context.

The following sub-sections provide an account of the philosophical discussions of the concept of exploitation in order to set a scene for outlining its elements in the context of human trafficking and the right to be free from slavery, servitude and forced labour, which are presented in Section 3.

2.2. Moralized and non-moralized exploitation

As already noted, the term exploitation does not necessarily carry a negative connotation in everyday discourse. Thus, it may simply refer to 'the action of making use of and benefiting from resources' as indicated in the Oxford dictionaries.[29] However, it may also mean taking the unfair advantage of a situation or a person.[30]

Wood has blamed philosophers who reflect on the concept of exploitation for providing a 'moralized' account of exploitation because they tend to follow the practice of dictionaries, distinguishing a 'non-moral' sense of exploitation from a 'moral' sense, and taking the latter to involve the idea of making use of someone or something unjustly or unethically. Hence, he claims that since these philosophers suppose that only the latter or 'pejorative' meaning of the term is of interest for social critics, they provide a so called 'moralized' account of exploitation that 'already has wrongfulness

[29] Oxford English Dictionary <http://www.oxforddictionaries.com/definition/english/exploitation> accessed 30 June 2015.

[30] ibid.

or moral badness built into its very meaning.'[31] On the contrary, Wood suggests that, in spite of a popular belief, exploitation is 'not unjust' by definition, although it 'is nearly always a bad thing.'[32] He further claims that a non-moralized account of exploitation would not necessarily preclude using the term pejoratively. It would merely deny that the moral wrongness was built into the very meaning of the term 'exploitation'. Accordingly, Wood argues that there is no semantic distinction between 'pejorative' and 'non-pejorative' senses of exploitation, 'any more than the words seizure and payment mean something different when the seizure is wrongful or the payment involves a breach of ethics.'[33] What is more, he claims that a moralized account of exploitation results in labelling actions 'wrongful because [they are] exploitative'.[34]

This is an important question for the discussion of the right to be free from slavery, servitude and forced labour, since the thesis argues that the wrong underlying this right is that of exploitation. Thus, if exploitation as a term proves to be neutral, this may *potentially* undermine the whole argument. However, that may not necessarily be the case. Even though exploitation as a general term does not necessarily carry a negative connotation, exploitation of a certain kind or quality may well do so.

In examining Wood's idea that the moral wrongness of the term 'is not to be assumed *a priori'*, it is important to specify that Wood appears to claim that a proper way to define exploitation would be to simply describe an *action*, without attaching a moral significance to it. Thus, he argues that 'exploitation consists in the exploiter's using something about the person for the exploiter's ends by playing on some weakness

[31] Allen W Wood, 'Exploitation' (1995) (12) 2 Social Philosophy and Policy 136, 137.

[32] ibid 136.

[33] ibid 147.

[34] ibid 141.

or vulnerability in that person.'[35] This 'basic idea behind all exploitation involving human objects' is said to apply equally to cases where exploitation is commonly considered unfair, wrongful, or unethical and to cases where it is not. Accordingly, he claims that nobody thinks it is wrong or unethical for a chess player to exploit her opponent's inattention in order to win the game. Therefore, he wonders why we should suppose that exploitation has a special *meaning* when applied to cases of injustice or wrongdoing:

> Terms like 'appropriation', 'transaction', 'seizure', or 'agreement' apply sometimes to acts, which are wrongful and sometimes to acts which are not, but we do not suppose that the word 'transaction' has a different meaning in the case of wrongful or unethical transactions from the one it has in the case of rightful and proper transactions.[36]

However, Feinberg rightly claims that it is precisely the element of 'wrongfulness' which distinguishes the term exploitation from 'non-exploitative utilization.'[37]

Furthermore, Wood himself admits that the fact that exploitation is a morally neutral concept does not prevent its pejorative use. In addition, he acknowledges that even on his own account of exploitation, which 'applies equally to cases where exploitation is commonly considered unfair, wrongful, or unethical and to cases where it is not', exploitation would, nevertheless, be 'morally objectionable', not because the meaning of the word itself, but because of moral convictions which most of us hold.[38] Thus, he contends that while there is no semantic distinction between 'pejorative' and 'non-pejorative' senses of exploitation '[w]hat there may be is a distinction between

[35] ibid 147.

[36] ibid 138.

[37] Joel Feinberg, *Harmless Wrongdoing* (Oxford University Press 19S8) 199,192.

[38] Wood, 'Exploitation' (n 31) 152.

some cases in which exploitation is (or is taken to be) morally innocent, and other cases in which, *on the basis of substantive moral principles* exploitation is taken to be morally objectionable.'[39] These substantive moral principles that he claims most of us hold, and that make exploitation objectionable, are based on the moral belief 'that when people are weak or vulnerable, others should not use their weakness or seek to benefit from it, but instead should seek to help them and rescue them from their bad situation.'[40] Thus, '[I]t is an affront to people's human dignity to have their weaknesses used, and shameful to use the weaknesses of others.'[41] This moral belief, he submits, is widely shared, and it is why the term 'exploitation' seems to refer to something bad, unfair, or unethical, which he argues, has nothing to do with the meaning of the word itself.

However, what distinguishes (morally innocent) exploitation of a chess player from (morally objectionable) exploitation of a child in a sweatshop (both of which satisfying Wood's semantically neutral definition of exploitation as 'using something about the person for the exploiter's ends by playing on some weakness or vulnerability in that person'), is the understanding of weakness or vulnerability that are being used for the exploiter's ends, and also the manner in which they are being used. Hence, it turns out that the account of exploitation ultimately depends on the meaning of the elements used to describe and define it. Further refining and specifying these terms does not undermine the definition itself. Therefore, an action may be rightly labelled wrongful 'because exploitative' provided that the conditions that qualify an action as

[39] ibid 147.

[40] ibid 150.

[41] ibid 158.

exploitative are clearly established. This of course, is a matter of choice within each society.

To prove this, one may use Wood's own example. Namely, in developing his argument, Wood uses the difference between the terms 'murder' and 'homicide' making an argument that those who use a moralized account of exploitation consider it to be akin to murder i.e. wrongful homicide. Thus, a mere using of the term already labels an action as wrongful. However, the reason why the term 'murder' carries a negative connotation is because we *chose* to attach additional conditions/elements that make an action of taking another's life wrongful, and therefore, criminal. Thus, we may well distinguish between wrongful exploitation and benign exploitation by outlining different conditions attached to those two situations. The problem appears to be, as outlined above, that Wood sees exploitation as a *technical* term to describe an action, similar to using the phrase 'causing the death of another human being' to describe murder. Therefore, nothing prevents using the account of wrongful exploitation, which outlines specific features that make such acts morally problematic, as an underlying wrong of the right to be free from slavery.

Furthermore, while many philosophers use dictionary definitions in order to specify the meaning of a concept in question, Wolf notes that dictionary definitions standardly have two related limitations. First, they generally only give enough information to 'get started' with the word. Secondly, he notes that 'a dictionary does not provide a philosophical analysis of a concept, in the sense of specifying a complete set of necessary and sufficient conditions for the application of the term.'[42]

[42] Wolff ,'Marx and Exploitation' (n 5) 108.

Therefore, the concept of exploitation lacks clearly defined necessary and sufficient conditions to govern its application.[43] Moreover, it is argued that, in addition to establishing the truth conditions for an exploitation claim, a theory of exploitation needs to consider the moral force of exploitation. In other words, what, if anything, should be done in response? Thus, it was noted that, '[t]he wrongness of exploitation does not dictate the way in which these moral questions should be answered.'[44] The following two sections examine philosophers' views on necessary and sufficient conditions for the application of the term and on its moral force.

2.3. Philosophical discussions of the necessary and sufficient elements of the concept of exploitation

Philosophical discussions of the concept of exploitation are mainly associated with Marxist thought.[45] In essence, Marxist theory sees exploitation as a structural feature of capitalism where capital accumulation depends on labour exploitation, which is a function of the inequalities of bargaining power that arise from class divisions.[46] There are variations of this account but they generally engage with the question of the extent to which, and the ways in which, one section of society had prospered at the expense of another. Susan Marks notes that in other accounts of exploitation, the focus is on forms of exploitation that are associated with other social divisions, such as those based on

[43] John Lawrence Hill, 'Exploitation' (1994) 79 (3) Cornell Law Review 631, 635.

[44] Wertheimer and Zwolinski, 'Exploitation' (n 10).

[45] Allen Wood, 'The Marxian Critique of Justice' (1972) 1 (3) Philosophy and Public Affairs 244; Nancy Holmstrom, 'Exploitation' (1977) 7 (2) Canadian Journal of Philosophy 353; Wolff ,'Marx and Exploitation' (n 5) 105.

[46] Marks, 'Exploitation as an International Legal Concept' (n 11) 281.

gender, race and ethnicity. Thus, she uses the example of the South Africa's Truth and Reconciliation Commissions and their alleged failure to grapple with apartheid as a system for using some people as a means for securing the advantage of others.[47]

However, the focus of this thesis is not on ‘structural’ or ‘systemic’ exploitation of one section of the society by another. Instead, the object of analysis are those relations that take place on a micro level – between private individuals (‘horizontal’ exploitation). Still, Susan Marks rightly questions whether these examples of exploitation that recently surfaced in the debates in international law could truly materialize without being embedded in larger structural formations, arguing that ‘despite the very different context in which we study capitalism today, Marx’s account of exploitation still remains relevant.’[48] Nonetheless, it has been argued that the moral core of the Marxist view of exploitation is not in fact unique to Marxism. Namely, the Marxist account is said to employ ‘the ordinary notion that one party exploits another when it gets unfair and undeserved benefits from its transactions or relationships.’[49]

Apart from the Marxist tradition, contemporary political and moral philosophy is said to have been largely unconcerned with exploitation. Wertheimer, therefore, notes that:

> John Rawls’s *A Theory of Justice* has virtually nothing to say about exploitation, as such. Nozick discusses the Marxian account of exploitation in *Anarchy, State, and Utopia*, but, not surprisingly, only to reject it as a basis for interfering with (most) transaction. (…) Although the American Society for Political and Legal Philosophy’s annual NOMOS volumes (...) have covered

[47] ibid.

[48] ibid 289.

[49] Wertheimer and Zwolinski, ‘Exploitation’ (n 10).

> many of the important concepts in political philosophy, there is no volume on exploitation.[50]

In spite of this criticism, there has been a sizeable amount of literature on exploitation - both of non-Marxist and Marxist orientation - that may be useful for identifying a plausible account of the elements of exploitation in the context of the right to be free from slavery.

Different philosophical accounts of exploitation are not mutually exclusive and they overlap in many regards. Thus, these different accounts tend to accept that exploitation involves, at minimum, some *gain* for the exploiter ,[51] which is sometimes called a benefit,[52] or advantage.[53] Furthermore, they generally agree that such a gain is obtained by 'using' another party's *vulnerability* or *weakness*.[54]

What they disagree on, however, is whether such weakness or vulnerability are simply taken advantage of (the opportunistic use),[55] or it was generated by the exploiter using coercion. Some accounts, thus, insist on the coercion element claiming that the exploited are forced to benefit others,[56] whereas others claim that coercion and exploitation are two different wrongs.[57] Thus, Wolff holds that '[e]xploitation is

[50] Alan Wertheimer, *Exploitation* (Princeton University Press 1995) 6-7.

[51] Robert Mayer, 'What's Wrong with Exploitation?' (2007) 24 (2) Journal of Applied Philosophy 137.

[52] Mikhail Valdman, 'A Theory of Wrongful Exploitation' (2009) 9 (6) Philosophers' Imprint 1.

[53] Wertheimer, *Exploitation* (n 50).

[54] See Mayer, 'What's Wrong with Exploitation?' (n 51); Robert E Goodin, 'Exploiting a Situation and Exploiting a Person', in Andrew Reeve, Modern Theories of Exploitation (Sage Publications 1987); Wood, 'The Marxian Critique of Justice'(n 46).

[55] Mayer, 'What's Wrong with Exploitation?' (n 51).

[56] Allen Buchanan, 'Exploitation, Alienation, and Injustice', (1979) 9 (1) Canadian Journal of Philosophy 121; Jeffrey Reiman, 'Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen', (1987) 16 (1) Philosophy & Public Affairs 3; George Panichas, 'Vampires, Werewolves, and Economic Exploitation', (1981) 7 (2) Social Theory and Practice 125; Justin Schwartz, 'What's Wrong with Exploitation?', (1995) 29 (2) Noûs 158.

[57] Mayer, 'What's Wrong with Exploitation?' (n 51).

typically a matter of using another person's vulnerability to your own advantage. Coercion, on the other hand, typically proceeds by first creating another's vulnerability and then exploiting it. Accordingly, not all exploitation is coercion.'[58] Similarly, Wood explains that:

> Perhaps it will be said that people in such desperate straits are forced or coerced into making such deals. (...) This is often true in the sense that the exploited have *no acceptable alternative* to the arrangement under which they are exploited. But it does not follow that the exploiters themselves are coercing the exploited. (This is true only if the exploiters themselves are the ones who put the exploited in their vulnerable situation).[59]

Some authors require at least a defect in the quality of the consent by using fraud, manipulation or other means while others maintain that exploitation can be fully voluntary.[60] Wertheimer, nevertheless, notes that it might be objected that perfectly rational and (otherwise) uncoerced choices are not appropriately consensual if made under conditions of desperation or from an inequality of bargaining power, or under unjust background conditions.[61] However, he refuses to classify such transactions as nonconsensual, because 'we would still have to contrast the cases that are nonconsensual because of coercion or fraud and those that are allegedly nonconsensual in other ways.'[62]

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[58] Wolff ,'Marx and Exploitation' (n 5) 11.

[59] Wood, 'Exploitation' (n 31) 149 (emphasis added).

[60] Wertheimer and Zwolinski, 'Exploitation' (n 10).

[61] ibid.

[62] ibid.

Furthermore, in the course of taking advantage of other's vulnerability or weakness, the exploited person[63] may well be harmed. While no one disputes that possibility, philosophers disagree on whether such harm is a *necessary* element of wrongful exploitation. Munzer, for example, thinks that '[p]ersons are exploited if (1) others secure a benefit by (2) using them as a tool or resource so as (3) to cause them serious harm.'[64] Others tend to disagree claiming that moral wrongness of harmful exploitation is not difficult to explain. Thus, it is argued that:

> It is trivially true that it is wrong for A to gain from an action that unjustifiably harms or coerces B. And even a libertarian will grant that some harmful exploitation may be legitimately prohibited by the state, if only because it is harmful (or rights violating) rather than because it is exploitative.[65]

Instead, it is more intriguing to examine those instances where exploitation is mutually beneficial, where an exploited person too gains from the transaction or an act. In fact, Wertheimer claims that it is precisely the fact that an 'exploitee' has a lot to gain from the exploitative relation that he wants to be exploited.[66] Similarly, Wood argues that:

> Since being benefited and being exploited are often merely two sides of the same coin, and people may often be in dire need of the benefits in question, they can often be eager to be exploited. The point is that it goes along with being vulnerable, or in a weak bargaining position, that you should have a lot

[63] While many scholars use the term 'exploitee', the thesis argues that this is wrong, since the term resembles the term 'employee', which may have an inadvertent effect of normalizing exploitation.

[64] Stephen R Munzer, *A Theory of Property* (CUP 1990) 171.

[65] Wertheimer and Zwolinski, 'Exploitation' (n 10).

[66] Alan Wertheimer, 'Two Questions about Surrogacy and Exploitation' (1992) 21 (3) Philosophy and Public Affairs 211, 223. See also Valdman, 'A Theory of Wrongful Exploitation' (n 53) 3. Both philosophers use the Antidote case to demonstrate that wrongful exploitation may well be consensual and benefit the exploitee. In sum, the Antidote case goes as follows: Person B is bitten by a rare poisonous snake while hiking in a remote forest. His death is imminent. Fortunately, another hiker, A, happens by and offers to sell B the antidote. Though it retails for $10, A insists that he will accept no less than $20,000. Since B would rather lose his money than his life, he accepts A's offer. This is called a 'paradigm case' of wrongful exploitation where, nevertheless, the exchange between A and B was consensual and mutually beneficial. It was mutually beneficial because both parties benefited relative to the non-transaction baseline or relative to how they would have fared had they not transacted with each other. Both Wertheimer and Valdman agree that the transaction is consensual because both parties knowingly and freely accepted the deal's terms.

> to gain from being taken advantage of, and a lot to lose if you cannot find someone able and willing to take advantage of your vulnerability.[67]

This could hardly be less true for types of behaviour examined in the context of human trafficking and the right to be free from slavery, servitude and forced labour. Thus, according to the above views, while exploitation may, and often does, harm an exploited person, it may not necessarily do so. Still, even such ‘mutually beneficial’ exploitation where both parties are better off than before, may *at the same time* be harmful. Thus, exploitation of criminal activities in the course of human trafficking may well leave the exploitee better off than before. But the imminent risk of conviction, as well as the circumstances in which it takes place, make the practice nevertheless harmful.

Moreover, an understanding of what constitutes harm differs among philosophers. Thus, those who invoke the Kantian notion that one wrongfully exploits when one treats another instrumentally or merely as a means, think that the instrumental use of one person is a distinctive harm on its own.[68] Mayer, on the other hand, sees ‘a failure to benefit others as some norm of fairness requires’ as the fundamental wrong of exploitation in every case. Accordingly, ‘as an exploiter, the master inflicts losses and thus *harms* by failing to benefit his victim as fairness requires.’[69]

In sum, while philosophical accounts of exploitation are not settled on the question of whether harm and coercion are necessary elements of wrongful

[67] Wood, ‘Exploitation’ (n 31) 148-149.

[68] According to Kant, ‘To exploit someone is to treat that person purely as a means to your own ends, and not as an “end in themself”’. Immanuel Kant, ‘Groundwork of the Metaphysics of Morals’ in *The Moral Law*, H Paton (transl) (Hutchinson 1948) 90–1. See also Allen W Wood, ‘What Is Kantian Ethics?’ in Allen W Wood (ed), *Rethinking the Western Tradition* (Yale University Press 2002); Jonathan Wolff ,‘Marx and Exploitation’ (n 5).

[69] Mayer, ‘What’s Wrong with Exploitation?’ (n 51) 142.

exploitation, most of them agree that the exploitative practice represents a wrongful gain for the exploiter by taking advantage of some weakness or vulnerability on the part of an exploited person. Thus, even if the 'transaction' does not leave an exploited person worse off than before, it leaves him worse off than he *might* or *ought to be* judging from the standpoint of fairness.[70] Mayer, thus, uses an example of a sweatshop noticing that while sweated labourer is better off than before, he is still insufficiently compensated. What fairness requires is, however, difficult to discern. Mayer admits that 'conceptions of desert drive this concept and make exploitation the most contentious form of wrongful gain.'[71] It has been said that '[t]here will (...) be as many competing conceptions of exploitation as theories of what persons owe to each other by way of fair treatment'.[72]

Exploitation, then, according to Mayer, becomes 'a thoroughly politicized concept' because contestable ideas about what fairness requires determine whether taking unfair advantage is recognized or not. He gives an example of Aristotle who did not view slavery as exploitative because he did not think slaves suffered a loss from the standpoint of fairness. Today, however, we tend to view slavery as 'paradigmatically exploitative because slaves are thought to receive much less than they deserve.'[73]

Valdman offers a plausible account of the wrongful exploitation that explains both a wrongful gain for the exploiter and weakness or vulnerability of an exploited person that has been taken advantage of, which are the elements on which most

[70] Wertheimer, *Exploitation* (n 50); Mayer, 'What's Wrong with Exploitation?' (n 51).

[71] Mayer, 'What's Wrong with Exploitation?' (n 51) 144.

[72] Richard Arneson, 'Exploitation', in Lawrence Becker and Charlotte Becker (eds) *Encyclopedia of Ethics* (Garland Publishing 1992) 350.

[73] Mayer, 'What's Wrong with Exploitation?' (n 52) 144.

philosophers agree. According to his account, the deepest wrong of exploitation lies in 'our moral obligation not to extract excessive benefits from people who cannot, or cannot reasonably, refuse our offers.'[74] On this view, there are two necessary conditions of an exploitation claim: first, that one extracts excessive benefits, and second, that these benefits are extracted from someone who is unable to reasonably refuse an offer. His account has been used to frame the notion of exploitation in the context of Article 4 ECHR outlined in Section of this chapter.

As for the latter condition – being unable to reasonably refuse an exploitative offer - he emphasizes the difference between 'being wrongly exploited' and 'let oneself being used' where the former refers to situations where a person has little control over her actions and choices. On the contrary, 'when a rational person has acceptable options but nevertheless allows someone to extract excessive benefits from her, she may be a victim of exploitation but she is also complicit in her victimhood.'[75] Thus, he claims:

> To wrongly exploit someone is to extract excessive benefits from him — it is to use the fact that his back is to the wall, so to speak, to get him to accept lopsided and outrageous terms of exchange.[76]

Nevertheless, Valdman doubts that a clear demarcation exists between being wrongly exploited and letting oneself be used. Whether someone has 'acceptable options' is dependant on one's perceptions and not only on objective conditions and it is not clear which of these two Valdman has in mind.

[74] Valdman, 'A Theory of Wrongful Exploitation' (n 53) 1.

[75] ibid 10.

[76] ibid 13.

In elaborating the first element - the extraction of excessive benefits – Valdman argues that extracted benefits are excessive ‘insofar as they deviate from the benefits we would expect A to receive were he transacting with someone who was rational, informed, and could reasonably refuse his offer.’[77] However, he admits that ‘[b]ecause it is not always possible to tell whether extracted benefits are excessive or whether one is in no position to refuse an offer, my theory will not always deliver a clear verdict.’[78]

In principle, Valdman’s theory may be useful for setting the parameters of the concept of exploitation underpinning the practices prohibited by the right to be free from slavery, but it requires further refinement to be suitable for practical application. Thus, it requires specifying conditions in which people ‘cannot, or cannot reasonably, refuse our offers’ as well as clarifying the meaning of ‘excessive’.

This section provided an overview of philosophical discussions of the concept of exploitation and its defining elements. These discussions identified the following as distinctive elements of the concept of exploitation that represent its wrong: use of another, harm, coercion, fairness, abuse of vulnerability, a failure of reciprocity or the combination thereof. Still, two elements – the use of *vulnerability* on the part of an exploited person to acquire an *excessive gain* – appear as the minimum common denominators of all these accounts. Accordingly, elaborating on these two elements may well represent the first step towards a workable concept of exploitation in the context of trafficking and the right to be free from slavery, servitude and forced labour.

[77] ibid 12.

[78] ibid 13.

2.4. Moral force of exploitation and the role of human rights law

In addition to establishing the truth conditions for an exploitation claim, a theory of exploitation needs also to consider the *moral force* of exploitation. In other words, what, if anything, should be done in response? It has been claimed that '[t]he wrongness of exploitation does not dictate the way in which these moral questions should be answered.'[79]

Wertheimer argues that the questions as to what agreements should be treated as invalid and what behaviours should be prohibited will be settled by moral argument informed by empirical investigation rather than conceptual analysis.[80] However, regardless of the approach for resolving this question, it is important to notice that philosophers tend to recognize different levels of severity of exploitation ranging from 'non-consensual or harmful' to 'consensual and mutually advantageous.'[81] Wolff, for example, explicitly notes there are different dimensions of strength, or moral seriousness, of exploitation. These range from 'a paradigm case of the deepest type of exploitation' that involves the employment of young children at very low wages in extremely hazardous and life-shortening jobs, to 'shallow exploitation' that refers to a trader who, purely as a matter of brute good fortune, has large stocks during a temporary shortage, and who hikes the price simply because local consumers now have no alternative but to pay up.[82]

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[79] Wertheimer and Zwolinski, 'Exploitation' (n 10).

[80] Alan Wertheimer, 'Remarks on Coercion and Exploitation' (1996-97) 74 (4) Denver University Law Review 889, 890.

[81] Wertheimer, *Exploitation* (n 50).

[82] Wolff ,'Marx and Exploitation' (n 5) 114-115.

In light of this sliding scale approach, an appropriate state intervention in exploitative practices may well require using different means and strategies for different levels of severity that range from criminal law to social policy measures, or warrant no intervention at all. Furthermore, Wolff warns that by interfering with exploitative arrangements, we may prevent one person from taking advantage of another's weakness, but in doing so we also risk consigning the vulnerable person to an even worse fate than being exploited. Therefore, a line between what ought to be prohibited by criminal law and what is best to be dealt by other legal instruments or measures of social policy should be drawn carefully. Thus, the UNODC claims that:

> The literature review confirmed support for understanding exploitation – in the sense of taking unfair advantage – as a continuum, albeit one that is poorly defined and highly contested. (...) From a legal perspective, the idea of a continuum is particularly useful because points on that continuum can be set with reference to the legal regime they fall within (and vice-versa).[83]

The thesis argues that human exploitation represents a serious social phenomenon, which goes beyond issues of slavery and human trafficking. Thus, the ILO website emphasizes that '[f]orced labour is different from sub-standard or exploitative working conditions.'[84] Similarly, it is noted that 'there is a fine line between those who voluntarily take a job that may be unpleasant or low status or where the wages and conditions are worse than normal for that type of occupation and those who are victims of trafficking.'[85] Still, ensuring respect for employment laws and regulations is said to prevent further erosion of labour standards, which eventually leads to 'labour

[83] UNODC, 'The Concept of Exploitation in The Trafficking in Persons Protocol' (2015) 21-22.

[84] ILO, 'Questions and Answers on Forced Labour' (1 June 2012) < http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_181922/lang--en/index.htm > accessed 2 August 2015.

[85] House of Commons, Home Affairs Committee, *The Trade in Human Beings: Human Trafficking in the UK* (Sixth Report of Session 2008–09) para 19.

exploitation.'[86] However, the right to be free from slavery, servitude and forced labour is only concerned with with the most abhorrent cases of exploitation - practices of a certain level of severity that states *ought to criminalise*, leaving aside practices that should be dealt with by other means. Thus, being one of the 'absolute' rights that protects against the most serious cases of exploitation, it requires state intervention by means of criminal law, *as a minimum safeguard*. Criminal law is, therefore, a necessary albeit insufficient method for states to secure this protection. The requirement of criminalization, nevertheless, only indicates the seriousness of these practices and should not be interpreted as the only or even predominant method of dealing with the most egregious cases of exploitation.

The following section develops an account of such egregious exploitation and outlines specific conditions that make it particularly serious.

3. Exploitation in the context of Article 4 ECHR

The discussion of the philosophical accounts of exploitation revealed the consensus on the minimum requirements of the account of exploitation, which are said to involve the use of vulnerability on the part of a victim and an excessive gain on the part of a perpetrator. Therefore, the elements of the account of exploitation in the context of the right to be free from slavery, servitude and forced labour ultimately depend on the conditions attached to these two requirements.

[86] Klara Skrivankova, 'Between Decent Work and Forced Labour Exploitation: Examining the Continuum of Exploitation' (Joseph Rowentree Foundation 2010); Cathryn Costello, ''Migrants and Forced Labour: A Labour Law Response' in Alan Bogg, Cathryn Costello, Anne CL Davies, Jeremias Prassl (eds) The Autonomy of Labour Law (Hart Publishing 2015). See also the discussion on the concepts of 'exploitation' and 'labour exploitation' in Chapter 4.

Due to its absolute nature, the right to be free from slavery, servitude and forced labour concerns only the most severe cases of exploitation. The thesis argues that elements common to all such practices include the following: a) abuse of power or vulnerability; b) excessive (disproportionate) gain acquired through the actions of an exploited individual; c) sustained action (the practice is taking place over a sustained period of time). The following sub-sections thus demonstrate that these elements distinguish exploitation from other, often related harm, such as abuse, fraud or extortion. At the same time, the presence of these elements eliminates those practices that may well be exploitative in the general meaning of the term but not of a sufficient level of severity to trigger Article 4 ECHR protection.

3.1. Abuse of power or the position of vulnerability

It is widely accepted that vulnerability and its abuse is 'central to any understanding of trafficking'.[87] Thus, it is said that 'to a large extent [human trafficking] is about exploiting vulnerable individuals'.[88] Human traffickers thus 'prey on people who are poor, isolated and weak.'[89] Similarly, the recent UNODC study on the concept of exploitation in the context of human trafficking notes that 'In both politics and philosophy, "exploitation", when attached to a person, is commonly understood as

[87] UNODC, 'Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons' (Issue Paper, 2013) 5.

[88] Council of Europe, Parliamentary Assembly, 'Trafficking of Migrant Workers for Forced Labour' (Committee on Migration, Refugees and Displaced Persons, Rapporteur: Ms Annette Groth) (4 January 2013) Doc. 13086 Report, para 1 page 6.

[89] UNODC, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action' (Background paper 2008) 3.

being linked to some weakness or vulnerability, which becomes the object of exploitation.'[90]

The terms 'vulnerable' and 'vulnerability' are used in areas of economic development, social science, human security, crime prevention, environmental research, disaster relief, famine, contagious diseases and mental health.[91] Vulnerability is described as 'a social condition of powerlessness ascribed to individuals with certain characteristics that are perceived to deviate from those ascribed to the prevailing definitions of a national.'[92] The term 'vulnerable victim' is used to refer to 'a victim who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to criminal conduct.'[93]

The explanatory report to the Anti-Trafficking Convention notes that:

> The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited.[94]

The notion of vulnerability is thus associated with a set of victims' personal characteristics, such as a person's age, disability, immigration or socio-economic status. For example, in the Dutch case law, 'a person is in a "vulnerable position" if there is a combination of illegal residence, a poor economic situation and being unable

[90] UNODC, 'The Concept of Exploitation in The Trafficking in Persons Protocol' (2015) 21.

[91] ibid 68.

[92] Jorge A Bustamante, 'Immigrants' Vulnerability as Subjects of Human Rights.' (2002) 36(2) International Migration Review 333, 340.

[93] Mohamed Y Mattar, 'Incorporating the Five Basic Elements of a Model Anti-Trafficking in Persons Legislation in Domestic Laws: from the United Nations Protocol to the European Convention', (2005) 14 (2) Tulane Journal of International and Comparative Law 29,30.

[94] Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) CETS 197 (Explanatory Report) para 83.

to speak the Dutch language.'[95] Furthermore, it is noted that '[p]eople that are vulnerable to exploitation are people that reside illegally in the Netherlands, especially minors, and members of closed migrant communities in the Netherlands (e.g. Chinese and Turkish).'[96] Irregular migration status is said to create vulnerability 'in the sense of disadvantage both factual and legal, engendering openness to exploitation or abuse.'[97]

When it comes to the migrant workers, it was noted that many of them 'work in so-called "three-D" jobs (dirty, degrading, and dangerous)' and are over-represented in 'marginally viable and sometimes semi-legal sectors' such as seasonal agricultural work, domestic services, and the sex-industry, in which the protection of workers is underdeveloped.[98]

In addition to irregular migrants and migrant workers who are declared 'a particularly vulnerable group and therefore deserve specific attention from States',[99] the ECtHR has recognised other groups as vulnerable in its jurisprudence, which include

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[95] Marijn Heemskerk and Conny Rijken, 'Combating Trafficking in Human Beings for Labour Exploitation in the Netherlands' in Conny Rijken (ed), *Combating Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011) 77.

[96] ibid 89.

[97] Mark Freedland, Cathryn Costello, 'Migrants at Work and the Division of Labour Law' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) 1.

[98] Antoine Pécoud and Paul de Guchteneire 'Migration, Human Rights, and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers' Rights' (2006) 24(2) Windsor Yearbook of Access to Justice 241, 243.

[99] Council of Europe, Committee of Ministers, Reply to Parliamentary Assembly Recommendation 2011 (2013) (16 July 2013) Doc 13287 para 2.

children[100], Roma minority,[101] persons with mental disabilities,[102] women subject to domestic violence,[103] and asylum-seekers.[104]

Importantly, the thesis emphasizes that it is the abuse of vulnerability, not vulnerability per se that is required for establishing exploitation. Wolf states that '[o]ne's vulnerability is exploited if the other person uses this weakness to obtain agreement to, or at least acquiescence in, a course of action that one would not have accepted had there not been this asymmetry in power.'[105] Similarly, it is noted that '[t]o exploit a person is to use a weakness in order to gain substantial control over the person's life or labour.'[106]

The notion of 'abuse of a position of vulnerability' figures as one of the means of human trafficking in its tripartite definition, which invalidates victims' consent.[107] Arguably, abuse of vulnerability represents one of the mildest ways of inducing consent with coercion being the most severe one.[108] Importantly, the thesis argues that abuse of vulnerability is instrumental to *any* type of (actual) exploitation that qualifies for Article 4 ECHR protection, not just human trafficking as a process leading to exploitation. This view may be supported by the fact that the list of indicators of human trafficking jointly developed by the International Labour Organisation and European

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[100] *A v UK* (1999) 27 EHRR 611 [22].

[101] *Oršuš and Others v Croatia* [GC] (App15766/03) (16 March 2010) [147].

[102] *Alajos Kiss v. Hungary* (App. 38832/06) (20 May 2010) [42].

[103] *Opuz v Turkey* (2010) 50 EHRR 28 [160].

[104] *MSS v Belgium* (2011) 53 EHRR 2 [232]-[233] and [252].

[105] Wolff ,'Marx and Exploitation' (n 5) 111.

[106] Ted Honderich (ed), *The Oxford Companion to Philosophy* (2nd edn, OUP 2005).

[107] UNODC, 'Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons' (Issue Paper 2013).

[108] 'Abuse of vulnerability' is seen as a mode of coercion in Rohit Malpani, 'Legal Aspects of Trafficking for Forced Labour Purposes in Europe' (ILO Working paper, 04 January 2006).

Commission lists separately indicators for 'recruitment by abuse of vulnerability' as one of the means of human trafficking, and indicators of 'abuse of vulnerability at destination' (i.e. at the exploitation stage).[109]

When it comes to determining the meaning of the term 'abuse of vulnerability', the *travaux préparatoires* to the Palermo Protocol state that it 'is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved".[110] Article 2(2) of the Anti-Trafficking Directive mirrors this statement.[111] Clearly, 'abuse of vulnerability' requires, first, recognizing specific traits as constituting vulnerability and, second, explaining the dynamics in which such vulnerability is played upon to ensure control over a victim. Hence, the notion of control (power) is inherent in this element and it is contingent upon a number of circumstances, which may not always stem from compulsion/coercion. For instance, when a child is in a dependant position with respect to her carers, or in situations where male family members have the power over female family members, which is the case in some legal systems, control is exerted in a much more subtle way. In these situations, control over an individual (power) due to a certain trait (age, gender) induces vulnerability that can be abused resulting in exploitation.

The ILO study thus observes that vulnerability can result from some innate characteristic of the victim (physical or mental deficiency, ill health, or youth) or may develop due to the situation the victim finds him/herself in within a destination country

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[109] Operational Indicators of Trafficking in Human Beings: Results from a Dephi Survey implemented by the ILO and the European Commission (September 2009).

[110] UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Organized Crime and the Protocols Thereto* (2006) 347.

[111] Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA (5 April 2011) 2011/36/EU (Anti-Trafficking Directive) art 2 (2).

(poverty, precarious administrative status).[112] Significantly, the study notes that actions of a trafficker could also either *create* or *worsen* a victim's vulnerability (extremely poor wages causing poverty, restricted movement causing isolation, seizure of identity documents causing fear of deportation). In these cases, we may say that vulnerability is created through the *abuse of power* over such a victim.

In sum, it was already shown that most philosophers do not treat coercion as a necessary element of exploitation, although they accept that it would often be present in exploitative situations.[113] When it is present, coercion serves to either create or exacerbate vulnerability.[114] Accordingly, both intrinsic and created vulnerability can be subject to abuse in order to induce control over, and thus dependency of a victim, making her susceptible to 'agree' to exploitation. However, the difference between coercion alone and abuse of vulnerability (intrinsic or created) is that the latter is an integral part of the notion of exploitation. Namely, a person may be coerced by one individual while being exploited by others. Nevertheless, whether or not exploiters also coerce a victim, they always abuse victim's vulnerability that was either given or

[112] Malpani, 'Legal Aspects of Trafficking' (n 108) 5.

[113] Mayer has noted an important distinction between taking unfair advantage and putting at a disadvantage, for example by coercing another agent. Thus, 'while exploiters prey upon the vulnerable, often they have not created the vulnerabilities of which they take unfair advantage'. Instead, many who gain at the expense of others are said to be simply opportunists who exploit the disadvantages, which they encounter. See Mayer, 'What's Wrong with Exploitation?' (n 51) 146-148. Similarly, Wolff argues that exploitation is typically 'a matter of using another person's vulnerability to your own advantage. Coercion, on the other hand, typically proceeds by first creating another's vulnerability and then exploiting it.' See Wolff ,'Marx and Exploitation' (n 5) 11. Mayer explains this vividly at page 143: 'A master who exploits a slave fails to benefit her as fairness dictates and thus gains at her expense. The master also oppresses the slave, but this is a separate wrong. The oppression makes the exploitation possible by putting the slave at a disadvantage, but putting at a disadvantage is not the same as taking unfair advantage. (...) The coercion is only instrumental, and exploitation is the aim of the perpetrators, but without the disadvantage which the coercion inflicts the exploitation could not happen.'

[114] Namely, the early representations of trafficking and exploitation depicted women with no apparent disadvantages abducted and physically coerced into obedience. While it is now generally known that such examples, if existent, represent a minority of cases of exploitation, they are useful to demonstrate that extreme coercion will always create vulnerability even when none existed in the traditional understanding.

created/exacerbated by the use of coercion. Thus, the abuse of power or vulnerability is the minimum necessary element of exploitation in the trafficking and slavery context.

Moreover, abuse of power or vulnerability is what distinguishes exploitation from situations of philanthropic *pro bono* work. Hence, vulnerable people, as opposed to those who may legitimately consent to 'exploitative arrangements', act with no autonomy. Thus, it was noted that '[t]he fewer one's alternatives, the more likely one is to enthusiastically consent to a situation, which can be labelled "unfree".'[115]

It is said that the existence of vulnerability is best assessed on a case-by-case basis, taking into consideration the personal, situational or circumstantial situation of the alleged victim. [116] Still, determining in which cases abuse is made of a vulnerable position may prove to be more difficult, especially in cases where (illegal) migrants approached the employers themselves, and requested work.

This was the situation in a seminal 'Chinese restaurant case', which concerned a suspicion of exploitation of Chinese workers living illegally in the Netherlands.[117] The Dutch Supreme Court addressed the charges of the criminal offence of human trafficking in Article 273f paragraph 1 of the Dutch Criminal Code engaging with the

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[115] Bridget Anderson and Blanka Hancilova, 'Migrant Labour in Kazakhstan: A Cause for Concern?' (2011) 37 (3) Journal of Ethnic and Migration Studies 467.

[116] UNODC, 'Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons' (Issue Paper, 2013) 72.

[117] Supreme Court (27 October 2009) LJN: BI7099 as cited in Linda van Krimpen, 'The Interpretation and Implementation of Labour Exploitation in Dutch Case Law' in Conny Rijken C (ed), *Combating Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011) 500-502. Van Krimpen notices that 'Before the Supreme Court ruling, eight out of twelve cases of presumed labour exploitation led to acquittals'. However, after the Supreme Court decision, 'six out of eight cases (...) did lead to convictions.'

definitions of the ‘abuse of authority arising from the actual state of affairs’, ‘abuse of a vulnerable position’ and ‘exploitation’ as elements of the offence.[118]

Illegal Chinese workers were employed in a restaurant under very poor conditions. Large numbers of them slept together in the same room, they worked long hours and had no days off. However, they had come to the Netherlands to work and approached the restaurant themselves. The Supreme Court ruled that ‘to prove misuse of a vulnerable position, for example, it is enough that the perpetrator recognises the vulnerable position and takes advantage of this position.’[119] It established that ‘a certain initiative and positive act by the perpetrators is presumed, by which they consciously misuse the weaker or vulnerable position of the victims.’[120]

It may be concluded that establishing that a person had no realistic alternative due to the abuse of power or vulnerability might be a weighty task that requires assessing factual circumstances, but it is the one that national courts engage with on a daily basis. The recent UNODC paper on this topic reviewed national legislations across the world and concluded that ‘a number of countries have integrated abuse of vulnerability into their understanding of exploitation.’[121] Moreover, it noted that specific vulnerability factors were remarkably similar across very different countries of origin, transit and destination. Therefore, the element of abuse of power or vulnerability proves to be useful in defining the general concept of exploitation while also leaving space for national institutions to apply it in culture-specific way.

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[118] Heemskerk and Rijken, ‘Combating Trafficking in Human Beings for Labour Exploitation in the Netherlands’ (n 95) 80. See also The Dutch National Rapporteur on Trafficking in Human Beings, ‘Trafficking in Human Beings: Ten Years of Independent Monitoring’ (BNRM 2010) 26.

[119] As cited in Van Krimpen, ‘The Interpretation and Implementation of Labour Exploitation in Dutch Case Law’ (n 117) 499.

[120] ibid 498.

[121] UNODC, ‘Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons’ (Issue Paper, 2013) 4.

3.2. Excessive (disproportionate) gain

The second element of the notion of exploitation requires that an exploiter gains excessively from the actions of an exploited person. There is no exploitation without excessive (disproportionate) gain. Thus, section 2.3 demonstrates that most philosophers use a reference to an unfair or excessive gain, advantage or benefit acquired by using another (vulnerable) individual to describe the situations of morally wrongful exploitation. Whereas exploitative situations may well harm an exploited person, this is not always the case and an exploited person will also sometimes 'benefit' from being exploited.[122] Such benefit, however, is always significantly less then 'what it might or ought to be', judged from the stand-point of fairness.[123]

Exploitation, thus, always implies a notion of excess – an unfair gain at the expense of an exploited person, which is what distinguishes this type of wrong from others. In all situations of exploitation, an exploited person gives significantly more than he/she gets in return.

Thus, in the case of *Van der Mussele v Belgium*, the Strasbourg Court made use of the notion of a 'disproportionate burden' to determine whether a lawyer had been subjected to compulsory labour when required to defend clients free of charge as a court-appointed lawyer.[124] In this case, a pupil-advocate complained of the lack of remuneration and of reimbursement of expenses arguing that these constituted forced and compulsory labour under Article 4 ECHR. However, the Court held that such

[122] Wertheimer, 'Two Questions about Surrogacy and Exploitation' (n 66) 223; Mayer, 'What's Wrong with Exploitation?' (n 51) 3; Wood, 'Exploitation' (n 31) 148-149.

[123] Mayer, 'What's Wrong with Exploitation?' (n 51) 141.

[124] *Van der Mussele v. Belgium* (1983) 6 EHRR 163 [34]-[41].

prejudice ‘went hand in hand with advantages and had not been shown to be *excessive*.’[125] Thus, the Court concluded that while remunerated work may also qualify as forced or compulsory labour, ‘the lack of remuneration and of reimbursement of expenses constitutes a relevant factor when considering what is *proportionate* or in the normal course of business.’[126]

Similarly, the African Commission on Human and Peoples' Rights established a clear link between exploitation and the lack of ‘just and favourable remuneration’ and ruled that Mauritania violated Article 5 of the the African Charter on Human and Peoples' Rights[127] that protects against ‘all forms of exploitation and degradation of man.’[128]

Furthermore, what counts as an excessive (disproportionate) gain is not necessarily expressed in monetary terms. Thus, the Strasbourg Court recently considered allegations of servitude and forced or compulsory labour by two orphaned Burundi sisters aged 16 and ten years, on the basis of their unremunerated domestic chores in their aunt and uncle’s home.[129]The Court noted that ‘the type and amount of work involved (...) help distinguish between “forced labour” and a helping hand which can reasonably be expected of other family members or people sharing

[125] ibid [40].

[126] ibid.

[127] *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African Commission on Human and Peoples' Rights, (11 May 2000) [135].

[128] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) art 5:
‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited’.

[129] *CN and V v France* (App no 67724/09) (11 October 2012).

accommodation.'[130] Accordingly, distinguishing between the situations of the two sisters, the Strasbourg Court found that the older one was forced to work 'so hard that without her aid Mr and Mrs M. would have had to employ and pay a professional housemaid.'[131] The second sister, on the other hand, was said not to have contributed 'in any *excessive* measure to the upkeep of Mr and Mrs M.'s household' even though it was undisputed that she, too, was the victim of ill-treatment by her aunt, which did not, in the Court's opinion, fall within the scope of Article 4.[132]

It is clear that all circumstances of the case need to be taken into account when assessing whether actions required from an individual subject to control of another were disproportionate to the benefits she received in return. This, similar to the assessment of 'no realistic alternative' for the element of abuse of power or vulnerability, is a factual question for the courts.

Hence, in the previously discussed 'Chinese restaurant workers case', the Dutch Supreme Court found it impossible to give a general definition of exploitation, as it depends heavily on the circumstances of the case. Still, it ruled that in a case like the present one, relevant factors include 'the nature and duration of the employment, the restrictions to the employee resulting from such employment, and the financial gain of the employer'.[133] Importantly, it noted that standards in Dutch society should be adopted as the frame of reference for weighing those factors. In the concrete case, it was proven that the Chinese were put to work on an average of eleven to thirteen hours a day, six days a week, for a wage far below the minimum wage. Similarly, the

[130] ibid [74].

[131] ibid [75].

[132] ibid (emphasis added).

[133] Heemskerk and Rijken, 'Combating Trafficking in Human Beings for Labour Exploitation in the Netherlands' (n 95) 80.

explanatory report to Article 273f of the Dutch Criminal Code noted that an extremely long working week for disproportionately low pay under poor working conditions represents an example of exploitation.[134] It is therefore clear that the economic benefit of an exploiter together with other conditions of work play a decisive role in establishing exploitation.

Furthermore, the requirement of an excessive gain distinguishes exploitation from abuse - wrongs that are different in nature while often interrelated. The difference is best explained using the examples of sexual exploitation and sexual abuse. Accordingly:

> The term 'sexual exploitation' means any actual or attempted *abuse of a position of vulnerability*, differential power, or trust, for sexual purposes, including, but not limited to, *profiting* monetarily, socially or politically from the sexual exploitation of another. Similarly, the term 'sexual abuse' means the actual or threatened physical *intrusion* of a sexual nature, whether by force or under unequal or coercive conditions.[135]

This distinction, nevertheless, has not always been recognized. Thus, Amar argues that child abuse should be seen as slavery under The Thirteenth Amendment of the US Constitution.[136] However, this approach confuses the distinctive wrongs of exploitation, which represents the core of practices such as slavery or human trafficking, and abuse. Thus, while victims of exploitation are also nearly always abused, the same cannot be said for the opposite. The case of *Hadijatou Mani Koraou v The Republic of Niger*,[137] decided by ECOWAS Community Court of Justice illustrates

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[134] Cited in The Dutch National Rapporteur on Trafficking in Human Beings, 'Trafficking in Human Beings: Case law on Trafficking in Human Beings 2009-2012 - An Analysis' (BNRM 2012) 85.

[135] UN Secretariat, Secretary-General's Bulletin, 'Special Measures for Protection From Sexual Exploitation and Abuse' (PSEA) (9 October 2003) ST/SGB/2003/13, Section 1, Definitions (emphasis added).

[136] Akdzil Reed Amar, 'Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney' (1992) (Yale Law School, Faculty Scholarship Series, Paper 1038).

[137] *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008, [79] (unofficial translation by INTERRIGHTS).

that exploitation does not always necessitate abuse. Namely, the Court cited the relevant passage from the judgment of the Nuremberg Military Tribunals,[138] which states that:

> Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves (...). We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - compulsory *uncompensated labour* - would still remain.[139]

Accordingly, this shows that *in essence*, slavery and other exploitative practices are distinctive from the ill-treatment that often accompanies them.

3.3. Sustained action

The third element of the notion of exploitation brings the idea of sustained action that involves repetitiveness. Hence, exploitation takes place (or is intended to) over a period of time. One-off situations may qualify as fraud but exploitation for the purpose of Article 4 ECHR requires sustained activity. Kevin Bales thus notes that 'indeterminate temporal nature is one of the defining characteristics of the crime of slavery.'[140] According to him, 'it is fundamental to the conceptualization of slavery that, once enslaved, a person cannot affect the period of their bondage'.[141]

Moreover, as discussed in Chapter 4, inherent in the notion of servitude is a victim's feeling that her condition is permanent and that the situation is unlikely to

[138] Judgement of 3 November 1947, in Trials of Major War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. 5, 1997, page 958.

[139] Emphasis added.

[140] Monti Narayan Datta and Kevin Bales, 'Slavery in Europe: Part 1, Estimating the Dark Figure' (2013) 35 Human Rights Quarterly 817, 821.

[141] ibid 822.

change.[142] When it comes to the concept of forced labour, it is evident that 'labour' implies prolonged work – not a one-off transaction forced at gunpoint.

However, this has not been made clear in practice. Thus, Linda van Krimpen criticises a new development in Dutch case law, which concerns 'rather "new" types of forced services as exploitation. A characteristic in these cases is that the services are only performed over a short period of time, *sometimes only once*.'[143] Thus, she particularly points to cases involving 'exploitation by forced subscribing to phone contracts' **(**after which victims had to give the phones to the suspect). In one of these cases, the court declared the suspect guilty of fraud, while the latter cases led to a conviction for human trafficking.[144] In one of the latter examples, however, in spite of convicting the accused of human trafficking, the court noted that the term 'fraud' did better fit common parlance and the public perception of the facts of this case.[145] Van Krimpen criticises the courts for 'overstepping the mark' since these rulings imply that almost every case of deception or swindle to induce victims to make themselves available for performing services, could now be defined as human trafficking. She rightly concludes that cases such as those involving forced subscription to phone contracts 'do rather remind of a form of fraud.'[146]

In addition, what distinguishes exploitation from mere extortion is the fact that an exploited person is required to *perform* an action over a period of time that benefits

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[142] *CN and V v France* (App no 67724/09) (11 October 2012) [91].

[143] Van Krimpen, 'The Interpretation and Implementation of Labour Exploitation in Dutch Case Law' (n 118) 502-506 (emphasis added).

[144] Dordrecht District Court (20 April 2010) LJN: BM1743. As cited in Van Krimpen, 'The Interpretation and Implementation of Labour Exploitation in Dutch Case Law' (n 118) 504.

[145] Haarlem District Court (8 December 2010) LJN: BO8985. As cited in Van Krimpen, 'The Interpretation and Implementation of Labour Exploitation in Dutch Case Law' (n 118) 505.

[146] Van Krimpen, 'The Interpretation and Implementation of Labour Exploitation in Dutch Case Law' (n 117) 506-507.

others disproportionately. On this account, financial exploitation of elderly or disabled adults would amount to mere extortion and/or fraud. The difference is best exemplified by contrasting situations of extracting money from the elderly and forcing them to beg on the street. Only the latter would amount to exploitation prohibited by the right to be free from slavery, servitude and forced labour. Thus, exploitation represents a situation where a victim is required to perform an action to benefit another - to offer her work or services of some kind without adequate compensation and in a situation where she has no acceptable alternatives.

The previous sections thus identified and elucidated the elements of a plausible account of exploitation in the context of trafficking and slavery that can be traced to the philosophical discussions and the existent jurisprudence of international and domestic courts. On this view, exploitation represents *acquiring an excessive gain through the actions of another individual by abuse of power over that individual, or of her/his position of vulnerability over a sustained period of time*. The discussion showed that all three identified elements (abuse of power or vulnerability, excessive gain and sustained action) are factual, which allows the courts to use national parameters to determine exploitative conditions, while preserving the universality of a concept itself. The proposed tripartite notion of exploitation in the context of trafficking and slavery thus describes practices that trigger protection guaranteed by Article 4 ECHR, while leaving lesser forms of exploitation to be dealt by other legal and policy instruments. In doing so, the concept is not intended to replace the notions of slavery, servitude, forced labour or human trafficking, but to explain what makes these practices related and thus jointly prohibited. This would, ultimately, provide a stronger conceptual and normative grounding for the prohibited practices, while also assisting national institutions in applying the relevant provisions on a national level.

4. Conclusion

This chapter points out to an obvious gap in international law in defining the notion of 'exploitation' central to understanding of practices associated with human trafficking. Thus, neither the Strasbourg Court, nor the Palermo Protocol, or any other international instrument offers guidance as to a *legal* definition of exploitation in the context of human trafficking and slavery. Instead, the Palermo definition refers to situations that *amount to exploitation* without stating the criteria used for classifying these diverse practices as exploitative. What is more, exploitation has not been elaborated in general international law either thus leaving the conceptual grounds of the notion of human trafficking unintelligible.

The present chapter addresses this shortcoming by proposing a model definition that can fill in the identified gap. Importantly, the chapter does not attempt to develop a general concept of exploitation in the context of individual relationships. Instead, it holds that exploitation is a matter of a degree and focuses on those forms of exploitation of such gravity that amount to a violation of the right to be free from slavery, servitude and forced labour, and thus, merit a specific state intervention through positive obligations. These positive obligations are analysed in the remaining part of the thesis (Chapters 6 and 7). At the same time, addressing lesser types of exploitation through different legal and policy actions, while not explicitly required by *this right*, is invaluable since it serves to prevent lesser forms of exploitation from escalating into more severe forms.

Having examined the references to the concept of exploitation in international law, this chapter has conducted a conceptual enquiry into philosophical discussions on this subject. Building on those findings, the chapter identified and elaborated on the necessary and sufficient elements of the notion of exploitation in the context of Article 4 ECHR. The analysis thus concluded that exploitation that brings together practices prohibited by Article 4 ECHR could be defined as: *acquiring an excessive gain through the actions of another individual by abuse of power over that individual, or of her/his position of vulnerability over a sustained period of time*. The three elements ('excessive gain', 'abuse of power or vulnerability' and 'sustained action') make the notion of exploitation suitably defined for universal application while allowing it to be adapted to specific socio-economic differences through the national legal practice. Moreover, these elements distinguish exploitation from other wrongs such as abuse, fraud or extortion that are often associated with exploitation but do not represent its necessary elements.

PART II

CHAPTER 6: ECHR, Positive Duties and Human Trafficking

1. Introduction

This chapter examines the scope of state positive obligations arising out of Article 4 ECHR. The possibility of invoking positive duties against states enables victims of trafficking and exploitation to stand up for their rights and hold states legally responsible for failing to protect them or to respond adequately to their ordeal. This is an empowering strategy and moves the focus from trafficked victims as objects of law to them as its subjects.[1] As discussed earlier in Chapter 3, although trafficking unquestionably raises a number of human rights issues, it can only amount to a human rights *violation* if states owed some duties beforehand, which they failed to discharge. Hence, it is essential to know what these obligations are, when they arise and what standards are to be used to assess state compliance. Obokata thus invites the human rights community 'to move beyond reporting the cases of human rights violations pertinent to trafficking and to articulate human rights obligations.'[2]

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[1] Unlike other instruments that require from, or recommend to, states to include human rights approach in their policies and legislation related to trafficking, the ECHR mechanism is unique in that it confers legally enforceable rights against the states. See Jonathan Todres , 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to a Labor Paradigm for Human Trafficking' (2013) 60 UCLA Law Review Discourse 142, 154-155. See also Alicia Ely-Yamin, 'Empowering Victims: Towards a Dialectical Pedagogy of Human Rights' (1993) 13 Human Rights Quarterly 640, 644.

[2] Tom Obokata, *Trafficking in Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers 2006)172.

However, many present studies of trafficking, which emphasize its human rights dimension and identify a multitude of obligations spelled out in various international instruments, tend to label any measure aimed at victim protection as their human right. Not only is this conceptually and legally implausible, but it also can seriously undermine articulating the set of enforceable rights that victims do have under the existent human rights law. Accordingly, the thesis argues that in articulating state positive human rights obligations, it is important to bear in mind the 'key distinction', highlighted in the thesis' introduction, between victim protection measures and human rights of victims, which are not necessarily correlative. Therefore, while most rights-based analyses and policy proposals predominantly focus on victim protection,[3] the purpose of this thesis is to shed more light on human rights protection.

However, the thesis argues that a comprehensive analysis that would ground these human rights obligations in the ECHR jurisprudence is lacking. Such an analysis would eventually expose the possibility of combining the existing Council of Europe mechanisms to provide concrete and meaningful protection to trafficking victims. This may in turn result in further expansion of the scope of positive duties within the ECHR into the domain of duties to provide, since many of these obligations identified in trafficking-specific instruments require some sort of material support for victims. This, however, inevitably raises questions of the financial costs of states' compliance.[4] Moreover, victims of trafficking may need international protection through observing

[3] European Commission, 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016' (19 June 2012) COM(2012)286; OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary (2010) 3.

[4] Alastair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon Press 1993) 345.

the principle of *non-refoulment,*[5] which may well conflict with states' immigration policies. Both questions, therefore, raise hotly debated issues of the Court's democratic deficit and its lack of competency to adjudicate issues of resource allocation.[6]

The aim of this analysis is to supplement the existing scholarship on 'the scope of important positive obligations' under the ECHR,[7] which has so far given scarce attention to obligations arising out of article 4 ECHR. This is not surprising since, until recently, there has not been a vast ECHR jurisprudence on this right and positive obligations arising out of it, in particular. However, in *Siliadin v France,* the Strasbourg Court recognized that 'restricting the application of Article 4 only to direct actions of state authorities that breached the obligations enshrined in the relevant international instruments would have deprived that provision of its substance.'[8] The decision in *Rantsev* further expanded the scope of those positive duties and provided solid grounds for exploring the potential directions of the future case law. Understandably, the impact of these developments to the overall suppression of human trafficking is not to be over-estimated and a comprehensive ('holistic') approach which brings together different legal frameworks and a multitude of actors is still seen as the optimal way of addressing the problem.[9] This means that the Strasbourg Court has neither the capacity nor a mandate to set up the comprehensive anti-trafficking strategy. Also, the number

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[5] UN High Commissioner for Refugees (UNHCR) 'Guidelines on International Protection:The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked' (7 April 2006) HCR/GIP/06/07; Ryszard Piotrowicz, 'The UNCHR's Guidelines on Human Trafficking' (2008) 20(2) International Journal of Refugee Law 242. This particular question is addressed in Sections 4.1 – 4.3.

[6] Sandra Fredman, *Human Rights Transformed: Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) Chapter 4.

[7] Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights* (n 4) 6.

[8] (2006) 43 EHRR 16 [89].

[9] Obokata, *Trafficking in Human Beings from a Human Rights Perspective* (n 2).

of cases to reach Strasbourg is not expected to be significant for all the reasons that prevent victims from seeking justice before national *fora*. Therefore, it is not likely that the Strasbourg Court will bring relief to a substantial number of individuals. Nevertheless, the existence of such duties and the mere possibility of being found in breach of their obligations by the binding decision of a supranational court will arguably make states more eager to comply, which may not be the case with obligations arising out of other international instruments. This was pointed out by Durieux, who compared the attitudes of the EU Member States towards the 1951 Refugee Convention and towards the ECHR.[10]

Positive obligations in general have 'growing importance' in the jurisprudence of the Strasbourg Court.[11] The case law in this field was described as 'one of the most dynamic and cutting-edge areas of Court activity'.[12] While positive duties arise in a range of situations and engage almost all Convention rights, this analysis will be confined to states' positive obligations that stem from 'absolute' rights[13] in situations where these are threatened by actions of private individuals. In other words, it aims to uncover the extent to which states are obliged to protect vulnerable individuals from private acts that constitute the most serious infringements of values upon which the whole Convention system is based: human life, dignity, physical integrity. It was noted that the full extent of such obligations 'has yet to be fully established with the Court

[10] Jean-François Durieux, 'The Vanishing Refugee', in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (Cambridge University Press 2013) 254-255.

[11] Mowbray, *The Development of Positive Obligations* (n 4) 229.

[12] Ed Bates, 'Book Review: Alastair Mowbray, The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights' (2005) 5 Human Rights Law Review 191.

[13] The term 'absolute rights' refers to rights contained in Articles 2, 3, 4(1) and 7. However, the term 'non-derogable' has been suggested as a more accurate. See Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th ed, Oxford University Press 2010) 37.

continuing to add to their number'.[14] Although the focus will be on vulnerable individuals, breaches of rights in the context of detainees will not be included because the responsibility of states in these circumstances is far easier to establish.[15] Furthermore, it is argued that existing scholarship has not given due consideration to the distinction between duties arising out of private and state violations and to the eventual consequences of such a divide to the scope and the extent of positive duties. Notably, the thesis introduction has drawn attention to the 'key distinction' between the scope of the right and scope of responsibility in situations when 'absolute' rights have been infringed by private individuals. Accordingly, the analysis in this chapter shows that whereas the prohibition in the right is 'absolute' for a state, the resulting state obligations in situations of private violations are not. Section 3 therefore analyses and explains the method the Court has been using to assess state responsibility under these rights.

This chapter proceeds by providing a theoretical and legal basis for positive duties followed by an extensive analysis of the ECHR case law. The focus is on protection of vulnerable individuals where the threat arises from private parties and offers a reading of state positive obligations in Article 4 ECHR that can be firmly based in the ECHR jurisprudence. Since only a few cases refer to positive obligations under Article 4, jurisprudence on Articles 2 and 3 dealing with protection of vulnerable individuals from private violations is used as *tertium comparationis*, because,

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[14] Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (2nd edition, Oxford University Press 2009) 20.

[15] See *Keenan v UK* (2001) 33 EHRR 913 [97-104]; *Paul and Audrey Edwards v UK* (2002) 35 EHRR 19 [56].

according to the Court, Article 4, together with these rights, enshrines 'on of the basic values of the democratic societies making up the Council of Europe.'[16]

Thus, Section 2 explores the difference between positive and negative duties, focusing specifically on private violations of human rights, vulnerable individuals and absolute rights. In this context, Sub-section 2.3 specifically points out to conflation of positive duties with remedies that results in confusion about what states owe to trafficking victims in the first place. A classification of positive duties in situations of private 'violations' of non-derogable ('absolute') rights is developed in Sub-section 2.4. The proposed classification is deducted from the ECtHR's jurisprudence, although the Court itself has never spelled this out in any general way. The chapter argues that positive duties identified in situations of private violations ought to be classified into two main categories: general and specific. General duties are thus concerned with the existence of preconditions for the effective protection of fundamental rights from private persons. These assume having in place an adequate legislative and administrative framework capable of providing the effective protection of individual rights accompanied by institutional arrangements to enforce such a legal framework. Specific duties, on the other hand, are concerned with concrete steps that states have taken in individual cases to put those legislative provisions in effect and include a range of measures. These entail both procedural and practical measures taken by authorities. This classification of positive obligations is used to discuss positive duties in the ECHR jurisprudence on Articles 2, 3 and 4 in Section 3.

In particular, Section 3 discusses the methods used by the Strasbourg court to establish violations of general and specific obligations arising out of Articles 2, 3 and 4

[16] *Siliadin v France* (n 8) [82], [112]; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [283].

ECHR. It provides a detailed analysis of the testes deployed by the Court and nuances that appear in applying these tests in different cases.

While the thesis' main focus is on elucidating the scope of protection offered to trafficking victims by Article 4 ECHR, Section 4 of this chapter also reflects on the potential for Article 3 ECHR to provide complementary protection. In addition, Section 4 offers an analysis on the non-deportation obligation available to victims under the ECHR vis-a-vis such an obligation within the 1951 Refugee Convention[17] and the Council of Europe Anti-Trafficking Convention.[18] The following chapter then examines in detail the potential of the specialised anti-trafficking instruments to inform these obligations.

2. Positive duties - theoretical and legal basis

2.1. Positive and negative duties

Chapters 2 and 3 have demonstrated difficulties in squaring trafficking in human beings as a *prima facie* human rights violation and, consequently, attributing responsibility for such a violation to a state. The main reason for this is the 'private' character of the trafficking act which makes it difficult to establish a clear link between the initial harm and a state's conduct. Such a link is important because, in spite of strong arguments that support extending human rights obligations to non-state actors,[19] only states can be

[17] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

[18] Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (Anti-Trafficking Convention) arts 13, 14 and 16.

[19] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).

held *responsible* for their violation under the existing international mechanisms. Still, the nature and the scope of such responsibility have fundamentally changed throughout the years and human rights law has been gaining increasing relevance in the sphere of relations between private individuals. It is now uncontroversial that the effective enjoyment of human rights requires more than just respect or non-interference on the part of the state. On the contrary, states are duty-bound to act in order to protect human rights of persons within their jurisdiction from acts of non-state actors, or otherwise to secure their effective enjoyment. It is persuasively argued that the concept of freedom, upon which human rights are based, is much richer and includes 'the extent to which individuals are in a position actually to exercise those rights' which in turn places positive duties on states in addition to simple non-interference.[20] Therefore, regardless of whether the threat to fundamental rights arises out of state actions or omissions, acts of private individuals,[21] natural hazards[22] or socio-economic situations in other states[23], states now have positive obligations to secure their enjoyment to the maximum extent according to what is legally and factually possible. As a result, 'the artificial distinction'[24] between negative duties - mainly associated with civil and political rights, and positive duties - linked with socio-economic rights and described as indeterminate, programmatic, resource intensive and thus non-justiciable, is firmly rejected both in theory and in the practice of human rights bodies.[25] Hence, all human

[20] Fredman, *Human Rights Transformed* (n 6).

[21] *Osman v UK* (2000) 29 EHRR 245; *A v UK* (1999) 27 EHRR 611; *Siliadin v France* (2006) 43 EHRR 16.

[22] *Öneryıldız v Turkey* (2005) 41 EHRR 20; *Budayeva and Others v Russia* [2008] ECHR 216.

[23] *D v UK* (1997) 24 EHRR 423.

[24] Fredman, *Human Rights Transformed* (n 6).

[25] UN Human Right Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add. 13, para 6.

rights give rise to both negative and positive duties.[26] The jurisprudence of the Strasbourg Court has immensely contributed to this paradigm shift in the human rights doctrine, albeit not being the first international forum to articulate the positive duties in practice.[27]

2.2. The rationale, legal basis and scope of positive duties

The reason for imposing positive duties on states is the need to provide ‘practical and effective’ protection of fundamental rights.[28] First, expressly spelled out in the *Airey* case,[29] it is now considered to be a general principle applicable whenever Convention rights are in issue.[30] The principle of effectiveness has enabled the Court to keep pace with social, moral, legal and political developments across Europe and has ensured the Convention’s continuing relevance. The Court has grounded such arguments in the ‘living instrument’ doctrine,[31] the Convention object and purpose[32] and evolving European consensus,[33] which in turn has resulted in significant expansion of its review

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[26] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, (2nd edn, Princeton University Press 1996); Mowbray *The Development of Positive Obligations* (2nd edition, Princeton University Press 1996); Fredman, *Human Rights Transformed* (n 4).

[27] *Velasquez-Rodriguez v Honduras*, Series C No.4 [1988] IACHR 1 (29 July 1988). See also Tara J Melish and Ana Aliverti, ‘Positive Obligations in the Inter-American Human Rights System’, (2006) 15 (3) Interights Bulletin: Positive Obligations 120.

[28] JG Merrills, *The Development of International Law by the European Court of Human Rights* (MUP 1993) 102-103.

[29] *Airey v Ireland* (1979-80) 2 EHRR 305 [24]; *Artico v Italy* (1981) EHRR 1 [33].

[30] Jacobs, White and Ovey (eds), *The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 74.

[31] *Tyrer v United Kingdom* (1979-80) 12 EHRR 1 [31]; *Christine Goodwin v UK* (2002) 35 EHRR 18 [75]; *Soering v United Kingdom* (1989) 11 EHRR 439 [102].

[32] *Soering v United Kingdom* (1989) 11 EHRR 439 [87].

[33] *Dudgeon v United Kingdom* (1982) 4 EHRR 149 [60]; *Marckx v Belgium* (1980) 2 EHRR 330 [41].

– both in its scope and intensity.[34] Such an expansive interpretation of Convention rights has attracted strong opposition and critique from states. Some academics keep pointing to the lack of legitimacy of such 'judicial activism', which, they say, goes well beyond duties initially undertaken by states.[35]

Positive human rights obligations thus represent one aspect of this expansive approach to rights interpretation. However, although the Convention text itself does not contain explicit reference to these, neither does it restrict state responsibility to situations of direct interference. Indeed, certain Convention rights are framed in language that clearly demands action.[36] Moreover, Articles 2, 3 and 4 are said to protect the most fundamental values of democratic society, thus placing a demand on states to ensure that individuals within their jurisdiction are effectively protected against their abuse, including situations when the threat emerges from acts of private individuals.[37] Similarly, the Inter-American Court of Human Rights explained that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but

[34] Jacobs, White and Ovey (eds), *The European Convention on Human Rights* (5th edn, Oxford University Press 2010)73; David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002) 55; Alastair Mowbray, 'Creativity of the European Court of Human Rights', (2005) 5(1) Human Rights Law Review 57.

[35] Paul Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 57 Human Rights Law Journal 66. For the positions that welcome this judicial creativity see George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Geir Ulfstein, Andreas Follesdal and Birgit Schlütter (eds), *The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2012).

[36] A duty to protect life in Article 2 ECHR; duties related to the right to fair trial in Article 6; a duty to hold elections in Article 3 Protocol 1.

[37] *Osman v UK* (n 21) [115]; *A v UK* (1999) 27 EHRR 611; *Z v UK* (2002) 34 EHRR 3 [73]; [22]; *E v UK* (2003) 36 EHRR 31 [88]; *MC v Bulgari*a (2005) 40 EHRR 20 [149]; *Opuz v Turkey* (2010) 50 EHRR 28 [128],[159]; *Siliadin v France* (n 18) [80]-[84].

> because of the lack of due diligence to prevent violation or to respond to it as required by the Convention.[38]

While the teleological method has been used as jurisprudential tools for developing positive duties, their legal basis is found in a general obligation to secure to everyone within the state's jurisdiction the rights and freedoms defined in the Convention.[39] The Strasbourg Court commonly uses a combination of this general duty and one of the substantive articles to affirm positive duties in a particular case.

So far, positive duties have been identified with respect to almost all rights although 'once considered to be the exception rather than the rule'.[40] However, while they undoubtedly constitute a part of the mainstream human rights discourse and practice, their scope and extent have not been firmly settled. In general, it is said that positive duties oblige states 'to do something'[41] but the content and limits of such duties are determined on a case-by-case basis. The case-law shows a broad range of actions that may be required from a state in order to fulfil its duty to secure rights: from the adoption of adequate legislation[42] to the protection against acts of private violence.[43]

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[38] *Velasquez-Rodriguez v Honduras* (n 27) [172].

[39] ECHR art 1. Similar duty exists in ICCPR art 2(1); CRC art 2(1) ; ACHR art 1.

[40] Jacobs, White and Ovey, *The European Convention on Human Rights* (n 34) 100.

[41] Dissenting Opinion of Judge Martens in *Gul v Switzerland* (1996) 22 EHRR 93.

[42] *Marckx v Belgium* (n 33).

[43] *Osman v UK* (n 21); *Z v UK* (n 37); *E v UK* (n 37); *Opuz v Turkey* (n 37).

2.3. Private violations, vulnerable individuals and absolute rights

It has already been noted that positive duties exist irrespective of the type or the source of conduct that threatens right. However, when the right in question is infringed by acts of state authorities, establishing a violation of positive duties rather than finding a breach of negative ones may appear peculiar and is said to create a ‘duty of schizophrenia’.[44] For it is rather a rhetorical question whether the provision of adequate medical care and conditions in detention flows from a positive or a negative duty not to impose inhuman or degrading treatment. On the other hand, although it has been acknowledged that threat to rights may stem from various sources, such acknowledgement is made for the purpose of showing the irrelevance of that differentiation rather than an important issue in framing the duties.[45] Still, in the context of the existing judicial mechanisms for human rights protection this misperception leads to conflation of positive duties with remedies. This in turn results in confusion about what states owe to trafficking victims in the first place.

Accordingly, when a right is infringed by a state act, the latter is obliged under Article 13 to provide adequate remedy. [46] If, on the other hand, a similar act was committed by a private individual, the responsibility of a state would only be engaged once it was proven that the state was aware of such a situation (or ought to have been).[47] This is, however, not a duty to remedy but rather a self-standing positive duty within the substantive article. In other words, remedies are concerned with a state’s

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[44] Jean-François Akandji-Kombe, ‘Positive Obligations under the European Convention on Human Rights’ (Human rights handbooks, No 7, Council of Europe 2007) 15.

[45] Clapham, *Human Rights Obligations of Non-state Actors* (n 19) Chapter I.

[46] *Aksoy v Turkey* (1997) 23 EHRR 553; *Aydin v Turkey* (1998) EHRR 251.

[47] *Osman v UK* (n 21); *Opuz v Turkey* (n 37).

wrongdoing while positive duties arise with respect to an initial act that causes harm, which may or may not be a consequence of the state's action. Still, the action required in both cases may well be the same.[48] Thus, on the one hand, in cases where a state has either directly contributed to death or ill treatment[49] or it has failed to prevent these[50] (thus violating a self-standing duty), the duty to investigate such allegations would logically represent a remedy.[51] On the other hand, when an act prohibited by Articles 2 or 3 was committed by private individuals[52], the duty to conduct an investigation would represent a self-standing positive duty within the substantive article, provided that state organs had knowledge of the situation. Hence, a failure to discharge such duty will in turn create a separate duty to provide a remedy for that violation.

This appears to be the logical reading of the requirement, first established in *Silver v UK*,[53] that one demonstrates an 'arguable claim' to be the victim of a violation of Convention rights in order to trigger a duty to provide an effective domestic remedy. Therefore, if the initial act was performed entirely by private individuals, there would be no *prima facie* violation of Convention rights in the traditional sense, but only a crime that may trigger positive duties of a state to act in a certain way. The Court,

[48] In *Beganovic v Croatia* [2009] ECHR 992 [69] the Court noted that the scope of the positive obligations might differ between a state-inflicted treatment contrary to Article 3 and cases of private violence. However, it did not explain why and how these duties differ.

[49] *Aksoy v Turkey* (n 46); *Aydin v Turkey* (n 46).

[50] *Z v UK* (n 37); *E v UK* (n 37).

[51] In the latter case, the duty relates to the investigation of allegations of a state's failure to protect a victim, not the initial event that had triggered that duty. This is evident *Menson*, where the defects in investigation of the lethal attack by private individuals were discussed with in the context of procedural aspect of article 2. To the contrary, with respect to 'the authorities' failure to secure the accountability of the police for the alleged discriminatory approach to the investigation, this is a matter which falls to be examined, if at all, under Article 6 of the Convention and, since they are close family members of the deceased, under Article 13'.

[52] *Menson and Others v UK* (Admissibility) (2003) 37 EHRR CD220; *MC v Bulgari*a (n 37); *Opuz v Turkey* (n 37); *Denis Vasilyev v Russia* [2009] ECHR 2078; *Beganovic v Croatia* (n 48).

[53] (1983) 5 EHRR 347 [113].

however, has never expressly endorsed nor consistently followed such reasoning. In fact, there is inconsistency in the Court's jurisprudence regarding the grounding of procedural duties in Article 13 or one of the substantive provisions, which clearly demonstrates a lack of comprehension of the difference between the state and private violations.[54]

Therefore, it is not surprising that discussions related to the human rights aspect of trafficking equally fail to distinguish between positive duties and remedies, to the detriment of potential victims.[55]

With respect to private violations, it is noted that 'some rights are more apt than others to give rise to obligations to protect against breaches of third parties', because rights aimed to protect physical integrity, for example, are just as vulnerable to violation by private actors as by state ones.[56] Positive duties in these situations are now firmly engrained within the Court's jurisprudence, especially when the requirement relates to the protection of vulnerable socially marginalized individuals.[57] Thus, it has been noted that:

> [C]hildren, and other vulnerable individuals, are owed a duty of special protection by the state, and the Court will be particularly demanding in its supervision of a state's existing measures designed to protect these individuals

[54] In some cases, the Court found the lack of investigation as breach of procedural duty under substantive articles (*Denis Vasilyev v Russia* [2009] ECHR 2078; *Assenov v Bulgaria* (1999) 28 EHRR 652; *Poltoratskiy v Ukraine* (2004) 39 EHRR 43; *McCann and Others v UK* (1995) 21 EHRR 97; *Hugh Jordan v UK* (2001) 37 EHRR 52). In other cases, the breach of the same investigative duty gave rise to article 13 violation (*Aksoy v Turkey* (1997) 23 EHRR 553; *Aydin v Turkey* (1998) EHRR 251). Finally, in some cases the Court found violations of both substantive article and article 13 (*Kaya v Turkey* (1998) 28 EHRR 1; *Yaşa v Turkey* 28 EHRR 408; *Ergi v Turkey* (2001) 32 EHRR 18. *Öneryıldız v Turkey* (n 22).

[55] Discussed in Chapter 3, Section 2.

[56] Walter Kälin, Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 106.

[57]*A v UK* (n 21) [22]; *Z v UK* (n 37) [73]–[75]; *E v UK* (n 37) [88]; *Opuz v Turkey* (n 37) [159]; *Siliadin v France* (n 21) [143]; *MC v Bulgaria* (n 37) [150]; *X and Y v Netherlands* (1986) 8 EHRR 235 [23]; *Stubbings and Others v UK* (1997) 23 EHRR 213 [62]-[64]; *Bevacqua and S v Bulgaria* [2008] ECHR 498 [64].

> from private violence. In other words, the Court will allow states a narrower margin of appreciation regarding the adequacy of the measures taken in such contexts.[58]

While states will usually have the choice of means with respect to the forms of such a protection, some interests are particularly important and require protection through criminal law.[59] In fact, violations of Articles 2, 3, and 4 (and certain aspects of articles 5 and 8) are seen as 'serious human rights violations' in respect of which states have an obligation to enact criminal law provisions.[60] Such duties are to be contrasted with those associated with protecting the rights of defendants from the excessive exercise of state power. While Mowbray has rightly noted that 'the dominant group of positive obligations expressly imposed upon states, by the text of the Convention (…) were concerned with different stages of the criminal justice system',[61] this type of duties actually requires the states to impose criminal law. These duties have been named coercive duties and a strong argument for their careful and restrictive design has been put forward.[62] Trafficking situations clearly call for duties of the second kind. However, in the context of trafficking, duties related to criminal law represent just one side of the story. In many cases, perpetrators will remain unknown or unreachable, while victims will still need protection. For that reason, much effort has been put into detaching such protection from victim cooperation in criminal proceedings against

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[58] Clapham, *Human Rights Obligations of Non-state Actors* (n 19) 357.

[59] *X and Y v Netherlands* (n 57) [23], [24], [27]; *MC v Bulgaria* (n 37) [150].

[60] The Council of Europe, Committee of Ministers, 'Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations' (1110th Meeting, 30 March 2011) at II. 3

[61] Mowbray, *The Development of Positive Obligations* (n 7) 222.

[62] Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Julian Roberts and Lucia Zedner (eds), *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (Oxford University Press 2012).

traffickers.[63] Also, it is believed that providing unconditional protection in turn contributes to criminal justice goals.[64] While an extensive list of these duties is provided by the Anti-Trafficking Convention, the question is whether there is a space for reading all of them into the ECHR. Unfortunately, only a handful of cases refer to positive obligations under Article 4 and there is an obvious need to establish what exactly states are obliged to do in situations of private exploitation.[65] For that reasons, jurisprudence on Articles 2 and 3 dealing with protection of vulnerable individuals from private violations will be used as *tertium comparationis*. Such a choice is natural given that 'together with articles 2 and 3, article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe.'[66] Nevertheless, it is important to point to the unique features of trafficking situations, which may not square well with principles established in different contexts. Therefore, these rules need to be adapted and specialised trafficking instruments, particularly the Anti-Trafficking Convention, may well provide guidance in that respect.

Finally, the thesis introduction has drawn attention to the 'key distinction' between the scope of the right and scope of responsibility. Accordingly, whereas the right itself is 'absolute' the resulting obligations are not. Section 3 will therefore

[63] Anti-Trafficking Convention, art 12(6); Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA (5 April 2011) 2011/36/EU (Anti-Trafficking Directive) art 11(3); Office of the High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002) E/2002/68/Add. 1, guideline 6.1; UNODC 'Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime' (New York 2004) (Trafficking Legislative Guide) para 62.

[64] Anne Gallagher**,** *The International Law of Human Trafficking* (Cambridge University Press 2010) 297.

[65] *M. and Others v Italy and Bulgaria* (Application no 40020/03) (31 July 2012); *CN v United Kingdom* (2013) 56 EHRR 24; *C.N. and V. v. France* (App no 67724/09) (11 October 2012); *LE v Greece* (App no. 71545/12) (21 January 2016).

[66] *Siliadin v France* (n 21) [82], [112]; *Rantsev v Cyprus and Russia* (n 16).

analyse and explain the method the Court has been using to assess state responsibility under these rights.

2.4. A classification of duties

A classification of positive duties in situations of private ‘violations’ of non-derogable (‘absolute’) rights will be developed in this section. The proposed classification is deducted from the Court’s jurisprudence, although the Court itself has never spelled this out in any general way,[67] choosing rather to examine cases on their own facts. Thus, it analyses the duties simultaneously and interdependently, being guided by the requirements of the case at hand, rather than following some overarching theoretical models.

Shue was one of the first scholars to demonstrate, on a theoretical level, that all fundamental rights give rise to both positive and negative duties. Accordingly, he argues that every right gives rise to three types of duties: to respect, to protect and to aid (provide). However, he noted that his ‘very simple tripartite of duties’ is only provisory and should by no means lead to some conceptual obsession.[68]

Mowbray takes a more pragmatic approach focusing on a ‘detailed examination (…) of the key positive obligations developed by the [Strasbourg] Court under the

[67] For different categorizations of positive duties see Keir Starmer, *European Human Rights Law* (Legal Action Group 1999) 195; Mowbray, *The Development of Positive Obligations* (n 4) 221; For an overview of different classifications see Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (Oxford University Press 2009) 366.

[68] Henry Shue, *Basic Rights* (n 26) 160. See also Final Report by Asbjørn Eide, ‘The Right to Adequate Food as a Human Right’ (UN Sub-Commission for the Promotion and Protection of Human Rights, UN Doc E/CN4/Sub2/1987/23, 1987).

major substantive Articles'.[69] Drawing on Shue's tripartite classification he identified 'some broad groupings of positive obligations'.[70] Thus, as 'one of the most prevalent types of positive obligation' he identifies the duty to take reasonable measures to protect individuals from infringement of their rights by other private persons.'[71] This duty, according to Mowbray, can be satisfied by having adequate domestic legal provisions criminalizing the conducts which threaten another's Convention rights.[72] Also, 'a more onerous form of this positive obligation demands that states deploy personnel to provide physical measures of security for potential victims known to be facing immediate threats of violence.'[73] The next broad collection of positive obligations, according to Mowbray, is concerned with the manner in which states treat persons detained under the authority of their criminal justice systems. He offers a number of examples of these duties under Articles 2, 3 and 5. He classifies both groups of positive obligations as falling within Shue's general duty to protect. Furthermore, the third significant group of positive obligations was said to be concerned with the duty of states to conduct effective investigations into credible claims that serious violations of Convention rights have occurred.[74] He places this duty under Shue's third category of duties – to aid. Interestingly, Mowbray argues in favour of requiring such investigations under Article 3, rather than under Article 13, even when ill-treatment

[69] Mowbray, *The Development of Positive Obligations* (n 4) 225.

[70] ibid.

[71] ibid.

[72] ibid.

[73] ibid.

[74] ibid 226.

stems from the state action because that would 'reflect the seriousness with which the Court characterises this type of ill-treatment'.[75]

In spite of its invaluable contribution to better understanding of positive duties by providing an extensive overview of the Strasbourg Court's case law in this area, Mowbray's study does not provide a satisfactory account of more general issues related to types, structure and principles that apply to assessing those duties. Thus for example, he appears to restrict the scope of a duty to protect individuals against non-state violations only to those situations where a threat arises from private individuals, although such a duty exists regardless of the source of the threat.[76] Also, he seems to limit the scope of states' duties only to the requirements related to criminalization and application of criminal law, even though this is but one of their obligations.[77] Furthermore, his overview of the case law suggests that the third group of duties mainly concerns investigations related to the breaches by states. Thus, he contends that 'The duty to conduct investigations under Article 3 (…) arises when there is an arguable claim that a person has been seriously ill-treated by state agents',[78] although the Court has clearly recognized this duty with respect to private violations too.[79] Finally, his analysis of states' investigative duties seems to confuse positive duties arising out of substantive rights with remedies, which is arguably the consequence of a failure to explicitly acknowledge the distinction between private and state violations.

[75] ibid.

[76] *Budayeva v Russia* (n 22). This case was concerned with the failure of Russian authorities to protect rights to life and property from the mudslides that hit the town. The Court ruled that: 'The fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of that right.'

[77] See Section 3.

[78] Mowbray, *The Development of Positive Obligations* (n 4) 227.

[79] *MC v Bulgaria* (n 37) [151]; *Opuz v Turkey* (n 37). Mowbray, however, does acknowledge that this duty exists with respect to Article 2. Mowbray, *The Development of Positive Obligations* (n 4) 28, 62.

The main proposition offered here is that positive duties identified in situations of private violations ought to be classified into two main categories: general and specific.

General duties are thus concerned with the existence of preconditions for the effective protection of fundamental rights from private persons. These assume having in place an adequate legislative and administrative framework capable of providing the effective protection of individual rights accompanied by institutional arrangements to enforce such a legal framework. Specific duties, on the other hand, are concerned with concrete steps that states have taken in individual cases to put those legislative provisions in effect and include a range of measures. These entail both procedural and practical measures taken by authorities.

Furthermore, while in the majority of cases both duties relate to measures taken within the law enforcement framework, those specific obligations may also involve purely protective measures, taken outside the scope of criminal prosecution and irrespective of any action directed against the alleged perpetrator.[80] Hence, in trafficking situations neither procedural nor practical duties will *always* require the coercion of potential perpetrators, although their conviction is certainly one of the important aims.

[80] *E v UK* (n 37).

3. Positive duties in the ECHR jurisprudence: Articles 2, 3 and 4

3.1. General duty to establish effective legal framework

States have a general obligation to protect rights by law and such an obligation is said to result directly from Article 1 of the Convention.[81] The duty to establish a legal framework which provides effective protection for Convention rights is said to represent 'the minimum obligation of contracting states.'[82] Thus, the Strasbourg Court has held that 'if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged'.[83] Similar obligation is also recognized in the context of ICCPR.[84]

As already noted, when the most important interests are at stake, the Court insists on protection through criminal law.[85] Thus, with respect to the right to life, states are required to take appropriate steps to safeguard the lives of those within its jurisdiction by:

> [P]utting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions'[86]

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[81] *Costello-Roberts v UK* (1993) 19 EHRR 112 [26].

[82] Starmer, *European Human Rights Law* (n 67) 196.

[83] *Young, James and Webster v United Kingdom* (1982) 4 EHRR 38 [49].

[84] UN Human Right Committee, General Comment No 31 (26 May 2004) CCPR/C/21/Rev.1/Add. 13, para 13.

[85] *MC v Bulgaria* (n 37).

[86] *Osman v UK* (n 21) [115]; *Menson and Others v UK* (n 52); *Opuz v Turkey* (n 37) [128]; *Kontrova v Slovakia* [2007] ECHR 419 [49].

Similarly, with respect to Article 3, the Court ruled that 'effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions'.[87]

Although the adoption of criminal law provisions was said to be necessary to provide effective deterrence,[88] the mere existence of adequate provisions will not be sufficient to absolve states of their general obligation. Thus, having established that Bulgarian Criminal Code defines rape in a manner which does not differ significantly from the wording found in statutes of other Member States, the Court in *MC* went further to assess the way this definition has been interpreted and applied in practice. Regardless of its inability to reach a conclusive answer about the existence of a restrictive practice, which would clearly violate the Convention, the Court, nevertheless, stated that it was 'sufficient for the purposes of the present case to observe that the applicant's allegation of a restrictive practice is based on reasonable arguments and has not been disproved by the Government.'[89] Hence, it is not sufficient for a state to prove that it has enacted appropriate legislation to comply with its general duty to secure rights through law - it also needs to demonstrate the *general practice* of its effective application. Being able to demonstrate the existence of this general practice, nevertheless, will not exempt the state from showing that such a practice was also followed in a particular case, which represents the specific obligation. Still, the absence of such general practice will create a strong presumption against it in the specific case.

[87] *MC v Bulgaria* (n 37) [150].

[88] See concurring opinion of Judge Tulkens in *MC v Bulgaria* where he questions the assumption that criminal remedies are the most effective in terms of deterrence and calls for a certain degree of restraint.

[89] *MC v Bulgaria* (n 37) [174].

This requirement of effective criminal law provisions, however, does not go as far as to assume a right to have criminal proceedings instituted against third parties.[90] The Court noted in this respect that:

> [E]ffective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law (...). However, if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 (…) does not necessarily require the provision of a criminal-law remedy in every case.[91]

This demonstrates that the protection of right to life *generally* requires that states have criminal law provisions available. However, whether criminal law will be applied in every case when life is endangered depends on the circumstances of the case: sometimes it may be deployed, at other times it must be. Hence, there may be occasions when a criminal-law remedy is not indispensable and other measures would suffice. The explanation for this position may be found in the difference between general and specific obligations - the former is fulfilled by the existence and functioning of the criminal justice system, while the latter will be judged on the circumstances of each case. Such an interpretation may, in turn, resolve the tension in the Court's jurisprudence following *Siliadin* where, contrary to its previous ruling that 'the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently',[92] it found a violation of Article 4 because the perpetrators of the impugned acts had not been convicted under criminal law.[93]

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[90] *Calvelli and Ciglio v Italy* [2002] ECHR 3 [51]; *Öneryıldız v Turkey* (n 22) [96].

[91] *Calvelli and Ciglio v Italy* (n 90) [51].

[92] *Vo v France* (2005) 40 EHRR 12 [90].

[93] *Siliadin v France* (n 21) [145]-[146].

Siliadin was the first case where the Court discussed positive duties in the context of Article 4. The applicant was a 16-year-old Togolese girl who was brought to France under a false promise that her immigration status would be regularised and that she would be sent to school once she paid off her travel costs by working as a housemaid. Nevertheless, after several months she was 'lent' to another couple where she worked for about 15 hours per day, with no day off, for several years, without ever receiving wages or being sent to school, without identity papers and without her immigration status being regularised. The case was brought to attention of the French authorities and criminal proceedings were instituted against her 'hosts'. Although initially convicted by the court of first instance, their appeal was upheld and they were acquitted of all charges. Following the successful appeal by the applicant, the Court of Cassation quashed the appellate court judgement, but only with respect to provisions dismissing her requests for compensation, given that no appeal was lodged by the public prosecutor's office. In the final judgement, she was awarded remuneration consisting of unpaid wages and compensation for psychological trauma, but the offenders went unpunished. The finding of a violation against France was based on the inadequacy of its criminal legislation, which, at the time, did not specifically address the rights guaranteed by Article 4, but related, in a much more restrictive manner, to the exploitation of labour and subjection to living or working conditions incompatible with human dignity. Nevertheless, the Court was more focused on the application of such legislation in the instant case than its actual wording. Therefore, although the Court found criminal law necessary to dispense duties that exist under Article 4, it did not require the state to adopt the precise wording of the international instruments that define slavery, servitude and forced labour. Accordingly, lack of specific provisions criminalising slavery, servitude and forced labour *as such* does not necessarily entail a breach of positive obligations under Article 4. Rather, the Court considered whether other criminal law provisions in French legislation ensured effective protection against slavery and slavery-like practices.[94] Importantly, this enables the Court to exercise its review without intruding into states' sovereignty with respect to their national criminal legislation by imposing a unified criminal law. Also, it allows for differences in legal systems to be accommodated while it does not prevent other branches of international law (EU Law, Transnational Criminal Law) to pursue their agendas with respect to the same issues.

Although the Court in *Siliadin* confined its analysis to criminal law – both to its language and to its application on concrete circumstances - this should not be interpreted to mean that protection through criminal law is sufficient. Sight must not be lost of the Court's continuing insistence on the circumstances of every case: in *Siliadin*, the criminal case was already initiated and it was the subsequent action of public authorities that led to complaints of inadequate protection. In fact, the applicant limited her complaints to challenging the adequacy of criminal legislation, probably because she has already received satisfaction in the form of compensation, which is said to be the exception rather than a rule in the majority of trafficking cases.[95]

The Court in *Rantsev* thus confirmed that the duty to penalize and prosecute trafficking is only one aspect of Member States' general undertaking to combat trafficking, which requires the 'spectrum of safeguards' set out in national legislation.[96] Therefore, although the Cypriot criminal legislation was generally described as 'satisfactory' and 'suitable', a number of weaknesses have been found with respect to

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[94] ibid [141]–[149].

[95] UN OHCHR, Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, Joy Ngozi Ezeilo (13 April 2011) A/HRC/17/35.

[96] *Rantsev v Cyprus and Russia* (n 16) [284]-[285].

the general legal and administrative framework and the adequacy of its immigration policy.[97] While in *this* case the Court found deficiencies in immigration law, it does not necessarily mean that its examination will be confined to the same issues in future.

With respect to the moment when this general duty arises, the Strasbourg jurisprudence indicates that states' compliance would not be assessed unless a concrete case of the alleged rights violation emerged. Thus, it noted that 'it is not the role of the Convention institutions to examine *in abstracto* the compatibility of national legislative or constitutional provisions with the requirements of the Convention.'[98] Hence, every assessment of a state's compliance with this duty will inevitably be tied to the analysis of specific duties towards a concrete victim. Furthermore, *Rantsev* demonstrated that rather than establishing some universal standards for assessing states' compliance, this duty will be analysed with reference to particular circumstances existent in every state and only with regard to acts that have occurred within its jurisdiction.[99] Thus, the Russian legal and institutional framework was subject to less intense scrutiny than the Cypriote one, Cyprus being the destination state.[100]

3.2. Specific duties

As noted earlier, the existence of an adequate legal and institutional framework is not sufficient to discharge states from their duties to protect rights of individuals within

[97] ibid [290]-[293].

[98] *McCann and Others v UK* (n 54) [153]; *Klass and Others v Germany* (1980) 2 EHRR 214 [33].

[99] *Rantsev v Cyprus and Russia* (n 16) [301]-[303].

[100] ibid [301]-[303].

their jurisdiction.[101] It is essential to show that the institutional and legal framework provides practical and effective protection to the Convention rights in each particular case. The analysis of the effectiveness of such a protection is usually approached by looking at the state's compliance with procedural and operational duties.

3.2.1. Procedural duties

The procedural duty to conduct effective investigations into the alleged violations of Articles 2 and 3 is a well-established duty in the Court's jurisprudence.[102] Initially, the Court laid down rules regarding the nature and purpose of this procedural obligation under article 2 in *Hugh Jordan v UK*.[103] These minimum standards have been subsequently applied in cases involving allegations that death resulted from the deliberate use of force by agents of the state.[104] In *Edwards*,[105] the Court extended the application of those principles to circumstances where state responsibility was engaged on the basis of its alleged failure to take reasonable care to prevent a foreseeable fatality from occurring. These cases may appear to suggest that procedural duties are linked to state behaviour, either active – through its deliberate use of force, or passive - through its failure to act to prevent death. However, the question arises as to whether a mere allegation of murder or treatment that potentially engages Articles 3 or 4, irrespective of any state involvement, creates *ipso facto* a duty to investigate any such

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[101] *Osman v UK* (n 21) [115]; *Kontrova v Slovakia* (n 86) [49]; *Opuz v Turkey* (n 37) [128].

[102] *McCann and Others v UK* (n 54) [161]; *Kaya v Turkey* (n 54) [86]; *Yaşa v Turkey* (n 54) [98]. Relying on these cases the Court established similar duty with respect to article 3 in *Assenov v Bulgaria* (n 54) [102]. See Alastair Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) 51(2) International and Comparative Law Quarterly 437.

[103] (2001) 37 EHRR 52 [105]-[109].

[104] Ben Emmerson, Andrew Ashworth, Alison Macdonald (eds), *Human Rights and Criminal Justice* (3rd edition, Sweet & Maxwell 2012) 817.

[105] *Paul and Audrey Edwards v UK* (n 15).

allegation? Jurisprudence of the Court seems to endorse a positive answer to that question. Thus, the Court has held that, even in the absence of any state responsibility for death, the obligation to protect life ‘requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has suffered life-threatening injuries in suspicious circumstances’.[106] Hence, ‘the mere fact that authorities were informed of the murder (…) gave rise *ipso facto* to an obligation under article 2 to carry out an effective investigation’.[107] Evidently, such a duty represents *a self-standing positive obligation* following directly from the procedural aspect of Article 2. This was also held with respect to article 3.[108] In *MC v Bulgaria*, for example, state agents were neither directly involved in rape allegations, nor were they found responsible for failing to prevent it. Still, the Court found violations of Articles 3 and 8 on the basis of deficiency in investigating and prosecuting the rape claim, while holding that no separate issue arose under article 13.[109] Such a position, evidently, supports the hypothesis that where there was no state responsibility for the initial harm, positive duties derive from substantive articles and not the right to remedy.

The moment when a duty to investigate arises

It was noted earlier that the duty to conduct effective investigations arises at the moment when authorities are informed of the murder or ill-treatment. Still, when an assault to a person results in her death, such a complaint is usually an indisputable fact. To the contrary, ill-treatment and exploitation suffered by private individuals is not

[106] *Menson and Others v UK* (n 52).

[107] *Yaşa v Turkey* (n 54) [100]; *Ergi v Turkey* (n 54) [82].

[108] *Beganovic v Croatia* (n 48) [69]-[98]; *Denis Vasilyev v Russia* (n 52) [97]-[104].

[109] *Beganovic v Croatia* (n 48).

always apparent and the question arises as to what kind of allegations would suffice to trigger the duty. In *Beganovic*, the Court held that 'article 3 requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion"'.[110] This, of course, can only be decided on the basis of the facts of each case. Importantly, the Court held that authorities must act on their own initiative, once the matter has come to their attention and cannot leave it to the victim's relatives to lodge a formal complaint.[111]

However, the question may emerge as to when and to what extent authorities are obliged to act proactively, even when a victim clearly opposes it. The Court has addressed this issue in *Opuz* in the context of a duty to protect the applicant's mother's life and prevent the recurrence of violent attacks on her physical integrity from her ex-husband. The Court was particularly focused on the question of the pursuance of criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaint. Although the comparative analysis of legislation and practice did not reveal any general consensus among Member States, the Court nevertheless drew the conclusion that in deciding the course of action, a balance needs to be struck between a victim's Article 2, 3 and 8 rights.[112] Moreover, it identified certain factors that can be taken into account when deciding such matters and concluded that 'the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.'[113] Such a ruling is of particular relevance for trafficking situations where victims often provide incomplete, inaccurate or misleading information about their

[110] *Beganovic v Croatia* (n 48) [66]; *M. and Others v Italy and Bulgaria* (n 65) [100].

[111] *Denis Vasilyev v Russia* (n 52) [124]; *Rantsev v Cyprus and Russia* (n 16) [288].

[112] *Opuz v Turkey* (n 37) [138]-[139].

[113] ibid.

experiences. The reason for that is usually mistrust of authorities or instruction from traffickers to provide an untrue account.[114]

The scope of the duty

The case-law suggests that the requirements initially laid down in *Jordan* apply in the same way regardless of whether the violation stems from private or state acts.[115] Hence, the requirements that the investigation is independent, impartial and subject to public scrutiny, and that the competent authorities act with *exemplary diligence and promptness* are identified as the minimum standards.[116] In *Rantsev*, the Court ruled that where the possibility of removing the victim from the harmful situation was available, the investigation must be undertaken 'as a matter of urgency'.[117]Furthermore, effective investigation must be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible.[118] To that aim:

> '[T]he authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical reports.[119]

[114] The Anti-Trafficking Monitoring Group (ATMG), 'Wrong Kind of Victim? One Year on: an Analysis of UK Measures to Protect Trafficked Persons' (June 2010) 27.

[115] *Denis Vasilyev v Russia* (n 52) [100]; *Opuz v Turkey* (n 37) [159].

[116] *Beganovic v Croatia* (n 48) [75]; *M and Others v Italy and Bulgaria* (n 65) [100].

[117] *Rantsev v Cyprus and Russia* (n 16) [288].

[118] *Menson and Others v UK* (n 52); *Denis Vasilyev v Russia* (n 52) [100].

[119] *Beganovic v Croatia* (n 48) [75].

Accordingly, '[a]ny deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of these standards.'[120]

Although the Court has continuously stressed that this is not an obligation of result, but one of means,[121] it has nevertheless affirmed that the requirements of Articles 2 and 3 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts. In such cases, the proceedings as a whole, including the trial stage must satisfy the requirements of the positive obligation to protect lives through the law and the prohibition of ill-treatment.[122] Yet, finding a violation of the procedural aspect of article 2 in *Öneryıldız*, not because of the lack of an effective investigation, but because of the judicial proceedings is said to be 'a wholly new approach'.[123] The Court in that case emphasized that when negligence attributable to state officials goes beyond an error of judgement or carelessness, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted, may amount to a violation of Article 2.[124] On the one hand, this appears to be in tune with its previous finding of the violation of article 4 in *Siliadin*, based on the fact that the applicant 'was not able to see those responsible for the wrongdoing convicted under criminal law'.[125] On the other hand, it contradicts the Court's approach in *MC*, where it was particularly careful to distance itself from

[120] *Denis Vasilyev v Russia* (n 52) [100]; *Menson and Others v UK* (n 52).

[121] *Hugh Jordan v UK* (n 54) [107]; *Menson and Others v UK* (n 52); *Denis Vasilyev v Russia* (n 52) [100].

[122] *Ali and Ayse Duran v Turkey* [2008] ECHR 289 [61]; *Beganovic v Croatia* (n 48) [77]; *Öneryıldız v Turkey* (n 22) [95].

[123] Dissenting judge Turmen in *Öneryıldız v Turkey* (n 22).

[124] *Öneryıldız v Turkey* (n 22) [93].

[125] *Siliadin v France* (n 8) [145]-[146].

expressing any opinion on the guilt of the alleged perpetrators when assessing the effectiveness of the investigation.[126] Still, while in *Öneryıldız* and *Siliadin* the national investigation clearly demonstrated the responsibility of the alleged perpetrators, which was then not followed by the appropriate judicial response; the failures in investigation in *MC* undermined the possibility for establishing such responsibility in the first place. Thus, the Court explained in *Öneryıldız* that it should not be inferred from the forgoing that article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for criminal offence.[127] Rather, the Court's task consists of reviewing 'whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by articles 2 and 3'.[128] Therefore,

> [I]t is not the Court's task to verify whether the domestic courts correctly applied domestic criminal law; what is in issue in the present proceedings is not individual criminal-law liability, but the State's responsibility under the Convention. The Court must grant substantial deference to the national courts in the choice of appropriate measures, while also maintaining a certain power of review and the power to intervene in cases of *manifest disproportion* between the gravity of the act and the results obtained at domestic level.[129]

This correlates with its ruling in *MC* that it was not concerned with 'allegations of errors or isolated omissions in the investigation', but rather with significant flaws of the

[126] *MC v Bulgaria* (n 37) [168], [185].

[127] *Öneryıldız v Turkey* (n 22) [96].

[128] *Ali and Ayse Duran v Turkey* (n 122) [62]; *Beganovic v Croatia* (n 48) [77]; *Öneryıldız v Turkey* (n 22) [96].

[129] *Beganovic v Croatia* (n 48) [78].

legislation, general practice and its application in the case at hand, that amounted to a breach of the respondent state's positive obligations.[130]

While these procedural obligations were reaffirmed in the context of Article 4 in *Rantsev,*[131] because the trafficking problem is not confined to the domestic arena, the Court further held that:

> In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, Member States are also subject to a duty in cross-border trafficking cases to co-operate effectively with the relevant authorities of other states concerned in the investigation of events which occurred outside their territories.[132]

The Court reminded the respondent states that such a duty results from trafficking-specific instruments and is also consistent with international agreements in which both states participate. The Court specially emphasized the importance of a full and effective investigation covering all aspects of trafficking allegations, from recruitment to exploitation. Hence, although there was no responsibility of Russian authorities for a failure to protect Ms Rantseva, since all the events took place outside of its territory, the Court found a violation of a procedural duty on the basis of its failure to investigate the recruitment aspect of alleged trafficking.[133] Such a failure in the present case 'was all the more serious in light of Ms Rantseva's subsequent death and the resulting mystery surrounding the circumstances of her departure from Russia'.[134] On the other hand, precisely for the fact that a victim died, the Court did not elaborate on the

[130] *MC v Bulgari*a (n 37) [167]-[168].

[131] *Rantsev v Cyprus and Russia* (n 16) [288].

[132] ibid [289].

[133] ibid [307]-[309].

[134] ibid [307].

procedural requirements placed on Cyprus, as a destination state, to investigate trafficking allegations. Instead, the analysis of procedural duties in that respect was subsumed by the obligation to investigate her death.[135]

It is important to note that states' procedural duties mainly relate to the criminal investigation that takes place after the initial act that potentially violates the right, with the aim of establishing the facts and eventually punishing the guilty party. However, as demonstrated in *Opuz*, states' investigative duties may also arise before such an act has taken place, thus effectively amounting to its prevention.[136] The same case also demonstrated that these duties may arise with respect to the alleged ongoing abuse with an aim of preventing its recurrence. In *Rantsev*, for example, the obligation of the police to make an inquiry into the circumstances which gave rise to a credible suspicion of her potential status as a trafficked victim was inexorably linked to a duty to protect her. [137] Nevertheless, standards of effective investigation undoubtedly apply in these cases too. Still, demands that human rights law places on the states in this respect by no means absolve them from observing the established rights of offenders. Thus, in the recent case that concerned the convicted trafficker complaining that his Article 6 rights had been violated because he was convicted solely on the basis of the statements of victims whom he had no opportunity to cross-examine, the Court held that 'the Rantsev judgment did not indicate that the positive obligation of States to prosecute traffickers go as far as infringing the defence rights of persons charged with trafficking.'[138]

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[135] ibid [300].

[136] See also *Kontrova v Slovakia* (n 86).

[137] *Rantsev v Cyprus and Russia* (n 16) [296] (emphasis added).

[138] *Breukhoven v The Czech Republic* [2011] ECHR 1177 [55].

3.2.2. *The duty to protect*

The duty to protect rights from threats that originate from non-state actors is commonly seen as an obligation to take operational measures aimed at preventing the initial harm or its recurrence. While these measures mainly concern a police action,[139] the obligation rests on all authorities who have the required knowledge and are in a position to take actions to avert the threat.[140]

The Court developed a test for assessing states' compliance with this duty in the well-known decision in *Osman*, which concerned the right to life.[141] Since then, the Court applied this test to a number of situations engaging both Articles 2[142] and 3.[143] Thus, the Court famously noted that Article 2 may imply 'in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'[144] Therefore, the Court ruled that

> [W]here there is an allegation that the authorities have violated their positive obligation to protect the right to life (…) it must be established (…) that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within

[139] In *Kontrova v Slovakia* (n 86) [52], the Court noted that 'it is one of the main tasks of the police to serve to protect fundamental rights and freedoms, life and health'.

[140] In *E v UK* (n 37), the responsibility was primarily placed on the social services who failed to discover the exact extent of the problem and, potentially to prevent further abuse taking place. In Öneryıldız, it concerned the relevant administrative and municipal departments responsible for supervising and managing the rubbish tip that was the source of the risk to the of the people living near the tip.

[141] Jeremy McBride, 'Protecting Life: A Positive Obligation to Help' (1999) 24 European Law Review 43.

[142] *Calvelli and Ciglio v Italy* (n 90) [55]; *Öneryıldız v Turkey* (n 22) [63]; *Opuz v Turkey* (n 37) [128]-[129]; *Kontrova v Slovakia* (n 86) [49]-[50]; *Kilic v Turkey* (2001) 33 EHRR 58 [62]; *Denizci and Others v Cyprus* [2001] ECHR 351 [375]-[376].

[143]*E v UK* (n 37) [88]; *Z v UK* (n 37) [73]; *M and Others v Italy and Bulgaria* (n 65) [99].

[144] *Osman v UK* (n 21) [115].

> the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[145]

The three-part test

The test developed by the Court consists of three parts. The first is concerned with *the objective circumstances* of the applicant's situation (or victim's situation, since in the majority of cases, the applicants would be victim's relatives). At this stage, the Court is invited to rule on whether there was a real and immediate risk to the right to life of an identifiable individual from criminal acts of a third party. The existence of such a risk is independent of the question whether it was known or ought to have been known, which in turn depends on whether it could possibly have been known at the time. Whether or not the situation reached that threshold depends on all the circumstances of the case.

The second part of the test relates to *the official awareness* of these circumstances or the inexcusable lack of it. This was said to be 'a discrete precondition for [states] responsibility'.[146] Here, it must be demonstrated that the authorities 'knew or ought to have known at the time' of the existence of the real and immediate risk to life. Such awareness may result from the victim's own attempts to draw it to their attention[147] or from other information available to authorities.[148] The Court's task is to scrutinize the way authorities dealt with information known to them at the time. However, it has been noted that states' obligations are not restricted to situations where

[145] ibid [116].

[146] Jeremy McBride, 'Protecting Life: A Positive Obligation to Help' (n 141) 45.

[147] *Opuz v Turkey* (n 37).

[148] *Öneryıldız v Turkey* (n 22).

the risk is effectively staring at their face.[149] Hence, the Court expressly rejected an argument that the failure to perceive the risk (or to take preventative measures to avoid that risk) must be tantamount to gross negligence or wilful disregard of the duty to protect life.[150] Still, any conclusion as to whether authorities knew or ought to have known of the risk can only be answered with reference to the specific circumstances of the case.

Finally, the last part of the test is concerned with *measures* that were within the scope of the powers of state authorities which, judged reasonably, might have been expected *to avoid that risk.* In other words, it prompts the question of whether the authorities did all that could be reasonably expected of them to avoid a real and immediate risk to life. Such a question requires consideration of three points: first, whether the required measure was within the state powers; second, whether this could be reasonably expected from the state and lastly, whether it would have had a capacity to avert the risk. Clearly, the obligation to protect life is not absolute and different considerations play a role when assessing its scope. As to the second point, the Court ruled that the required action must not impose 'an impossible or disproportionate burden' on the authorities. The limits to the required action are set by 'difficulties involving policing modern societies, the unpredictability of human conduct and the operational choices which must be made both in terms of priorities and resources'.[151]

With respect to the third point, the action required from the state must have the *potential* to make a genuine difference. In the context of Article 3, the Court explained that this

[149] Jeremy McBride, 'Protecting Life: A Positive Obligation to Help' (n 141) 47.

[150] *Osman v UK* (n 21) [116].

[151] ibid.

> [D]oes not require it to be shown that "but for" the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.[152]

Furthermore, the Court clarified that the choice of the measures that are 'necessary and sufficient' to protect individuals[153] primarily rests with national authorities.[154] Thus it held that 'it is not for the Court to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their positive duties.'[155]Nevertheless, it underscored its ultimate power to provide final authoritative interpretation of the rights and freedoms and, according to the principle of practical and effective protection of the rights, to ensure that states discharge their obligation to protect rights in an adequate manner.[156]

Obviously, the *Osman* test has been used for assessing states' obligations in a variety of contexts - from domestic violence and child abuse to environmental catastrophes and, finally, trafficking in human beings. While most of the time the Court followed its wording, it slightly modified the test when applying it to a (potential) trafficking situation. The Court has been criticised for not offering any explanation for this change.[157] However, such adaptation is welcome given that trafficking circumstances differ significantly from life-threatening situations (although, as seen in

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[152] *E v UK* (n 37) [99].

[153] *Öneryıldız v Turkey* (n 22) [101].

[154] *Öneryıldız v Turkey* (n 22) [107]; *Opuz v Turkey* (n 37) [165].

[155] *Opuz v Turkey* (n 37) [163]-[165].

[156] ibid.

[157] Vladislava Stoyanova 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30(2) Netherlands Quarterly of Human Rights 163, 192.

Rantsev, they may well coincide). Still, the explanation for this modification is far less important than developing such a test properly, which arguably, may not have been the case.

Rantsev and beyond

Drawing a parallel with Articles 2 and 3, the Court stated that Article 4 too 'may, in certain circumstances, require a state to take operational measures to protect victims, or potential victims, of trafficking.'[158] It is immediately noticeable that the Court omitted the word 'preventative' from the phrase, thus potentially indicating the difference between situations when life is threatened and the threat of trafficking arises. Namely, while the duty to protect life inevitably demands action *before* any harm has actually occurred, victims of trafficking will most likely already have been subject to a certain form of 'enforced control'[159]when they came to attention of authorities. Hence, preventing *further* harm may well call for a different kind of protective measure that includes, at a minimum, immediate assistance and support.[160] Some academics also recognize that the duty to protect, in general, is not confined to preventative action. Thus, Kälin and Künzli noted that '[t]he obligation to protect (…) is a *preventative* obligation where action is needed to avert an impending violation and it is *remedial* where the state comes to the aid of victims during or after the fact.'[161] According to them, while the former mainly takes the form of police intervention, the latter is often

[158] *Rantsev v Cyprus and Russia* (n 16) [286].

[159] The term used to describe a common denominator between the concepts of slavery, servitude and forced labour contained in article 4. See *R v SK* [2011] EWCA Crim. 1691 [40].

[160] UN High Commissioner for Refugees, 'Prevent, Combat, Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights Based Approach' (November 2011) 42.

[161] Kälin and Künzli, *The Law of International Human Rights Protection* (n 56) 96 (emphasis added).

concerned with redressing the consequences of a violation, i.e. through victims' rehabilitation.

The test outlined in *Rantsev* reads as follows:

> In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the state authorities were aware, or ought to have been aware, of *circumstances giving rise to a credible suspicion* that an identified individual *had been, or was at real and immediate risk of being, trafficked or exploited* within the meaning of art.3(a) of the Palermo Protocol and art.4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of art.4 of the Convention where the authorities *fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk*.[162]

Careful comparative reading of this test with the one developed in *Osman* reveals important differences. Admittedly, the Court did not offer any explanation for these alterations. However, although it usually does provide reasons when it seeks to depart from its earlier practice in the cases that raise similar considerations,[163] the nature of the trafficking problem, as opposed to life threatening situations, clearly justifies such a departure.

The *Rantsev* judgment exposes the difference with respect to all three parts of the *Osman* test discussed above. While the *text* itself does not differ significantly with respect to the requirement of the state's awareness,[164] the wording used in other two parts may result in considerably different standards for assessing states' compliance.

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[162] *Rantsev v Cyprus and Russia* (n 16) [286] (emphasis added).

[163] *Christine Goodwin v UK* (2002) 35 EHRR 18 [73]-[74].

[164] Although criteria for judging such awareness introduce new elements, which will be explained below.

First part of the test: objective circumstances

With respect to the objective circumstances that should alert authorities to take an action, instead of '*the existence* of a real and immediate risk to the life', the Court used the phrase '*circumstances giving rise to a credible suspicion* that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited'. Two issues deserve attention: the factual aspect of the test and the evidential standard set out in it.

As for the factual requirement, the test requires that there was a credible suspicion *either* that an identifiable individual *had been trafficked or exploited or, that she was at real and immediate risk of being trafficked or exploited.* While the first part of the requirement rightly establishes an obligation with respect to victims who have arguably already been subject to trafficking (with or without exploitation having taken place), the second part invites more detailed consideration. In particular, the phrase 'at real and immediate risk of being trafficked' seems to be too broad. This is because, as already noted in Chapter 2, the definition of trafficking is broad enough to include even those acts that are quite remote from any exploitative practice, such as recruitment, for example. In such circumstances, being 'at real and immediate risk of trafficking' as opposed to having already been trafficked but not yet subject to exploitation (which in turn means being at real and immediate risk of exploitation), seems to be too distant a moment for imposing protective duties on states. Such a requirement would disproportionately interfere with both the victim's and the potential perpetrator's rights, given the low evidential threshold (i.e. a credible suspicion). The only context where this statement could be said to have meaning are deportation cases, when there is a risk that one might be trafficked if deported back to the state of origin. Nevertheless, the basis for such a claim would be the fact that a person has already been trafficked in the past. Accordingly, the more appropriate phrasing of the requirement with respect to the factual aspect would be that an identifiable individual had been trafficked in the past (if she approached authorities alone) or is currently in the situation of trafficking (if rescued by the police), regardless of whether any exploitation had occurred.[165] That is because all trafficked victims are indeed at real and immediate risk of being exploited, because that is the sole purpose of the act of trafficking. On the other hand, if the exploitation had already begun, the victim may also rely on one of the explicitly prohibited conducts or alternatively, on the protection provided by article 3.[166]

It is important to note that the Court did not seek to establish conclusively that Ms Rantseva had been trafficked or exploited, neither was this necessary, at least with respect to the duty to conduct further enquiries into her circumstances. In fact, contrary to the situation in *Siliadin*, the Court here was not concerned with the question of whether the judicial system provided sufficient protection through prosecuting and penalising those clearly established to have been responsible for the situation. Instead, a *credible suspicion* that she might have been the victim was sufficient to engage the Article 4 protection.[167]

Turning to the evidential requirement, it is noteworthy that the standard 'existence of a real and immediate risk' was replaced by 'circumstances giving rise to a

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[165] Both the Anti-Trafficking Convention and Anti-Trafficking Directive require protection when there are reasonable grounds to believe that a person 'has been victim of trafficking in human beings' (Anti-Trafficking Convention art 10(2)) or that she 'might have been subjected to any of the offences referred to in Articles 2 and 3' (Anti-Trafficking Directive art 11(2)).

[166] *M and Others v Italy and Bulgaria* (n 62). See also Section 4 of this chapter.

[167] This, however, inevitably results in a different level of protection and measures required to provide it, which is evident in the Anti-Trafficking Convention. Namely, some of the provisions to protect and assist victims contained in Chapter III of the Convention apply to all victims (arts 10, 11, 12, 15 and 16), while others apply to persons not yet formally identified as victims but whom there are reasonable grounds for believing to be victims. See arts 10(2), 12(1), 12 (2) and 13.

credible suspicion'.[168] Stoyanova criticises the Court for 'softening' the *Osman* test, suggesting that the new approach was borrowed from the Anti-Trafficking Convention, namely, the reasonable grounds test for victims' identification contained in article 10(2). Apart from expressing regret for the Court's failure to substantiate and explain this modification of the *Osman* test, she also asks whether this 'less stringent' test is of relevance only to persons who are allegedly victims of human trafficking for the purpose of prostitution or it has a wider application. In addition, she is concerned that the test may apply 'irrespective of whether [the victims] want to be saved or whether there is something to be saved from'.[169]

While the analogy with the Anti-Trafficking Convention is all too obvious and barely in need of any justification, the concerns expressed with respect to the 'weakening' of the *Osman* test are unfounded. In fact, the low evidential threshold is primarily related to the state's investigative duties and a duty to provide immediate assistance and protection, which should enable the correct identification of victims, 'which is often tricky and necessitates detailed enquiries'.[170] As already noted, the Court places special attention on investigating situations of potential grave abuse of individual rights, not only in the absence of the victim's initiative, but also even in spite of her ostensible opposition. Still, in deciding the course of action in such situations, states must strike a proper balance between victim's Article 2, 3 and 8 rights.[171]

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[168] Stoyanova, 'Dancing on the Borders of Article 4' (n 157) 193.

[169] ibid.

[170] Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) CETS 197 (Explanatory Report) para 127. See also Jessica Elliott, '(Mis)Jdentification of Victims of Trafficking: The Case of R v. 0' (2009) 21 International Journal of Refugee Law 727, 732; Parosha Chandran, 'The Identification of Victims of Trafficking', in Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (2011) 45-6.

[171] *Opuz v Turkey* (n 37) [138].

However, even if such reasonable grounds to believe exist, any measure of victim's protection would apply exclusively on a 'consensual and informed basis'.[172] Therefore, the argument about paternalistic protection clearly does not hold.

Furthermore, apart from the victims' reluctance to reveal their suffering, the lower threshold for state intervention is justified by a difference in the nature of the trafficking act and life-threatening situations. In the latter cases, the question relates to the *future risk*, which, even if eventually materialized, invites a careful consideration of the requirements imposed on states, especially if these involve the coercion of a potential perpetrator. Conversely, in trafficking situations, the question for national authorities is rather that of *uncertainty about past and present* facts, which in turn justifies placing stricter obligations.

Second part of the test: the official awareness of the objective circumstances

It has already been noted that for a positive obligation to give rise to protective measures, it must also be demonstrated that the objective circumstances were known to the authorities, or ought to have been known to them at the time. In *Rantsev*, the Court used the phrase 'aware or ought to have been aware', which in substance does not differ from the *Osman* test. Importantly, the Court recognized a range of standards that might be used in assessing states' awareness, many of which flow directly from trafficking-specific instruments. With respect to Cyprus, the seriousness of the trafficking problem in general, clearly depicted in the reports of the Cypriot Ombudsman and the CoE Commissioner for Human Rights, was instrumental in setting higher expectations from authorities. Hence, these were expected to pay heightened attention and carefully examine every situation that raised a concern with respect to the

[172] Anti-Trafficking Convention, art 12(7); Anti-Trafficking Directive, Recital 21.

possibility of trafficking.[173] This ought to be read together with the Court's *general requirement* from states to ensure adequate training for law enforcement and immigration officials, which is based directly on the relevant provisions of the Palermo Protocol and the Anti-Trafficking Convention.[174] Hence, the magnitude of the trafficking problem in general, coupled with specific circumstances of the case clearly revealing the indicia of trafficking (especially the fact that her 'employer' was in possession of her passport and other documents'), created a credible suspicion that Ms Rantseva was, or was at real and immediate risk of being, trafficked or exploited, which authorities ought to have been aware of.[175] In other words, the circumstances of the case were such as to raise a credible suspicion that she might have been a trafficking victim, which adequately trained and diligent authorities would have been aware of and would have had a duty to act upon. Accordingly, authorities were obliged to investigate these circumstances and to take any necessary operational measure to protect her. Instead, they did not even take a statement from her nor did they make any further inquiries into the background facts, which together with the multitude of other failures, resulted in the finding of a violation of article 4 in this respect.[176]

Moreover, the question of a state's awareness of a potential trafficking situation is closely linked with the issue of victim identification. This duty is set out in Article 10 of the Anti-Trafficking Convention and places a demand on state parties to establish a legal and institutional framework necessary to identify victims and to ensure that:

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[173] For a national approach, see *Minh, R (on the application of) v The Secretary of State for the Home Department* [2015] EWHC 1725 (Admin) (18 June 2015).

[174] *Rantsev v Cyprus and Russia* (n 16) [296].

[175] ibid.

[176] ibid [298].

> [I]f the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking in human beings, that person shall not be removed from its territory until the identification process (…) has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.[177]

A failure to identify a trafficking victim would mean that his or her fundamental rights will continuously be denied and the prosecution will be denied the necessary witness in criminal proceedings.[178] It is important to note that the Anti-Trafficking Convention affords protection to individuals who are either recognized as trafficking victims or where there are reasonable grounds to believe that they are.[179] The arguments in favour of such an interpretation were presented above.[180] On the other hand, according to *Rantsev*, even persons who are at risk of being trafficked qualify for protection under the ECHR. Thus, the Court has yet to clarify whether it meant to include future, rather than potential victims, within the scope of Article 4 protection.

The question of whether the ECHR places a separate duty on states to identify a person as a victim of trafficking, regardless of any further duty to protect her,[181] has not been explicitly addressed by the Strasbourg Court. Still, the *Rantsev* judgment seems to support the view that such a duty is inexorably linked with the assessment of her protection needs and thus confined to the discussion of the scope of the protective

[177] Anti-Trafficking Directive, art 10(2).

[178] Explanatory Report, para 127.

[179] Also Anti-Trafficking Directive, art 11(2).

[180] See the discussion on the first part of the test.

[181] See *R (on the application of E) v Secretary of State for the Home Department* [2012] EWHC 1927 (Admin) (the *E* case) and *R (on the application of Y) v Secretary of State for the Home Department* [2012] EWHC 1075 (Admin) (the *Y* case). In the Y case [46] and [50], Mr Philip Mott QC concluded that Anti-Trafficking Convention clearly envisaged that 'victim status, in the sense of someone requiring [Convention] assistance and protection, may be time- limited, but that the time will vary from case to case' and that the Convention required consideration of the 'victim's current status at the "Reasonable Grounds" decision stage'.

duties.[182] Accordingly, if no violation of the duty to protect were found, there would be no separate violation of Article 4 simply on the basis of a failure to identify the alleged victim.[183] Hence, the assessment of a state's awareness of the objective circumstances, which implies a duty to identify a victim, represents just one step in the Court's analysis of the obligation to protect her. Thus, a low threshold for victims' initial identification effectively serves to establish relevant circumstances and to assess their protection needs, even when such status has not been formally recognized.

Third part of the test: measures required to protect an individual

Having found that objective circumstances raise a credible suspicion as to the individual's victim status and, that a state was or ought to have been aware of these, the final task for the Court would be to assess whether the state complied with its duties to protect such an individual. The Court held in *Rantsev* that if the answers to the above questions are affirmative 'there will be a violation of Article 4 of the Convention where the authorities fail to take *appropriate* measures within the scope or their powers *to remove the individual from that situation or risk*.'[184] While the *Osman* test calls for measures which, judged reasonably, might have been expected 'to avoid' that risk, the *Rantsev* test requires an action 'to remove' her from the situation or risk. Thus, while the former invites the assessment of the extent of the risk and the probable capacity of

[182] See also *LE v Greece* (App no. 71545/12) (21 January 2016). However, Stoyanova criticises this decision arguing that a duty to identify trafficking victims falls under the general duty to establish an adequate legal framework. Vladislava Stoyanova, 'L.E. v. Greece: Human Trafficking and the Scope of States' Positive Obligations under the ECHR' (2016) 3 European Human Rights Law Review 290.

[183] Similar conclusion as to the duties under the Anti-Trafficking Convention was reached by Philip Mott in the *E* case [49]. However, Lorna McGregor contends that 'in Rantsev, the European Court read Article 10 of the Palermo Protocol, which requires the training of officials, to find that the Cypriot authorities had failed in their duty of due diligence by failing to identify the applicant's daughter as a potential victim of trafficking when she was brought to the police station.' Lorna McGregor, 'Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings' (2014) 36 Human Rights Quarterly 210, 223.

[184] *Rantsev v Cyprus and Russia* (n 16) [286] (emphasis added).

any measure to avoid it, trafficking situations consider victims who have potentially already suffered some harm. This may in turn place stricter duties on the states. In fact, the stronger the indicia or evidence of one's trafficking status, [185] the less excuse the state will have for failing to protect her.

Nevertheless, Article 4, like Articles 2 and 3, does not confer the right to absolute protection. Therefore, the appropriate measures required from the national authorities must be within the scope of their powers and must not be interpreted to impose an impossible or disproportionate burden on them. With respect to the proportionality requirement, while the Court in *Osman* only referred to considerations that act as constraints to the required action, *Rantsev* also presented considerations that fall on the other side of the balancing scale. Hence, the Court noted that the proportionality of any positive obligation will be assessed in the light of the States' obligations under the Palermo Protocol to endeavour to provide for the victims' physical safety, to establish comprehensive policies and programs to prevent and combat trafficking and to provide relevant training for state officials.[186] While this statement clearly signals the preparedness of the Court to take into consideration a much more substantive body of duties enshrined in these trafficking-specific instruments when assessing states' compliance with their duties, the problem of the nature and scope of these protective measures within Article 4 remains the most difficult to answer. In other words, are 'appropriate measures within the scope or [state] powers to remove the individual from that situation or risk' limited to rescuing victims from actual or imminent danger, or do they include a range of substantial measures, enshrined in the Anti-Trafficking Convention?

[185] UNODC, 'Human Trafficking Indicators' <http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf> accessed 4 April 2015.

[186] *Rantsev v Cyprus and Russia* (n 16) [287].

The specific circumstances of the *Rantsev* case must be born in mind when taking a critical stance towards the Court's failure to state more explicitly the scope of the states' protective duties. Namely, the alleged victim died under suspicious circumstances and in spite of some worrying signals, the authorities did literally nothing to establish whether she was actually trafficked or have been exploited. This made the finding of a violation quite straightforward, and the Court may not have felt obliged to address this issue in more detail.

The following chapter contains an extensive overview of the range of protective measures contained in the Anti-Trafficking Convention, and largely incorporated into the Anti-Trafficking Directive.[187] The analysis in Chapter 7 thus examines whether and to what extent these substantive victim protection measures could be grounded in the ECHR, and Article 4 ECHR in particular.

4. The 'incomplete coverage' of Article 4 and the role of Article 3 ECHR in human trafficking

Lorna McGregor made a well-argued case for using the right to be free from torture, inhuman or degrading treatment in human trafficking situations.[188] In addition, the UN Committee against Torture has recognised the link between trafficking and torture in its Concluding Observations for Russian Federation,[189] South Africa,[190] and Togo.[191]

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[187] Art 11.

[188] Lorna McGregor, 'Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings' (2014) 36 Human Rights Quarterly 210-241.

[189] UN Committee against Torture, 'Concluding Observations Russian Federation' (2007) CAT/C/RUS/CO/4, para 11.

It is important to note that the *travaux preparatoires* to the Torture Convention and torture experts suggest that a state purpose is necessary for the torture qualification, hence rendering it inapplicable to trafficking situations, which mainly concern private violations.[192] Nevertheless, these limitations do not seem to extend to other ill-treatment, 'which may be engaged provided the acts are of the requisite severity and the state authorities are on notice of them but fail to prevent or protect the victim of trafficking.[193]

Whereas the thesis does not, in any way, oppose using this, or any other right, to advance the protection of trafficking victims, Part I of the thesis clearly demonstrated that human trafficking *intrinsically* falls under the right to be free from slavery, servitude and forced labour. Thus, even though practices of human trafficking may, and regularly do infringe upon the right to be free from torture, inhuman or degrading treatment,[194] this is always done with the purpose of exploitation, which may or may not have materialised. As a result, while the act and means elements of the trafficking definition may meet the requirements of a definition of inhuman or degrading treatment, the purpose element (exploitation) is what makes this practice distinctive from other forms of ill-treatment.

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[190] UN Committee against Torture, 'Concluding Observations South Africa' (2006) CAT/C/ZAF/CO/1 para 24.

[191] UN Committee against Torture, 'Concluding Observations Togo' (2012) CAT/C/TGO/CO2 para 18 and UN Committee against Torture, 'Concluding Observations Togo' (2006) CAT/C/TGO/CO/1, para 26.

[192] Manfred Nowak, Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008) 39; Herman Burgers, Hans Danelius , *The United Nations Convention Against Torture: A Handbook on The United Nations Convention Against Torture and Other Cruel and, Inhuman or Degrading Treatment or Punishment* (International Studies of Human Rights, Martinus Nijhoff Publishers 1988) 118.

[193] McGregor, 'Applying the Definition of Torture to the Acts of Non-State Actors' (n 188) 222.

[194] The Court in Rantsev noted that that ' the use of violence and the ill-treatment of victims are common features of trafficking.' *Rantsev v Cyprus and Russia* (n 16) [252].

For example, in the case of *Hadijatou Mani Koraou v The Republic of Niger*,[195] ECOWAS Community Court of Justice referred to the judgment of the Nuremberg Military Tribunals,[196] holding that

> We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - *compulsory uncompensated labour* - would still remain.[197]

Evidently, *in essence*, slavery and other exploitative practices are distinctive from the ill-treatment that often accompanies them.

Furthermore, while exploitation itself may, arguably, also be labelled as inhuman or degrading, it represents, as demonstrated in Chapter 5, a distinct wrong. Thus, the Strasbourg Court in *Rantsev* noted that it was clear that the use of violence and the ill-treatment of victims are common features of trafficking. Furthermore, in the subsequent case of *M v Italy and Bulgaria*, the Court held that 'human trafficking as defined in international conventions (...) undoubtedly also amounts to inhuman and degrading treatment under Article 3 of the Convention.'[198] However, the Court considered that 'any inhuman or degrading treatment suffered by [the victim] (...) was inherently linked to the alleged trafficking and exploitation',[199] thus making the ill-treatment allegations subsidiary and consumed by the exploitation charges.

This, however, does not mean that Article 4 ECHR provides full and complete protection to trafficking victims. On the contrary, the right to be free from torture and

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[195] *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08 of 27October 2008, [79] (unofficial translation by INTERRIGHTS).

[196] Judgement of 3 November 1947, in Trials of Major War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, vol 5, 1997, page 958.

[197] Emphasis added.

[198] *M and Others v Italy and Bulgaria* (n 65) [106].

[199] *Rantsev v Cyprus and Russia* (n 16) [272].

inhuman or degrading treatment may well offer complementary protection in certain situations. Thus, McGregor notes that '[t]he extension of the prohibition of torture and other ill-treatment to trafficking would therefore provide a vehicle for its fuller characterization under international human rights law and an expansion of the prevention and protection systems in place for victims.'[200] Namely, McGregor suggests that while the majority, if not all, trafficking cases are covered by the prohibition of slavery, servitude, and forced labour, this may not always be the case and the protection offered by the right to be free from torture, inhuman or degrading treatment may offer complementary protection in such cases.

The question of whether the 'dual application' of the prohibition of slavery, servitude, and forced labour and the prohibition of torture and other ill-treatment is 'normatively desirable' depends on the interpretation of McGregor's opinion on the 'incomplete coverage' provided by the former.[201] Namely, it is clear that in her view, the application of Article 4 on human trafficking situations is only possible at the exploitation stage of the trafficking process. Thus, she appears to argue that in order to engage Article 4, human trafficking needs to be interpreted as one of the three expressly prohibited conducts (slavery, servitude or forced labour.[202] Accordingly, on this view, the incomplete coverage means that situations of human trafficking will not always reach the threshold of slavery, servitude or forced labour thus leaving the victims without protection. As a result, she claims that only 'a "small fraction" of trafficking cases may fall under the prohibition of slavery, although the size of the

[200] McGregor, 'Applying the Definition of Torture to the Acts of Non-State Actors' (n 188).

[201] ibid section IV.

[202] ibid 232-234.

fraction will depend on the definition of slavery adopted.[203] Furthermore, she adds that ‘many cases of trafficking are likely to violate the prohibition of forced labour although questions persist over certain practices such as trafficking for sexual exploitation, due to issues surrounding whether sexual exploitation can constitute work[204] and organ removal.’[205] Thus, she concludes that ‘while [the prohibition of forced labour] may provide more expansive coverage, it is by no means comprehensive.’[206]

However, her view is contrary to the argument defended in Chapters 3 and 4 of this thesis and to the position of the Strasbourg Court in *Rantsev*, as well as in the subsequent case law[207] that trafficking *itself* falls within the scope of Article 4. Accordingly, protection is guaranteed not only to victims who are *already exploited* but also who are *at risk of being exploited* by way of being in the trafficking situation. As already noted, being in the situation of trafficking means that the risk of exploitation, as its purpose, is imminent.

Notwithstanding the academic debates on the appropriate scope of Article 4 ECHR and whether it covers only situations of actual or also intended exploitation (human trafficking), the ‘incomplete coverage’ refers to situations where it is difficult to satisfy the definitional criteria of the practices prohibited by this right and therefore, a victim may resort to Article 3 instead. Hence, Article 3 protection serves to provide a

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[203] ibid 233.

[204] See Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 103rd ILC session, 11 Jun 2014) (entry into force 9 November 2016).

[205] McGregor, ‘Applying the Definition of Torture to the Acts of Non-State Actors’ (n 188) 233.

[206] ibid.

[207] *M and Others v Italy and Bulgaria* (n 65) [150]-[151].

safety net when Article 4 allegations fail, which was the case in *M v. Italy and Bulgaria.*[208]

This case arose from the circumstance where the applicants, a Roma family from Bulgaria, came to Italy on the alleged promise of work from another Roma family of Serbian origin. The applicants complained, *inter alia*, that their daughter had suffered ill-treatment, sexual abuse and forced labour at hands of the Serbian family in Italy, in violation of her rights under Articles 3 and 4. In addition to the allegations that the Italian authorities failed to protect her and punish the perpetrators, they claimed that instead of investigating the circumstances complained of, the police instituted criminal proceedings against the girl and her mother for perjury and false accusations. The government counter-claimed that the situation amounted to a typical marriage according to the Roma tradition. In the light of the party's dispute over the factual circumstances and the Court's finding it 'difficult to decipher the facts and the veracity of the situation',[209] the Court declared the Article 4 complaint inadmissible. It noted that

> [T]he circumstances as alleged by the applicants could have amounted to human trafficking. However, it considers that from the evidence submitted there is not sufficient ground to establish the veracity of the applicants' version of events (...) It follows that the applicants' allegation that there had been an instance of actual human trafficking has not been proved and therefore cannot be accepted by the Court.[210]

Thus, diverging accounts of factual circumstances presented by the applicants and the respondent states, and the failure of Italian authorities to investigate the events, resulted in little evidence available to the Court to determine the case. This has prevented the Court from making a conclusion on 'the existence of the circumstances capable of

[208] (Application no 40020/03) (31 July 2012).

[209] ibid [68].

[210] ibid [154].

amounting' to trafficking which, *had they been proved*, could have amounted to human trafficking.

This has not, however, stopped the Court from finding a violation of the procedural limb of Article 3 on account of an ineffective investigation into the first applicant's alleged ill-treatment by the Serbian family.[211] In fact, in the light of its finding that the Italian authorities failed to undertake an effective investigation under the procedural aspect of Article 3, the Court found it unnecessary to examine a procedural obligation to investigate situations of potential trafficking.[212]

Leaving aside the problematic reasoning of the Court, criticised by Judge Kalaydjieva in his dissenting opinion,[213] this case illustrates how the *alternative* application of the right to be free from torture, inhuman or degrading treatment may prove useful in the trafficking situations not least because of the comparable scope of protection it offers.

On the other hand, drawing on the key distinction between the scope of the right and the scope of state responsibility (where the former defines practices that fall within the specific right and the latter determines whether such practices could be attributed to a state in the concrete situation), and in the light of positive obligations arising out of Article 4 ECHR, it is clear that McGregor's argument about the 'incomplete coverage' of Article 4 ECHR only covers the former. Accordingly, such an argument can also be extended to the list of positive obligations established under this

[211] ibid [107]-[108].

[212] ibid [157]-[158].

[213] See also the critique of these findings in Marija Jovanovic, 'Trafficking in Human Beings and the European Court of Human Rights – In Dubio pro State' (OxHRH Blog, 27 April 2013) <http://ohrh.law.ox.ac.uk/trafficking-in-human-beings-and-the-european-court-of-human-rights-in-dubio-pro-state/> accessed 8 February 2016.

right. In that light, Article 3 ECHR also provides important complementary protection, especially in cases of victims facing deportation. The following sub-section further elaborates this problem.

4.1. The *non-refoulment* obligation under the ECHR

The *non-refoulment* obligation for victims with irregular immigration status under Article 4 ECHR has not been recognised so far. A few cases have raised the issue but have been either declared inadmissible due to non-exhaustion of domestic remedies,[214] or struck out of the list of cases because the matter has been resolved between the parties by a friendly settlement.[215]

The thesis argues that the right to be free from slavery, servitude and forced labour is ill-placed to provide protection to the majority of trafficking victims facing deportation, except in the most extreme cases. Namely, it is argued that in the light of the nature and purpose of *this* right, the protection from deportation beyond the reflection and recovery period,[216] would only be available if there was a real and immediate risk of re-trafficking and exploitation upon return. The reason for such a narrow protection is the fact that this right is aimed at protecting from a specific harm – that of exploitation and the risk thereof.

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[214] *FA and YK v UK* (Application no. 20658/11 and 21413/11) (10 September 2013).

[215] *M v United Kingdom* (n 65) (this was the first human trafficking-related complaint against the UK to be taken to the European Court of Human Rights by a victim of trafficking in the UK complaining of violations of Articles 3,4 and 8 ECHR); *LR v United Kingdom* (App. No. 49113/09) (14 June 2011); *OGO v UK* (Application no. 13950/12) (18 February 2014).

[216] The obligation to provide for a reflection and recovery period 'of at least 30 days' is established by article 13 of the Council of Europe Anti-Trafficking Convention. See Chapter 7 for a detailed discussion of this provision.

On the other hand, Article 3 with its well-articulated jurisprudence on the matter of *non-refoulment* offers a protection from a broader spectrum of harm, which needs to fall under one of the three prohibited practices (torture, inhuman or degrading treatment).[217] In particular, the decision of the Strasbourg Court in the case of *HLR v France*[218] establishes the principle that individuals should not be sent back to a state where they are at risk of ill-treatment, *even at the hands of non-state agents*, whom the state cannot or will not control.

Therefore, whereas Article 4 offers the protection only when deportation would result in the real and immediate risk of exploitation/re-trafficking, the risk of a much broader spectrum of harm in the returning state may well trigger the non-deportation obligation contained in Article 3. This is so, the thesis argues, because it is difficult enough to prove even the (present) status of a victim of exploitation (trafficking) that establishing the (future) risk of exploitation (re-trafficking) would be next to impossible. Thus, for example, in the case of *VF v France*, which concerned the proceedings for the applicant's deportation to Nigeria, the applicant alleged that if she were expelled to Nigeria she would be at risk of being forced back into the prostitution ring from which she had escaped, and of being subjected to reprisals by those concerned, and that the Nigerian authorities would be unable to protect her.[219] The Strasbourg Court declared the application inadmissible (manifestly ill - founded) observing that, while the Nigerian legislation on preventing prostitution and combating such networks had not fully achieved its aims, considerable progress had been made

[217] *Soering v United Kingdom* (n 32); *Chahal v UK* (1997) 23 EHRR 413; *D v UK* (1997) 24 EHRR 423; *N v United Kingdom* (2008) 47 EHRR 39; *Saadi v. Italy* (2009) 49 EHRR 30; *N v Sweden* [2010] ECHR 1139; *MSS v Belgium* (2011) 53 EHRR 2; *Sufi and Elmi v UK* (2012) EHRR 209; *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21; *Othman (Abu Qatada) v. United Kingdom* (2012) 55 EHRR 1; *Tarakhel v. Switzerland* [2014] ECHR 1185.

[218] *HLR v France* (1998) 26 EHRR 29.

[219] *VF v France* (Application no. 7196/10) (29 November 2011).

and it was likely that the applicant would receive assistance on her return. Evidently, it might prove more useful for victims to rely on the protection offered by Article 3 (and Article 8), which apply equally to victims of trafficking as they apply to any other individual facing deportation. For it is arguably much easier to establish the risk of harm that often accompanies human trafficking and exploitation than to prove the risk of the composite human trafficking/exploitation offence.

4.2. The *non-refoulment* obligation under the Council of Europe Anti-Trafficking Convention

Chapter 7 showes that the Council of Europe Anti-Trafficking Convention offers a better protection in situations of trafficking victims facing deportation. Thus, the UK Upper Tribunal (Immigration and Asylum Chamber), for example, held that the very high standard set in *N v The United Kingdom*[220] for Article 3 cases may not necessarily be required by the Anti-Trafficking Convention.[221]

However, one should be mindful of the 'key distinction' outlined in the thesis introduction, which emphasizes the importance of distinguishing between, on the one hand, obligations established with a view of victim protection, and those that represent their rights, as a matter of human rights law. As shown in this and Chapter 7, whereas some of the obligations established by the Anti-Trafficking Convention may well correspond and inform the obligations under the ECHR, this unfortunately, could not

[220] (2008) 47 EHRR 39.

[221] *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC) [63]-[64].

be said for all of them. It is clear from its enforcement mechanism that the Anti-Trafficking Convention was never meant to confer enforceable rights to trafficking victims.[222] On the contrary, it obliges states to develop anti-trafficking policies and actions with a view of victim protection. Thus, a failure to comply with these obligations may lead to 'urging' the offending state to take corrective action.[223]

Moreover, taking the UK as an example, the Anti-Trafficking Convention has never been directly incorporated into its domestic law. Accordingly, as an unincorporated international treaty, it cannot be invoked as a freestanding source of rights, obligations and legal effects and consequences in domestic law.[224] Instead, the UK's international obligations have been implemented by the adoption of procedures and policies by government ministers responsible. The most important of these is said to be the Secretary of State for the Home Department,[225] who has issued and updated a document now called 'Victims of Modern Slavery: Competent Authority Guidance'.[226] Consequently, 'a failure to apply the provisions of the Anti-Trafficking Convention may give rise to a successful claim for judicial review: not because the treaty has any

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[222] The Convention monitoring mechanism consists of the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties, the latter being linked directly to the Council of Europe's Committee of Ministers thus adding a political dimension to the evaluation process. See Chapter VII of the Convention. Moreover, Ascola notes that the Anti-Trafficking Convention brings 'a more human rights sensitive approach', which builds on the Palermo Protocol's criminal justice approach, but provides 'more attention to the protection and assistance to victims through more generous and less discretionary provisions on the treatment of victims.' Heli Ascola, 'Article 5 – Prohibition of Slavery and Forced Labour' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (1st edn, Hart Publishing, 2014) 115.

[223] In the first evaluation round of the Anti-Trafficking Convention, GRETA evaluated states' measures using verbs 'urge', 'consider' and 'invite', which correspond to different levels of urgency of the recommendation for bringing the party's legislation and/or practice into compliance with the Convention. See GRETA, 'Fourth General Report on GRETA's Activities' (Council of Europe, March 2015) GRETA (2015) 1 [31]-[33].

[224] *SHL v Secretary of State for the Home Department* (Tracing obligation/Trafficking) Afghanistan [2013] UKUT 312 (IAC).

[225] *FM, R (on the application of) v Secretary of State for the Home Department* [2015] EWHC 844 (Admin) (26 March 2015).

[226] UK Home Office, 'Victims of Modern Slavery: Competent Authority Guidance' (21 March 2016).

direct effect (because it does not), but because the Government has then failed to apply its own published policy.'[227]

Accordingly, as shown in Chapter 7 (sections 6.3 and 7.2), whereas the Council of Europe Anti-Trafficking Convention offers better protection against deportation, its enforcement depends on national courts and it remains to be seen whether the Strasbourg court will choose to impose the same level of obligation.

Notably, the UK Immigration and Asylum Tribunal recently held that whereas the non-deportation duty is not established under Article 4 ECHR but under the Anti-Trafficking Convention, this duty will be stronger when it was shown that the state violated Article 4 ECHR first.[228] Moreover, as noted before, the Tribunal expressly held that the very high standard set for Article 3 cases may not necessarily be required by the Anti-Trafficking Convention.

4.3. The *non-refoulment* obligation under the 1951 Refugee Convention

Victims of human trafficking with irregular immigration status may benefit from refugee law protection,[229] which is much more comprehensive than simply the

[227] *Minh, R (on the application of) v The Secretary of State for the Home Department* [2015] EWHC 1725 (Admin) (18 June 2015).

[228] EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania v Secretary of State for the Home Department [2013] UKUT 313 (IAC).

[229] UNHCR, 'Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked' (HCR/GIP/06/07, 7 April 2006).

protection from deportation. [230] The 1951 Geneva Convention relating to the Status of Refugees[231] is the key international instrument adopted by the UN after WWII to provide a legal regime regulating the status of all the hundreds of thousands of refugees who were displaced in Europe in 1951. The Convention provides a comprehensive package of rights for a narrowly defined group of people at risk of persecution in their home countries.

Article 1A of the Convention – as now modified by the 1967 Protocol[232] – defines as a 'refugee' a person who:

> [O]wing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, *membership of a particular social group* or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.[233]

Those who are recognised according to these criteria as refugees are accorded protection from *refoulement* (return to the country where they risk persecution) by Article 33 of the Convention.[234]

However, the 1951 Refugee Convention itself does not lay down any rules for the procedures or criteria that are to be applied to the determination of whether a person

[230] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007); Hélène Lambert (ed), *International Refugee Law* (Ashgate 2010); Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011); James C Hathaway, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014).

[231] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

[232] The 1967 Protocol removes the time and geographic limits originally part of the Convention.

[233] emphasis added.

[234] UNHCR, *The Refugee Convention 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis* (1990). ·

is, or is not, a refugee, though the UNHCR has published a handbook,[235] and sets out guidance from time to time in the Conclusions of its Executive Committee,[236] or in other Guidelines.[237]

The recent case law of the UK courts[238] has acknowledged that former victims of human trafficking may represent a particular social group within the meaning of Article 1A(2) of the 1951 Refugee Convention, 'because of their shared common background or past experience of having been trafficked'[239] and therefore, qualify for the refugee protection. Similar was held by the French *Cour Nationale du Droit d'Asile*.[240]

However, the thesis argues that this possibility is unlikely to provide a remedy for a significant number of trafficking victims for two main reasons. First, not all victims come from the societies that target former victims of trafficking for persecution. Thus, the above mentioned UK and French jurisprudence demonstrate that only victims originating from specific countries, and so far, only victims trafficked for sexual exploitation are likely to succeed in proving the risk of persecution due to their

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[235] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1 January 1992).

[236] UNHCR, Conclusions of the Executive Committee on International Protection <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=49eee4826&cid=49aea93a20&scid=49aea93a12&tid=49ec6f17f> accessed 30 March 2016.

[237] UNHCR, Guidelines on International Protection <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=home&skip=0&cid=49aea93ae2&comid=4a27bad46&keywords=RSDguidelines > accessed 30 March 2016.

[238] SB (PSG-Protections Regulations-Article 6) Moldova CG [2008] UKAIT 00002; PO (Trafficked Women) Nigeria CG [2009] UKAIT 00046; HC & RC (Trafficked women) China CG [2009] UKAIT 00027 (18 July 2009); AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC) (18 February 2010); AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC) (23 April 2010). See also Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011) Chapter 14.

[239] SB (PSG-Protections Regulations-Article 6) Moldova CG [2008] UKAIT 00002.

[240] Cour Nationale du Droit d'Asile, 24 March 2015, Décision n° 10012810 cited in European Database of Asylum Law <http://www.asylumlawdatabase.eu/en/case-law/france-national-asylum-court-24-march-2015-decision-no-10012810> accessed March 2016.

membership in a particular social group.[241] Clearly, there is only a limited scope to classify victims of trafficking as refugees and most of the former victims of trafficking would not qualify for such protection in the first place.[242]

Secondly, even though the refugee law provides for an extensive protection mechanism, which goes beyond non-deportation, a claim to refugee status is often based upon the alleged insufficiency of state protection against persecution by non-state agents and not upon a well-founded fear of persecution by the state itself or by organs or agents of the state.[243] In such cases, as noted by the UK House of Lords in the *Horvath* case, the ability of the refugee's own state to provide protection is crucial and only if such protection is not available then there is an obligation on a receiving state to provide surrogate protection.[244] However, in assessing the ability and willingness of a home state to provide protection, the judges stated that '[t]he standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state.'[245] Hence, in cases of persecution by non-state agents, the bar for proving that a home state is unable or unwilling to provide protection is set rather high.

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[241] SB (PSG-Protections Regulations-Article 6) Moldova CG [2008] UKAIT 00002. In PO (Trafficked Women) Nigeria CG [2009] UKAIT 00046 at [174] the expert witness noted that among the Nigerian population, human trafficking was equated with prostitution. To the uninformed Nigerian public, deportee victims are said to be regarded as sex workers who are likely to be infected with HIV or AIDS. She further explained that Nigerian society has a low regard for prostitution and stigmatises HIV and AIDS victims, subjecting them to psychological abuse.

[242] Ryszard Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection', (2005) 24 Australian Yearbook of International Law 159. See also Kaori Saito, 'International protection for trafficked persons and those who fear being trafficked' (United Nations High Commissioner for Refugees, Research Paper No. 149 December 2007); UNHCR, 'Guidelines on International Protection No. 7' (n 229).

[243] UNHCR, 'Guidelines on International Protection No. 7' (n 227) paras 21-24; UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees' (April 2001) para 19.

[244] *Horvath v. Secretary of State for the Home Department* [2000] UKHL 37. See also *Januzi v Secretary of State for the Home Department & Ors* [2006] UKHL 5.

[245] *Horvath v. Secretary of State for the Home Department* [2000] UKHL 37 (Lord Hope).

Finally, since there is no supranational body providing review, particularly not judicial review, of national decisions relating to the application and implementation of decisions under the 1951 Refugee Convention, asylum seekers who are refused refugee status at national level have no recourse to an international review body, much less a court, which can review that decision. Thus, the enforcement of international refugee protection is problematic, and for the most part it relies extensively on the ECHR.[246] In fact, Article 3 ECHR has been seen as a safety net in the protection refugees who have not been identified as such under refugee law.[247] Unfortunately, such protection is limited to protection from *refoulmont.*[248]

The last three subsections demonstrate that international human rights obligations of states concerning the immigration status of trafficking victims are weak and the decision-making power on these matters is still largely at hands of national institutions. However, it is reassuring to notice that domestic courts are indeed prepared to raise the bar of protection, as shown in the *EK* case, by combining protection offered by the ECHR and that of the Anti-Trafficking Convention. It remains to be seen whether the Strasbourg will follow the lead and decide to raise the bar currently set by the ECHR.

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[246] Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (Cambridge University Press 2013) chs 1, 9 and 10.

[247] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) ch 3; Case C-465/07, *Elgafaji v Staatssecretaris van Justitie* (CJEU, GC, 17 February 2009); *Bagdanavicious v SSHD* [2003] EWCA Civ 1605.

[248] Durieux, 'The Vanishing Refugee' (n 10).

5. Conclusion

The analysis in this chapter sheds an important light on the potential of the ECHR, and Article 4 in particular, to provide effective and meaningful protection to trafficking victims, as indicated by the recent case law of the Strasbourg Court. While these important developments would have undoubtedly benefited from a more robust reasoning of the Strasbourg Court, the chapter demonstrated a strong and unequivocal basis in the ECtHR jurisprudence to support the interpretation of positive obligations offered in Section 3. Moreover, this chapter opened a debate on the possibility of using the obligations set out in trafficking-specific instruments to inform Article 4 obligations, which is further elaborated in Chapter 7. While the Strasbourg Court opened a door for this important move, it remains to be seen to what extent it will be prepared to develop this potential. Arguably, this depends not only on its perception of its own place among the myriad of specialized anti-trafficking institutions and instruments, but also on the type of cases that reach Strasbourg. The analysis in this and the following chapter is thus hoped to provide assistance in developing arguments that could be successfully advanced before the Strasbourg Court.

The contribution of this chapter to the scholarship on both positive obligations under the ECHR, and on obligations arising out of Article 4 in particular, is significant. Thus, the chapter elaborates the distinction in a way the Convention, and 'absolute' rights more specifically, apply in situations of private violations as opposed to infringements committed by state bodies. Moreover, the chapter classifies positive obligations arising out of violations of 'absolute' rights by private individuals and offers a unique and thorough analysis of each group of obligations using the Strasbourg jurisprudence on Articles 2, 3 and 4. Finally, the chapter examines the potential of the

ECHR to provide protection from deportation for trafficking victims with irregular immigration status. The chapter shows that in the light of the protective ambit of Article 4, a non-deportation claim is more likely to succeed through Article 3 ECHR or by using the specialised Anti-Trafficking Convention on a domestic level. Section 4 also reflects on the possibility of victims of trafficking to qualify for refugee protection but concludes that such an opportunity would be available to only a small number of them.

CHAPTER 7: Beyond the ECHR – State Obligations under the Specialized Anti-Trafficking Instruments

The previous chapter identified and analysed positive obligations under Article 4 ECHR, using the Strasbourg jurisprudence as a reference point. While some of the obligations identified have been explicitly recognised in its case law, the ECtHR failed to formulate an unambiguous statement of the full scope of positive obligations arising out of Article 4. Thus, the Court expressly established that the ECHR provisions do not apply in a vacuum[1] and that the extent of the positive obligations arising under Article 4 must be considered within a broader context of legal instruments (the Palermo Protocol and the Anti-Trafficking Convention) acceded to by almost all Council of Europe Member States.[2] The problem, nevertheless, lies in the fact that the Court failed to make clear which of the numerous obligations established by these instruments are to be included within the ambit of Article 4.

Some authors have claimed that 'following the Rantsev judgment, it is now possible to argue that many if not all of the victim-protection provisions in the [Anti-Trafficking Convention] are also covered by the positive obligations States owe victims (or possible victims) of human trafficking under Article 4 [ECHR].'[3] This chapter critically examines this claim providing a comprehensive analysis of the obligations espoused by the anti-trafficking instruments and their potential to inform positive obligations under Article 4 ECHR.

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[1] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [273]; *Loizidou v Turkey* (1997) 23 EHRR 513; *Öcalan v Turkey* (2005) 41 EHRR 45.

[2] *Rantsev v Cyprus and Russia* (n 1) [285].

[3] Saadiya Chaudary, 'Trafficking in Europe: An Analysis of the Effectiveness of European Law', (2011) 33:77, Michigan Journal of International Law 77, 94.

The purpose of this chapter is two fold. First, in examining the evolution of the anti-trafficking instruments, the chapter demonstrates that these are not human rights instruments even though they may well have been inspired by a desire to safeguard victims' rights and well-being. The analysis, thus, reveals that the human rights dimension of human trafficking is entirely novel, contrary to the suggestion of human rights advocates. General human rights law has made sporadic explicit references to human trafficking, albeit of a limited scope and with no guidance on the intricate legal questions it provokes.[4] On the other had, general human rights instruments have explicitly prohibited practices that represent some of the end purposes of human trafficking, notably: slavery, servitude and forced labour. It is precisely this link that has enabled human trafficking to migrate from the law enforcement to the human rights law realm and it is the ECtHR that has recognized and promoted this shift. Still, as noted in Chapter 2, distinguishing between human trafficking as a law enforcement issue and human trafficking as a human rights violation reveals that the same definition applies differently in the law enforcement context as opposed to the human rights context.

The second purpose of the chapter is to draw attention to a key distinction between victim protection and victims' rights. Accordingly, while the most recent instruments such as the Council of Europe Anti-Trafficking Convention contain a strong victim-centred focus, not all victim protection measures automatically translate into their human rights, let alone create enforceable obligations for states under Article 4 ECHR. In light of this 'key distinction', the chapter conducts an analysis of the

[4] The Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 6; the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 35; Charter of Fundamental Rights of the European Union (18 December 2000) 2000/C 364/01 (EU Charter) art 5 (3). See Alice Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor' (2007-2008) 36 (1) Denver Journal of International Law and Policy 9, 29-35.

provisions of the three most significant anti-trafficking instruments: the Palermo Protocol, the Anti-Trafficking Convention and the EU Anti-Trafficking Convention Directive. The chapter only discusses those provisions that are relevant for the protection of victims, critically examining their strength and the potential to inform the articulation of human rights obligations, discussed in previous chapter.

The analysed provisions are divided into two groups. The first group is concerned with victim protection in the criminal justice context, while the second group refers to victim protection outside the criminal justice context, that is, irrespective of any criminal process against traffickers.

While the latest anti-trafficking instruments make an effort to detach victim protection from any criminal process against traffickers,[5] the chapter demonstrates that the legal position of victims, and especially of those victims with an irregular immigration status, is dependant on their willingness to cooperate with the law enforcement authorities.

Outside of the criminal justice context, victim protection largely depends on their immigration status. Thus, victims with regular immigration status have access to a much broader range of protection measures than victims with irregular status. For victims with an irregular immigration status, only the core protection within the reflection and recovery period is available unconditionally.[6] In the light of that, the

[5] However, the latest report of the Council of Europe Group of Experts Against Trafficking in Human Beings (GRETA) expressed concern about 'indications that the provision of assistance to victims of trafficking hinges on their co-operation with law enforcement authorities, even though the link does not exist formally.' See Council of Europe, GRETA, 'Fourth General Report on GRETA's Activities' (March 2015) GRETA (2015) 1 (Fourth GRETA Report).

[6] The obligation to provide for a reflection and recovery period 'of at least 30 days' is established by Article 13 of the Council of Europe Anti-Trafficking Convention. During this period presumed victims cannot be removed from the member state concerned and are guaranteed measures of emergency assistance contained in Article 12 (1) and (2). Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (Anti-Trafficking Convention).

chapter concludes that regardless of being emphasized as one of the main goals of the anti-trafficking instruments, victim protection remains subject to the states' immigration and criminal justice interests.

Moreover, the anti-trafficking instruments instruments leave much discretion to the states in implementing the relevant provisions and it is left to national authorities to develop and shape the legal position of trafficking victims. However, in analysing the provisions of the anti-trafficking instruments, the chapter points to the areas where the Strasbourg Court may strengthen protection by reading such measures into the ECHR. The chapter argues that the ECHR ought to lay down general guidance as to the goals to be achieved, and that the specific content of positive obligations rests on the specialised anti-trafficking instruments and national legislation. This way, the two bodies of law can complement each other to strengthen the protection of victims and their instruments.

1. The evolution of the anti-trafficking instruments: from law enforcement to human rights

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the United Nations Convention against Transnational Organized Crime, entered into force in December 2003.[7] The Palermo Protocol brought human trafficking to the forefront of international attention and introduced a modern universal definition of human trafficking that is 'sufficiently broad

[7] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol).

to embrace all but a very small range of situations in which individuals are severely exploited for private profit.'[8] The legal nature of the Palermo Protocol is undisputed – it is an instrument aimed at facilitating law enforcement actions against the serious *crime* of human trafficking. Some critics saw the adoption of the Palermo Protocol as the process where '[h]uman trafficking, an obscure but jealously guarded mandate of the UN's human rights system, had been (...) unceremoniously snatched away from its traditional home.'[9] Supporters of Palermo defended this move, however, arguing that '[d]uring the entire twentieth century, when trafficking and its array of associated practices belonged exclusively to human rights, states could not even agree on a definition, much less on specific legal obligations.'[10] While we may well agree with the claim that the law enforcement treaty was, at the time, the only way to mobilize wide state support for anti-trafficking action, the statement that prior to the Palermo Protocol human trafficking belonged exclusively to the domain of human rights law deserves closer scrutiny.

The next section thus disputes the notion that the Palermo Protocol marked a shift from a human rights conception of trafficking to one grounded in law enforcement, and demonstrates that the Palermo Protocol and its trafficking definition spring from a steady flow of instruments that were firmly grounded in the crime prevention and law enforcement field. The Protocol was said to have been developed 'in a context of governments' fear about the rapid growth and power of organised crime

[8] Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) Virginia Journal of International Law 789, 791. However, Edwards questioned 'whether all forms of trafficking are of a similar nature and are therefore well-suited to conjoined regulation.' See Alice Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor' (n 4) 15.

[9] Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground?' (n 8) 790.

[10] ibid 792.

worldwide, rather than a particular concern about women in prostitution or slavery-like practices and forced labour.'[11]

The anti-trafficking initiatives were part of the larger efforts to abolish slavery and slave trade that started in the early 19th century, and '[f]rom this early perception and condemnation of slavery and practices similar to slavery, grew both the international human rights movement and the international anti-trafficking framework.'[12] However, while clearly inspired by human rights considerations, both international slavery and anti-trafficking frameworks have since adopted a criminalisation approach to the abolition of such practices. While slavery, servitude and forced labour found the way into general human rights instruments, [13] a proposal by France to substitute 'trade in human beings' for 'slave trade', to also cover the traffic in persons, during the negotiations of the ICCPR was rejected at the time.[14] It took more than 50 years before trafficking in human beings as such was considered a human rights violation that may result in the responsibility of the offending state. Importantly, with the post-Palermo legal instruments creating the grounds for such a move, it was the European Court of Human Rights that situated 'trafficking itself, within the

[11] Elaine Pearson, 'Historical Development of Trafficking: the Legal Framework for Anti-Trafficking Interventions' in *Challenging Trafficking in Persons: Theoretical Debate and Practical Approaches* (Nomos, GTZ, German Federal Ministry for Economic Cooperation and Development, 2005) 23.

[12] Corin Morcom and Andreas Schloenhardt, 'All About Sex?! The Evolution of Trafficking in Persons in International Law' (University of Queensland, Human Trafficking Research Gorup, Working paper 2011) 11. See also Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press 2012); Hendrik Willem Verzijl, *International Law in Historical Perspectives* (Springer 1976) 240.

[13] Universal Declaration of Human Rights (10 December 1948) 217 A (III) art 4; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 8; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 OASTS No 36, art 6; Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5 (ECHR) art 4.

[14] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, 2005 Kehl, Strasbourg, Arlington, N.P. Engel) 200. See also UN General Assembly, Draft International Covenants on Human Rights (Tenth Session, A2929, 10 July 1955)

meaning of art.3(a) of the Palermo Protocol and art.4(a) of the Anti-Trafficking Convention' within the scope of Article 4 of the ECHR.[15]

2. Anti-trafficking instruments before Palermo

The notion of human trafficking first surfaced in international law in instruments concerned with 'white slave traffic' for the purpose of prostitution. Thus, the International Agreement for the Suppression of the White Slave Traffic from 1904[16] was aimed at 'securing to women of full age who have suffered abuse or compulsion, as also to women and girls under age, effective protection against the criminal traffic known as the "White Slave Traffic"'. Principally concerned with a coordination of information and state actions in detecting criminal traffic, as well as with facilitating repatriation of victims to their states of origins, this Agreement did not explicitly define the notion of 'white slave traffic'. Still, several provisions and statements from the Agreement suggest that the notion of 'criminal traffic known as white slave traffic' should be understood as 'the procuring of women or girls for immoral purposes abroad'. A distinction was made between women of full age, and women and girls under age. Whereas the latter enjoyed unconditional protection, the former would fall within the ambit of this Agreement only if they suffered abuse or compulsion.

[15] *Rantsev v Cyprus and Russia* (n 1) [282]. See also *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC).

[16] International Agreement for the Suppression of the White Slave Traffic (adopted 4 May 1904, entered into force 18 July 18 1905) 1 LNTS 83.

The subsequent International Convention for the Suppression of the White Slave Traffic from 1910[17] prescribes two offences that respective Contracting Parties undertook to include in their legislation. Article 1 required states to punish those who 'in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, (...) notwithstanding that the various acts constituting the offence may have been committed in different countries.' Article 2 is concerned with a woman or girl over age and requires that the prohibited action has been committed 'by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion'. These provisions were more evolved and better-articulated statements than the earlier Agreement on what exactly states were committed to combat. The distinction between women and girls under age, and women of full age was retained, as well as the requirement of compulsion for girls over age, this time expanded to include fraud, violence, threats, abuse of authority, or any other method of compulsion. This bears a striking resemblance with the wording of the Palermo definition that differentiates between trafficking of children and adults in terms of the relevance of consent. Importantly, it is evident that both instruments dealt with human trafficking, however limited in its scope to prostitution of women and girls, as a law enforcement matter.[18]

Shortly after these two international instruments came into force, states adopted the International Convention for the Suppression of Traffic in Women and

[17] International Convention for the Suppression of the White Slave Traffic (adopted 4 May 1910, entered into force 8 August 1912) 3 LNTS 278.

[18] Both instruments were amended and updated by the UN Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic (adopted 4 May 1949, entered into force **21** June 1951) 30 UNTS 23.

Children in 1921,[19] followed by the International Convention for the Suppression of the Traffic in Women of Full Age in 1933.[20]

Both Conventions[21] represented a step forward in terms of the scope of protection, while still being narrowly focused on prostitution. Namely, the 1921 Convention required that states 'take all measures to discover and prosecute persons who are engaged in the traffic in children of *both sexes* and who commit offences within the meaning of Article 1 of the Convention of May 4, 1910'.[22] In addition, the 1933 Convention removed the element of compulsion that was previously required in cases of 'a woman or girl of full age', which is a lower threshold than the one used in the Palermo definition.[23] It is clear that the focus of these instruments remained on states' actions in order to to discover, prosecute and punish persons who are engaged in the trafficking of women and children, thus, reinforcing the criminal law nature of these instruments.

Finally, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[24] consolidated all the previously described Protocols, Conventions and Agreements. While the scope of the protection now

[19] International Convention for the Suppression of Traffic in Women and Children (adopted 30 September 1921, entered into force 15 June 1922) 9 LNTS 415 (The 1921 Convention).

[20] International Convention for the Suppression of the Traffic in Women of Full Age (adopted 11 October 1933, entered into force 24 August 1934) 150 LNTS 431 (The 1933 Convention).

[21] They were later consolidated and amended by the UN Protocol Amending the Convention for the Suppression of the Traffic in Women and Children, and Amending the Convention for the Suppression of the Traffic in Women of Full Age (12 November 1947) 53 UNTS 13.

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[22] The 1921 Convention, Article 2 (emphasis added).

[23] The 1933 Convention, art 1: Whoever, in order to gratify the passions of another person, has procured, enticed or led away *even with her consent*, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries (emphasis added).

[24] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 25 July 1951) 96 UNTS 271 (The 1949 Convention).

included ‘any person’, the focus remained solely on ‘prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution’ which are said to be ‘incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.’ Importantly, however, the element of compulsion was entirely removed – with any victim consent rendered irrelevant. This was a result of the ‘feminist impetus’ aimed at preventing prostitution altogether.[25]

The duties placed on respective states in all the above instruments clearly belong to the law enforcement realm. Alice Edwards, thus, notes that

> Apart from the 1904 Agreement, all trafficking-specific treaties had and continue to adopt a criminal law focus. In fact, the 1904 Agreement, which emphasized the protection of victims rather than the prosecution or punishment of perpetrators, was considered to have been ineffective and these criticisms account for the shift in position away from a victim-centered to a perpetrator-centered approach.[26]

Hence, the provisions of The 1949 Convention stipulate offences that states were required to punish,[27] regulate extradition and transfer of criminal proceedings,[28] require states establish a service charged with the coordination and centralization of the results of the investigation of offences referred to in the present Convention,[29] etc. The protection of victims was not a priority of this instrument. What measures there were, they were linked to pending repatriation arrangements and required states ‘to make

[25] Barbara Sullivan, ‘Trafficking in Women: Feminism and New International Law’ (2003) 5 (1) International Feminist Journal of Politics, 67.

[26] Edwards, ‘Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’ (n 4) 15.

[27] The 1949 Convention, arts 1-3.

[28] ibid, arts 8-11.

[29] ibid art14.

suitable provisions for their temporary care and maintenance'.[30] Moreover, these provisions were only to be implemented 'so far as possible'.

Additionally, states were required to 'take the necessary measures for the supervision of employment agencies in order to prevent persons seeking employment, in particular women and children, from being exposed to the danger of prostitution.'[31] This consolidated provision in the 1949 Convention was weaker than that contained in the 1921 Convention, which required states to prescribe 'legislative or administrative measures regarding licensing and supervision of employment agencies and offices, (...) as are required to ensure the protection of women and children seeking employment in another country.'[32]

It was clear that the provisions aimed at victim protection and prevention of trafficking were weak, and that the instrument was committed to the suppression of criminal activity that occurs across borders. As Edwards notes

> Although not couched in human rights terms specifically, this preambular opening statement places trafficking within a human rights paradigm of "human dignity". In spite of this, its substantive provisions continue to focus on criminal prosecution and punishment.[33]

This was in part, as Farrior notes, because 'in 1949, the notion of human rights as a matter of international concern was still relatively new in international law'.[34]

[30] ibid art19.

[31] ibid art 20.

[32] The 1921 Convention art 6.

[33] Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor' (n 4) 16.

[34] Stephanie Farrior, 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential' (1997) 10 Harvard Human Rights Law Journal 213, 219.

Similarly, the UN Special Rapporteur on Violence Against Woman expressly stated that 'the [1949] Convention does not take a human rights approach.'[35] Accordingly, Gallagher points to the significant absence of any link between the 1949 Convention and recent legal developments, especially the Council of Europe Anti-Trafficking Convention, which makes no reference to it.[36]

Therefore, the evolution of the anti-trafficking initiatives from the early instruments described above to the adoption of the Palermo Protocol is clear, consistent and firmly grounded in the crime prevention and law enforcement realm. It is clear that, historically, human trafficking, albeit much narrower in scope, has always been part of the law enforcement field.

3. Palermo Protocol – an overview of established obligations

Replacing the outdated concept of human trafficking reserved for specific gender or race, and restricted to prostitution, the Palermo Protocol, introduced a modern universal definition of human trafficking. This initiative renewed an interest in trafficking and created a platform for developing a 'human rights dimension' of the problem.[37]

The Protocol has three basic purposes: the prevention and combating of human trafficking; the protection and support of victims of human trafficking; and the

[35] UN OHCHR, Report of the Special Rapporteur on Violence Against Women, it's Causes and Consequences, Ms Coomaraswamy, on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, (29 February 2000) U.N. Doc. E/CN.4/2000/68, para 22.

[36] Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 63.

[37] Ryszard Piotrowicz, 'The Legal Nature of Trafficking in Human Beings', (2009) 4 Intercultural Human Rights Law Review 175.

promotion of cooperation between states.[38] In order to achieve those purposes, the Protocol requires state parties to implement a range of measures.[39] These obligations imposed on states are divided into four categories. First, states are required to criminalize human trafficking, as well as to criminalize participating as an accomplice and organizing or directing other persons to commit the offence. Attempting to commit the offence must also be criminalized, but only 'subject to the basic concepts' of the legal system of each State party.[40] The second set of duties includes a range of obligations that are concerned with providing assistance to and protecting victims of human trafficking, which are infamously couched in a discretionary language.[41] The third group of obligations is concerned with the prevention of human trafficking and includes a range of 'comprehensive policies, programmes and other measures',[42] border measures[43] as well as the security and control of travel or identity documents.[44] Finally, states are obliged to to cooperate with each other, and in certain cases, with entities that are not States parties to the Trafficking in Persons Protocol, such as non-governmental organizations, other relevant organizations and other elements of civil society. State cooperation is focused on information-sharing,[45]the process of repatriation of

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[38] Palermo Protocol art 2.

[39] For a good analysis of the issues addressed in the Protocol see Federico Lenzerini, 'International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: Which Gaps Are to Be Filled?' (2009) 4 Intercultural Human Rights Law Review 205, 270.

[40] ibid art 5.

[41] ibid arts 6 - 8.

[42] ibid art 9.

[43] ibid art 11.

[44] ibid arts 12 and 13.

[45] ibid art 10.

victims,[46]as well as on the matters concerning border measures and travel documents.[47] The Protocol also promotes collaboration with civil society in relation to the provision of assistance to victims[48]and the establishment of prevention measures.[49]

Importantly, not all of the required actions carry the same level of obligation. They can be grouped into: measures that are mandatory (either absolutely or where specified conditions have been met); measures that States parties must consider applying or endeavour to apply; and measures that are entirely optional.[50] Accordingly, whereas states are *required to* 'establish as criminal offences the conduct set forth in article 3 of this Protocol', [51] they are only asked to protect the privacy and identity of victims of trafficking in persons 'in appropriate cases and to the extent possible under its domestic law',[52] or to 'consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons'.[53] Surprisingly, states shall only 'endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory'.[54] This is in stark contrast with the

[46] ibid art 8.

[47] ibid arts 11-13.

[48] ibid art 6 (3).

[49] ibid art 9 (3).

[50] UNODC 'Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime' (New York 2004) (Trafficking Legislative Guide) para 8.

[51] Palermo Protocol art 5.

[52] ibid art 6(1).

[53] ibid art 6 (3).

[54] ibid art 6 (5). This provision should be read together with articles 24 and 25 of the Organized Crime Convention, which make provisions for victims and witnesses that apply to all cases covered by the Convention See UNODC, 'Legislative guides for the implementation of the UN Convention Against Transnational Organized Crime and the Protocols Thereto' (New York 2004), pt II paras 57-59 and pt I paras 352-375. Thus, whereas the obligation of the Protocol is only to 'endeavour to provide' for safety, the obligation of the Organized Crime Convention is to take any measures that are appropriate within the means of the State party concerned to provide effective protection from potential retaliation or intimidation. The obligations to protect witnesses (article 24) are more extensive, but article 24 (4)

Osman-style obligation clearly established under Article 4 ECHR described in Chapter 6. Generally, the provisions of the Protocol setting out procedural requirements and basic safeguards are said to be mandatory, while requirements to provide assistance and support for victims incorporate 'some element of discretion.'[55]

The data from the 2014 UNODC Global Report on Trafficking in Persons shows that the Palermo Protocol has made a significant impact on the criminalization of human trafficking worldwide. Namely, of the 173 countries considered for in the report, in November 2003, nearly two thirds of countries did not have a specific offence that criminalized human trafficking. On the contrary, as of August 2014, 146 countries criminalize all aspects of human trafficking explicitly listed in the Palermo Protocol, while only 9 did not have any offence in their legislation. The report, nevertheless, speculates that instances of trafficking in these countries may well have been prosecuted by leveraging other articles of the criminal code, such as slavery, forced labour, pimping, child stealing or others.[56]

Furthermore, examining the manner in which the Palermo Protocol has been incorporated into the legal order of various countries, Jean Allain concludes that

> While there is much in common within the definitions of trafficking in persons, as incorporated into domestic legislation worldwide, there is also enough variation within those provisions as to limit the very effectiveness of the regime envisioned in the Palermo Protocol.[57]

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requires States parties to ensure that those protections will extend to all victims who are also witnesses. Furthermore, article 25 (1) requires States to take appropriate measures within their means to provide assistance and protection to victims of offences covered by the Organized Crime Convention, in particular in cases of threat of retaliation or intimidation. Importantly, 'to meet the requirements of article 25, legislators must either extend them to victims who are not witnesses, or adopt parallel provisions for victims and witnesses. In either case, the substantive requirements will be the same.

[55] Trafficking Legislative Guide, para 53.

[56] UNODC 'Global Report on Trafficking in Persons 2014' (November 2014), para 51.

[57] Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 7 Albany Government Law Review 142.

Nonetheless, bringing legislation in line with international requirements is just the first step in the process of fighting against this crime. Unless accompanied by effective policing, investigations, and criminal trials, criminal law provisions alone have little meaning. Hence, while the most recent UNODC Global Report commends the Protocol for its impact on the national legislative responses around the world, it also notes that 'the data on investigations, prosecutions and convictions collected for the 2010-2012 period shows that the number of convictions for the crime of trafficking in persons remains very low.'[58] About 15 per cent of the 128 countries covered by the data collection for the Report did not record a single conviction during the reporting period.

The provisions of the Palermo Protocol regulating the protection and assistance to trafficking victims, while broad in range, impose 'little or no firm obligations' on states.[59] These are concerned with: the protection of privacy and identity;[60] the provision of information on relevant court proceedings and an opportunity to have their views presented and considered[61]; the provision of their physical safety[62] and the physical, psychological and social recovery[63]; the possibility of receiving compensation for damages suffered[64]; provisions concerning the status of victims in receiving states[65] and the facilitation of their return.[66]

[58] ibid para 52.

[59] Suzanne Egan, 'Protecting the Victims of Trafficking: Problems and Prospects' (2008) 1 European Human Rights Law Review 106, 110.

[60] Palermo Protocol, Article 6 (1).

[61] ibid art 6 (2).

[62] ibid art 6 (5).

[63] ibid art 6 (3).

[64] ibid art 6 (6).

[65] ibid art 7.

The Legislative Guide to the Organized Convention and its Protocols states that all provisions, except for the one containing measures to provide for the physical, psychological and social recovery of victims,[67] contain mandatory requirements.[68] Nevertheless, it is clear from the text of these provisions that such 'mandatory' requirements ask states no more than to 'endeavour to provide for the physical safety of victims while they are in their territory',[69] or to protect their privacy and identity 'in appropriate cases and to the extent possible under domestic law'.[70] Moreover, the Protocol does not even establish a duty to identify victims of human trafficking, which is a precondition for any action aimed at providing assistance and protection. Instead, emphasizing a strong criminal justice focus of the Palermo Protocol, the Legislative Guide notes that '[A]part from criminal proceedings against offenders, there are no formal judicial or administrative proceedings in which the status of victims of trafficking as such can be determined.[71]

Overall, provisions of the Protocol that set out procedural requirements linked to the conduct of criminal proceedings against traffickers are couched in a stronger language, while the more substantial requirements to provide assistance and support to victims are left entirely at the discretion of states. These include 'an extensive list of support measures intended to reduce the suffering and harm caused to victims and to assist in their recovery and rehabilitation',[72] such as: the provision of appropriate

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[66] ibid art 8.

[67] ibid art 6 (3).

[68] Trafficking Legislative Guide, paras 49-50.

[69] Palermo Protocol art 6 (5).

[70] ibid art 6(1).

[71] Trafficking Legislative Guide, para 61-a.

[72] ibid para 62.

housing, counselling and information, medical, psychological and material assistance, as well as employment, educational and training opportunities. The discretionary nature of those 'obligations' is justified by the high costs of such benefits and the fact that they apply equally to all States parties in which victims are found, regardless of the level of socioeconomic development or availability of resources. Furthermore, the Legislative Guide notes that apart from the humanitarian goal of reducing the effects on victims, providing support, shelter and protection increases the likelihood that they will be willing to cooperate with and assist investigators and prosecutors.[73] It is evident, therefore, that victims' safety and need for appropriate assistance and support are subordinate to their role in criminal proceedings.

Furthermore, unlike the later anti-trafficking instruments, the Protocol does not require states to adopt legislation that would allow victims to remain in their territory, either temporarily or permanently, depending on their safety or protection needs. Nevertheless, one of the provisions dealing with the prevention of human trafficking calls for measures to protect victims 'from being trafficked again and from other forms of revictimization', which may well happen 'if they are repatriated to places where trafficking is common'.[74]

Without intent to diminish the success of the Palermo Protocol in giving trafficking international exposure, this short overview of the duties imposed upon states reveals their rather modest and largely narrow law enforcement focus. Thus, Egan rightly notes that 'while the measures in question are professed to be aimed at protecting the human rights of the victims, there can be little doubt that the emphasis in

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[73] ibid.

[74] Palermo Protocol art 9 (1) (b); Trafficking Legislative Guide, para 72.

the Protocol is primarily on the issue of crime control and prevention.'[75] This is understandable given that the Palermo Protocol accompanies the Organized Crime Convention that is primarily concerned with 'conduct that must be criminalized by domestic law, made punishable by appropriate sanctions and made subject to the various requirements governing extradition, mutual legal assistance and other forms of assistance and cooperation.'[76]

In sum, the obligations to provide assistance and protection to human trafficking victims are obligations of means rather than result. As such, they do not bestow any legal entitlements upon human trafficking victims. Thus, states can fulfil their duties under the Protocol by merely putting in place schemes and mechanisms that comply with the required provisions regardless of whether and how these mechanisms function in reality.

4. Anti-trafficking instruments after Palermo and the key distinction

Notwithstanding its limitations when it comes to victim protection, by bringing human trafficking under the spotlight of the international community, the Palermo Protocol indisputably created the grounds for 'the development of a comprehensive international legal framework comprising regional treaties, abundant interpretive guidance, a range of policy instruments, and a canon of state practice.'[77] Gallagher, thus, rightly notices that

> [F]ar from damaging human rights, the issue of trafficking provides unprecedented opportunities for the renewal and growth of a legal system that,

[75] Egan, 'Protecting the Victims of Trafficking' (n 59) 110.

[76] Trafficking Legislative Guide, para 11.

[77] Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground?' (n 8) 791.

> until recently, has offered only platitudes and the illusion of legal protection to the millions of individuals whose life and labor is exploited for private profit.'[78]

Post-Palermo developments in the anti-trafficking action have seen a greater concern for the protection of the victims leading to the adoption of new instruments on the European level.

The following sections provide a short overview of the Council of Europe Anti-Trafficking Convention[79] and the EU Anti-Trafficking Directive,[80] followed by an analysis of obligations prescribed by these specialised anti-trafficking instruments, their character, strength and methods of enforcement. The provisions of these instruments are diverse and range from border measures, security and control of travel and identity documents, the protection and assistance of victims and witnesses, effective investigation and prosecution to measures intended to promote international cooperation on action against trafficking in human beings including the collaboration with the civil society. This chapter examines only those provisions with the potential to inform positive obligations under Article 4 ECHR.

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[78] ibid 794.

[79] Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (Anti-Trafficking Convention).

[80] Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA (5 April 2011) 2011/36/EU (Anti-Trafficking Directive).

4.1. The Council of Europe Convention on Action against Trafficking in Human Beings

The Council of Europe has been seen as a major bastion of human rights protection in Europe and beyond. Significantly, its Anti-Trafficking Convention is said to have been 'drafted in Europe, but it is not meant just for Europe.'[81] Whereas the same is equally true for the ECHR due to its impact on the development of the human rights law across the globe, the Anti-Trafficking Convention is even formally open to any country in the world, regardless of its membership to the Council of Europe. Thus, Belarus has become the first non-member state to accede to the convention on 26 November 2013.[82]

According to the explanatory report accompanying the Anti-Trafficking Convention, the new instrument seeks to strengthen the protection afforded by other instruments relevant for combating human trafficking,[83] 'in particular in relation to the protection of the human rights of the victims of trafficking.'[84] Therefore, the added value of the Anti-Trafficking Convention was said to lie in the formal affirmation that trafficking in human beings is a violation of human rights, thus calling for a greater protection for its victims.[85] However, the first draft of the Anti-Trafficking Convention had not been met with approval by the Parliamentary Assembly of the Council of

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[81] Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA) '3rd general Report on GRETA's Activities' (17 October 2013) GRETA(2013)17 (Third GRETA Report), para 15. See Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 144 – 149.

[82] Only the Russian Federation and Czech Republic have not yet signed the Anti-Trafficking Convention, whereas Liechtenstein and Turkey have signed but not ratified it.

[83] Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) CETS 197 (Explanatory Report) para 8.

[84] ibid para 30.

[85] ibid paras 36 and 51.

Europe (PACE) that noted that 'the measures for the protection of victims, which should be at the heart of the Convention, have become weaker in the course of the negotiations',[86] making the instrument not very convincing.

Whereas some of the PACE proposals subsequently found their way into the Anti-Trafficking Convention, a number of critical remarks voiced by the PACE have been ignored. The most striking example is the rejection of the suggestion to include the provision granting the victims the right to appeal to an independent and impartial body against the decisions on identification. This is particularly problematic as 'failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her fundamental rights and the prosecution to be denied the necessary witness in criminal proceedings.'[87]

Furthermore, the PACE called for a significantly stronger protection of victims' safety including, if necessary, the protection of their family members, as part of the unconditional assistance and not only during the criminal proceedings. Moreover, the PACE expressly called for providing necessary medical or other assistance to victims, and for securing access to the labour market, to vocational training and education *regardless* of their immigration status. Disappointingly, the Anti-Trafficking Convention granted access to these benefits only to victims lawfully resident within the territory of a respective state.[88] The provisions that most obviously substantiate the PACE's criticism of member states' prioritization of illegal migration over the protection of victims are those dealing with residence permits contained in Article 14. These provisions were said to be 'excessively vague' leaving a wide

[86] Council of Europe Parliamentary Assembly (PACE), Draft Council of Europe Convention on Action Against Trafficking in Human Beings (26 January 2005) Opinion 253 (2005) para 8.

[87] Explanatory report, para 127.

[88] Anti-Trafficking Convention arts 12 (3) and 12 (4).

margin of discretion to the states, which weakens the scope of the commitments entered into by states.[89]

Nevertheless, in spite of this criticism, the Anti-Trafficking Convention was said to embody the ‘revolutionary way of thinking about trafficking and about victims of trafficking’.[90]This includes, *inter alia*, guaranteeing minimum standards of assistance and protection to all victims of trafficking irrespective of their willingness to cooperate with criminal justice authorities,[91] mandatory recovery and reflection period during which no victim or presumed victim can be deported[92], establishing an independent monitoring body,[93] etc.

Unfortunately, the Anti-Trafficking Convention does not provide for an individual complaints mechanism and, therefore, victims have no opportunity to bring cases against states that do not abide by their accepted duties. Instead, the compliance is secured through the monitoring mechanism that includes the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties, which is linked directly to the Council of Europe's Committee of Ministers and adds a political dimension to the evaluation process, thus giving it more weight.[94] GRETA is comprised of fifteen independent experts elected by the Committee of the Parties with a view to ensuring the gender and geographical balance and to securing the representation of the main legal systems. GRETA issues country reports evaluating

[89] PACE Opinion 253 (2005) (n 86) paras 9 and 12.

[90] Anne Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments’ [2006] European Journal of Migration and Law 163, 187.

[91] Anti-Trafficking Convention art 12 (2).

[92] ibid art 13.

[93] ibid chapter VII.

[94] ibid chapter VII.

states' progress in implementing the Convention and outlining the steps that need to be taken to improve compliance.[95] These are based on states responses to the questionnaires developed by experts, the input of the civil society and country visits. At best, GRETA can 'urge' offending states to take corrective action. In the first evaluation round of the Anti-Trafficking Convention, GRETA used verbs 'urge', 'consider' and 'invite', which correspond to different levels of urgency of the recommendation for bringing the party's legislation and/or practice into compliance with the Convention.

Nonetheless, despite the absence of a victim's right of individual petition, victims and their representatives have some opportunity to use the instrument on a national level. This is evidenced by the recent developments in the UK jurisprudence.[96] While the Anti-Trafficking Convention is binding on the United Kingdom as a matter of international law, it is not directly justiciable in English law.[97] However, the UK government has announced its intention to comply with the provisions of the Convention and has issued guidance to competent authorities and other immigration officials for the purposes of doing so.[98] Accordingly, '[f]ailure to apply the provisions of the Convention may give rise to a successful claim for judicial review: not because the treaty has any direct effect (because it does not), but because the Government has then failed to apply its own published policy.'[99]

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[95] See Fourth GRETA Report paras 31-33. See also Julia Planitzer, 'GRETA's First Years of Work: Review of the Monitoring of Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings' (2012) 1 Anti-Trafficking Review.

[96] *FM, R (on the application of) v Secretary of State for the Home Department* [2015] EWHC 844 (Admin) (26 March 2015);

[97] *Minh, R (on the application of) v The Secretary of State for the Home Department* [2015] EWHC 1725 (Admin) (18 June 2015) [51].

[98] UK Home Office, 'Victims of Modern Slavery: Competent Authority Guidance' (21 March 2016).

[99] *Minh, R (on the application of) v The Secretary of State for the Home Department* [2015] EWHC 1725 (Admin) (18 June 2015) [53].

In *Atamewan*,[100] for example, the Divisional Court considered whether the Home Office policy guidance, which is intended to give effect to the UK's obligations under the Anti-Trafficking Convention, had misinterpreted the Convention. It held, overturning the earlier judgement of the High Court,[101] that Home Office guidance was erroneous in its treatment of historic victims of trafficking in excluding them from the category of persons to be treated as 'victims' and entitled to appropriate assistance and support under the Convention. The case of *Minh*, too, discussed the proper approach to victim identification and the resulting protective obligations. Namely, the claimant arrived in the UK from Vietnam via Russia, where he claimed he had been forced to work in a factory for several years before being released. The component authority however refused to identify him as a trafficking victim, which was the reason for seeking judicial review. Further, he argued that this failure to correctly identify him as a victim of trafficking amounted to a violation of the state's positive obligation under Article 4 of the ECHR to protect victims of trafficking. The Court noted that where fundamental human rights are in issue, 'the greater the likely impact of a decision on the rights of the person affected, the greater the detailed justification and explanation which will be expected.'[102] Importantly, the judge held the '[I]f the decision-maker has not properly and fairly applied the Secretary of State's Guidance intended to protect the human rights of putative victims of trafficking, then it will follow that there has been a breach of the positive obligations under Article 4.'[103]

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[100] *R (Atamewan) v Secretary of State for the Home Department* [2014] 1 WLR 1959.

[101] *R (Y) v. Secretary of State for the Home Department* [2012] EWHC 1075 (Admin).

[102] *Minh, R (on the application of) v The Secretary of State for the Home Department* [2015] EWHC 1725 (Admin) (18 June 2015) [4].

[103] ibid [63].

This case illustrates two points. First, it shows that while no international court can (yet) enforce the full scope of measures guaranteed by the Anti-Trafficking Convention, this does not mean that they are devoid of normative power altogether and they may well be given effect through national courts. Secondly, the decision in *Minh* illustrates an important interplay between the protective guarantees in the ECHR and the Anti-Trafficking Convention, where the former lays down a general guidance and the latter clarifies and specifies this by outlining concrete requirements.[104]

In sum, even though the Anti-Trafficking Convention is 'geared towards the protection of victims' rights and the respect for human rights',[105] it does not *itself* confer enforceable human rights obligations, at least no more than the Torture Convention does.[106] The Anti-Trafficking Convention builds on the Palermo Protocol's criminal justice approach albeit providing 'more attention to the protection of and assistance to victims through more generous and less discretionary provisions on the treatment of victims.'[107] As such, it represents 'an important step away from the dominance of the criminal prosecution approach',[108] reflecting the requirements of an integrated 'holistic' approach to the fight against trafficking,[109] but it is not a human

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[104] See also the discussion in Section 7.2. concerning the provisions on residence permits.

[105] Explanatory report, para 32.

[106] Suzane Egan thus notes that GRETA reports 'will be publicly accessible and hence have the same practical impact as those of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which monitors the Council of Europe Torture Convention. Egan, 'Protecting the Victims of Trafficking' (n 59) 113.

[107] Heli Ascola, 'Article 5 – Prohibition of Slavery and Forced Labour' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (1st edn, Hart Publishing, 2014) 115.

[108] Petra Follmar-Otto and Heike Rabe, Human Trafficking in Germany Strengthening Victim's Human Rights (German Institute for Human Rights, 2009) 36.

[109] Tom Obokata, Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach 174 (2006); UN High Commissioner for Refugees, 'Prevent, Combat, Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights Based Approach' (November 2011) (Joint UN Commentary on the EU Directive).

rights treaty, in the traditional sense. Rather, it is a hybrid instrument, which combines measures of victim protection with the law enforcement ones including measures of border controls, document security, and various organisational requirements.

Nevertheless, as this chapter will demonstrate, the provisions of the Anti-Trafficking Convention have a great potential to inform positive obligations under human rights law and the decision in *Minh* aptly illustrates that point. Whether the Strasbourg Court will choose to embrace such an approach, remains to be seen.

4.2. The EU Directive 2011/36/EU

Prior to the adoption of Directive 2011/36/EU, EU trafficking legislation was contained in three different instruments. First, there was the Council Framework Decision 2001/220/JHA on the Standing of Victims in Criminal Proceedings[110], which did not explicitly refer to trafficking victims, but instead dealt with victims of any crime covered by the national law of Member States. The second instrument was the Council Framework Decision 2002/629/JHA on Combating Trafficking in Human Beings[111] that focussed almost exclusively on the criminal law framework and the investigation and prosecution of those responsible for trafficking individuals. Finally, there was the Council Directive 2004/81/EC,[112] which requires Member States to provide residence

[110] Council Framework Decision 2001/220/JHA of 15 March 2001 on the Standing of Victims in Criminal Proceedings [2001] OJ L 82/1.

[111] Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L 203/1.

[112] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261.

permits to trafficking victims who are not EU nationals and who cooperate with the Competent Authorities.[113]

Human trafficking is also explicitly prohibited by the EU Charter of Fundamental Rights,[114] which became an instrument at the highest level of the EU legal order following the coming into force of the Lisbon Treaty in December 2009.[115] However, the Charter only applies to EU institutions and Member States when they are implementing Union law,[116] and The Court of Justice recently took a very restrictive view on what this means.[117] Furthermore, it is suggested that 'Article 5(3) of the Charter (...) says that "trafficking in human beings is prohibited", which entails, as discussed arguably a more narrow (criminal justice) approach that simply requires effective criminalization.'[118]

The adoption of a Directive was welcome as 'a clear indication by the European Union institutions and the Member States of their intention to adopt a rights-based legislative response to the crime of trafficking.'[119] Opting for a Directive instead of a Framework Decision has numerous advantages. First, obligations contained in

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[113] For an overview of the last two instruments see Anne Gallagher, 'Recent Legal Developments in the Field of Human Trafficking' (n 90) 163. See also Rosa Raffaelli, 'The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive, and the Italian Experience' (2009) 10 (3) German Law Journal 205, 206-210.

[114] Article 5(3).

[115] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

[116] The Charter of Fundamental Rights art 52.

[117] *Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration* (C-87/12) Judgment of 8 May 2013 [40]-[43].

[118] Ascola, 'Article 5 – Prohibition of Slavery and Forced Labour' (n 107) 117.

[119] Joint UN Commentary on the EU Directive 18.

Directives can have direct effect in national law[120] if they are clear, precise, and unconditional, provided that the deadline for implementation has passed.[121] Therefore, if the provisions of Directives have not been incorporated into domestic law, individuals may rely directly on those effective provisions before domestic courts. Individuals can also bring actions for damages against the authorities for failing to implement the provisions of a Directive that has a direct effect.[122]

In addition to the enhanced legal status of the Directive in comparison to the Framework Decision, a further advantage of Directive 2011/36/EU is that it sets minimum standards for the protection of victims of human trafficking as well as for the prevention of the crime of trafficking.[123] The Framework Decision, to the contrary, was almost exclusively focused on the criminal law framework and the investigation and prosecution of traffickers. Thus, the Directive is said to adopt 'an integrated, holistic, and human rights approach to the fight against trafficking in human beings'.[124]

However, in spite of this seemingly broader focus, the Anti-Trafficking Directive remains closely tied to the law enforcement field. Ascola notes that even though the Directive constitutes an improvement, 'the EU's approach is still focused on

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[120] The direct effect of European law has been enshrined by the Court of Justice in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) [1963] ECR 1. See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 106.

[121] Directive is an act addressed to Member States and must be transposed by them into their national laws. However, in certain cases the Court of Justice recognises the direct effect of directives in order to protect the rights of individuals. Therefore, the Court laid down in its case-law that a directive has direct effect when its provisions are unconditional and sufficiently clear and precise (*Van Duyn v Home Office* (41/74) [1974] ECR I 1337). However, it can only have direct vertical effect and it is only valid if the Member States have not transposed the directive by the deadline (*Pubblico Ministero v. Ratti* (148/78) [1979] ECR 1629).

[122] *Francovich and Bonifaci v Republic of Italy* (C-6 and 9/90) [1990] ECR I-5357.

[123] Anti-Trafficking Directive art 1.

[124] Anti-Trafficking Directive, Preamble, para 7.

criminal justice'.[125]Moreover, the EU rules on human trafficking are grounded in Articles 82(2) and 83(1) of the Treaty on Functioning of the European Union (TFEU), in Chapter 4, on Judicial Cooperation in Criminal Matters.

Thus, the measures of assistance and support are guaranteed to victims 'before, during and for an appropriate period of time after the conclusion of criminal proceedings.'[126] It appears that, even though such assistance and support are due 'as soon as the competent authorities have a reasonable-grounds indication for believing' that the person might have been a victim of trafficking,[127] irrespective of the victim's willingness to cooperate in the criminal investigation, prosecution or trial,[128] if there were no criminal proceedings, these provisions would not apply. This is also evident from the Recital 18 of the Directive, which indicates that

> Where necessary, assistance and support should continue for an appropriate period after the criminal proceedings have ended, for example if medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim' s statements in those criminal proceedings.

In spite of this strong law enforcement grounding, the Anti-Trafficking Directive refers to human rights law at several places. Importantly, Recital 33 states that the Anti-Trafficking Directive is to be implemented with full respect of the rights and principles, recognized in particular by the EU Charter.[129] This effectively means that in implementing the Anti-Trafficking Directive, states are bound to 'comply with existing

[125] Ascola, 'Article 5 – Prohibition of Slavery and Forced Labour' (n 107) 116.

[126] Anti-Trafficking Directive art 11(1).

[127] ibid art 11(2).

[128] ibid art 11(3).

[129] Recital 33 specifically lists: human dignity, the prohibition of slavery, forced labour and trafficking in human beings, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, the protection of personal data, the right to an effective remedy and to a fair trial and the principles of the legality and proportionality of criminal offences and penalties.

obligations of States under international human rights law, as set forth in the core human rights treaties and other standards setting instruments.'[130] Whereas the Anti-Trafficking Directive specifically refers to the European Charter of Fundamental Rights, the interpretation of the listed rights and duties is heavily influenced by the jurisprudence of the ECHR.[131]

The analysis so far has established that the anti-trafficking instruments are not human rights instruments. While most of these instruments identify victim protection as one of their main goals, that fact alone does not make them human rights instruments. Thus, for example, the Anti-Trafficking Convention is said to take 'a victim-oriented perspective to anti-trafficking action and provides for a series of measures to protect and assist victims.'[132] Accordingly, Member States are obliged 'to promote a human rights-based approach in the development, implementation and assessment of the policies and programmes to prevent human trafficking.'[133] However, an obligation 'to promote a human rights-based approach' does not imply that 'measures to protect and assist victims' amount to victim's human rights.

Explaining what the human rights approach to human trafficking entails, six UN agencies argue that:

> It ensures compliance with *existing* State obligations under international and regional human rights treaties; it guarantees that anti-trafficking responses do not undermine or otherwise negatively impact on the human rights of trafficked persons or other groups affected by trafficking or anti-trafficking

[130] Joint UN Commentary on the EU Directive 27.

[131] Explanations Relating to the Charter of Fundamental Rights (14 December 2007) OJ C303/17, Explanation on Article 5 — Prohibition of slavery and forced labour. Article 52(3) of the Charter provides that insofar as the Charter contains rights which 'correspond to rights guaranteed by' the ECHR, the 'meaning and scope of those rights shall be the same' as in the ECHR.

[132] Petya Nestorova, Executive Secretary of the Council of Europe Convention on Action against Trafficking in Human Beings, 'Trafficking in Europe' (Conference 'Bringing Human Trafficking Out of the Shadows', Cardiff, 21 November 2012).
[133] ibid.

> responses, or discriminate against women, migrants, refugees or other groups in a vulnerable situation.[134]

This human rights-based approach thus implies 'considering, at each and every stage, the impact that a law, policy, practice or measure may have on the human rights of trafficked persons and other groups who may be affected by trafficking or anti-trafficking policies.'[135] However, implementing the provisions of the specialized anti-trafficking instruments in a way that respects *recognised* human rights under international and regional human rights treaties is fundamentally different from claiming that the protective measures contained in these instruments represent human rights requirements *as such*.

Nevertheless, these instruments have a clear potential to inform human rights obligations established under the general human rights instruments, and the ECHR in particular. Therefore, the following two sections provide a detailed account of those provisions laid out in the Anti-Trafficking Convention and the Anti-Trafficking Directive that have a capacity to shape human rights obligations under the ECHR. As outlined in the introduction to this chapter, these provisions are divided into two groups according to whether they refer to victim protection within or outside of the criminal justice context. The reason for such a classification is two fold. First, as the overview of these obligations clearly establishes, provisions that guarantee victim protection in the criminal justice context are couched in much stronger language. In contrast, victim protection outside of the criminal justice context is largely left to the discretion of states, and this adversely affects victims with an irregular immigration status.

Secondly, Section 7 of this chapter provides a critical evaluation of the victim protection measures established by the specialized anti-trafficking instruments and

[134] Joint UN Commentary on the EU Directive 26 (emphasis added).

[135] ibid 28.

shows that different considerations play a role in assessing their potential to inform positive duties under Article 4 ECHR. Thus, whereas defendants' rights and freedoms inevitably restrain the extent of victim protection in the criminal justice context, the resource-intensive nature of the assistance and support measures plays a decisive role in shaping the obligations to protect victims outside of the criminal justice setting.

5. Victim protection in the criminal justice context

This section outlines the provisions of the Anti-Trafficking Convention and the Anti-Trafficking Directive that provide protection to victims of human trafficking in the context of criminal proceedings against the traffickers. These provisions stipulate, on the one hand, state obligations concerning criminalization, investigation and the imposition of appropriate penalties in human trafficking cases. On the other hand, they also include protection of victims in the course of criminal investigations, prosecutions and trials. Overall, the described provisions are aimed at harmonisation of countries' domestic law and ensuring that criminal penalties are 'effective, proportionate and dissuasive'.[136] In addition, provisions concerning procedural law require states to adapt their criminal procedure in order to 'to protect victims of trafficking and assist prosecution of the traffickers'.[137] The provisions outlined in this section are therefore highly relevant to the framing and specifying of both general and specific positive obligations identified in *Rantsev* (which are outlined in Section 7 of this chapter).

[136] Explanatory Report paras 216 and 252.

[137] ibid para 275.

5.1. Criminalization, investigation and adequate penalties

The obligation on states to criminalize trafficking is contained in all specialist trafficking treaties.[138] The Anti-Trafficking Convention places on states a series of obligations aimed at enabling the effective prosecution of traffickers and ensuring that they are punished in a proportionate and dissuasive manner. Thus, in addition to the obligation to criminalize the offence of human trafficking in Article 18, which is identical to that in Article 5 of the Palermo Protocol, states 'must consider making it a criminal offence to knowingly use the services of a victim of trafficking'.[139] The explanatory report, nevertheless, admits that proving such knowledge may be a difficult matter for the prosecution authorities.[140]

States are also required to criminalize attempting or being an accomplice in the commission of trafficking offences,[141]as well as to ensure that the sanctions for the punishable criminal offences are 'effective, proportionate and dissuasive'.[142] In addition, the Convention requires states to 'adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence'.[143] This obligation is vital in the light of the emerging knowledge of the exploitative practices being carried out under the cover of legitimate business activities,

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[138] Palermo Protocol art 5; Anti-Trafficking Convention art 18; Anti-Trafficking Directive art 2.

[139] Anti-Trafficking Convention art 19.

[140] Explanatory Report, para 234.

[141] Anti-Trafficking Convention art 21.

[142] ibid art 23.

[143] ibid art 22.

in agriculture, construction, domestic service, the transport sector, or the food service industry.

On the EU level, the obligation to criminalize human trafficking is the first and the main duty placed upon Member States by the Anti-Trafficking Directive.[144] Thus, the Anti-Trafficking Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. The Anti-Trafficking Directive draws on the Palermo Protocol in setting out the constitutive elements of the trafficking offence.

Moreover, in order to tackle recent developments in the phenomenon of trafficking in human beings, the Anti-Trafficking Directive is said to adopt 'a broader concept of what should be considered trafficking in human beings'.[145] Thus, the exploitative purposes of the act of trafficking now explicitly includes the 'exploitation of begging', where forced begging should be understood as a form of forced labour or services as defined in the 1930 ILO Convention No 29 concerning Forced or Compulsory Labour. Furthermore, the definition under the Anti-Trafficking Directive also includes 'exploitation of criminal activities', which should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain. The definition under the Anti-Trafficking Directive also covers trafficking in human beings for the purpose of the removal of organs, as well as, other behaviour such as illegal adoption or forced marriage. It is wrong to claim that the Anti-Trafficking Directive introduces a 'broader concept' of human trafficking by referring explicitly to these 'new' types of exploitation, since the Palermo definition contains an open-ended list of exploitative purposes. The Anti-Trafficking Directive

[144] Anti-Trafficking Directive art 2(1).

[145] ibid Preamble, para 11.

only complements this open-ended list by adding the practices that have been seen emerging in recent years. Also, adding the 'exploitation of criminal activities' to the list of exploitative purposes is in line with the provision of the non-prosecution of trafficking victims for their involvement in criminal activities, which they have been compelled to commit.[146]

The Anti-Trafficking Directive also prescribes a number of other duties specifically concerned with the law enforcement actions including: criminalizing incitement, aiding and abetting, and attempt,[147] the appropriate penalties reflecting the gravity of the offence,[148] liability of and sanctions on legal persons,[149] establishing jurisdiction[150], and seizure and confiscation of proceeds of the crime of human trafficking.[151]

When it comes to the investigation, prosecution and procedural law, even though one of the purposes of the Anti-Trafficking Convention is to ensure the effective investigation and prosecution of human trafficking,[152] it does not establish an explicit obligation of the state to investigate instances of human trafficking. It only requires states to ensure that investigations into or prosecution of human trafficking offences are not dependent upon the report or accusation made by a victim,[153] and to

[146] Piotrowicz and Sorrentino, 'Human Trafficking and the Emergence of the Non- Punishment Principle' (2016) Human Rights Law Review (forthcoming) (n 110).

[147] Anti-Trafficking Directive art 3.

[148] ibid art 4.

[149] ibid arts 5 and 6.

[150] ibid art 10.

[151] ibid art 7.

[152] ibid art 1(1) (b).

[153] ibid art 27.

cooperate with each other regarding investigations and/or criminal proceedings related to these offences.[154]

The Anti-Trafficking Directive explicitly stipulates that an obligation to investigate and prosecute trafficking offences does not depend on any reporting or accusation by a victim.[155] Also, states are obliged to ensure that authorities responsible for investigating or prosecuting trafficking offences are adequately trained and equipped with effective investigative tools, 'such as those which are used in organised crime or other serious crime cases'.[156] In addition to these express duties, the Preamble of the Directive encourages the law enforcement authorities of the Member States to close cooperation, information sharing and the coordination of investigations and prosecutions of cases of trafficking in human beings.[157] Moreover, they are urged to consider the possibility of imposing sanctions on the users of any service exacted from a victim, with the knowledge that the person has been trafficked. Such further criminalisation could cover 'the behaviour of employers of legally staying third-country nationals and Union citizens, as well as buyers of sexual services from any trafficked person, irrespective of their nationality.[158] That would be in accordance with the Directive 2009/52/EC that provides for sanctions for employers of illegally staying third-country nationals who, while not having been charged with, or convicted of, trafficking in human beings, use work or services exacted from a person with the knowledge that that person is a victim of such trafficking. However, in spite of these

[154] ibid art 32.

[155] ibid art 9 (1).

[156] ibid art 9 (3) and (4).

[157] ibid recital 5.

[158] Anti-Trafficking Directive, recital 26.

significant efforts to ensure that human trafficking does not go unpunished, the reported numbers of prosecutions and convictions in Europe remain very low.[159]

Finally, the provisions dealing with substantive criminal law also include an obligation concerned with the non-punishment of victims of human trafficking when they 'have been compelled to be involved in unlawful activities' in the course, or as a consequence of being trafficked.[160] Interestingly, whereas previously described requirements placed on states are concerned with a *deployment* of criminal law to protect victims, the non-punishment principle requires from the countries directly the opposite – it effectively *restrains* the operation of the national criminal justice system. The number and significance of legal issues raised by this provision and the scarcity of interpretative guidance on its implementation, requires a separate and detailed analysis, which is not included in this thesis.[161]

5.2. Protection of victims as witnesses

The Council of Europe Anti-Trafficking Convention places a strong focus on the protection of victims of trafficking in the course of criminal investigations, prosecutions and trials. Thus, Article 28 places on states a duty to 'adopt such legislative or other measures as may be necessary to provide effective and appropriate protection from potential retaliation or intimidation in particular during and after

[159] UNODC 'Global Report on Trafficking in Persons 2014' (n 56). See also the second working paper on trafficking in human beings in Europe containing statistical data at EU level for the years 2010, 2011 and 2012 as gathered and submitted by national authorities: Eurostat, 'Trafficking in Human Beings' (2015 edition); Mike Dottridge,'E-notes: Report on the Implementation of Anti-Trafficking Policies and Interventions in the 27 EU Member States from a Human Rights Perspective' (2008 and 2009) 69.

[160] Anti-Trafficking Convention art 26; Anti-Trafficking Directive art 8.

[161] Piotrowicz and Sorrentino, 'Human Trafficking and the Emergence of the Non- Punishment Principle' (2016) Human Rights Law Review (forthcoming) (n 110).

investigation and prosecution of perpetrators'.[162] The protection is offered to victims, collaborators with the judicial authorities, witnesses and members of such persons' families. The protection measures listed in Article 28 (2) include physical protection, relocation, identity change and assistance in obtaining jobs and are said to be just examples. Hence, the explanatory report emphasizes that the expression 'effective and appropriate protection' requires states to adapt the level of protection to the threats to the persons entitled to the protection.[163]Similarly, the explanatory report advises that the period in which protection measures have to be provided depends on the threats upon the persons.[164]

Furthermore, in order to avoid situations where victims get intimidated during the court proceedings in human-trafficking cases, Article 30 requires states to adapt their judicial procedure in order to protect victims' privacy and ensure their safety. Importantly, these measures differ from those provided for in Article 28, which have to do with extrajudicial protection whereas the measures referred to in Article 30 are concerned with the procedural measures to be introduced. Therefore, victims' private life, identity, safety and protection from intimidation, are to be protected in the course of judicial proceedings 'in accordance with the conditions under its internal law' and 'in accordance with the [ECHR], in particular Article 6'.[165] The explanatory report acknowledges the potential clash between the defence rights on the one hand, and victim and witness privacy and safety on the other. Accordingly, care must be taken that measures maintain a balance between defence rights and the interests of victims and witnesses.

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[162] Anti-Trafficking Convention art 28 (1).

[163] Explanatory Report, para 286.

[164] ibid para 288.

[165] Anti-Trafficking Convention art 30.

The Anti-Trafficking Directive also prescribes measures that are concerned with the protection of victims in criminal investigation and proceedings.[166] These provisions contain a robust set of obligations that are couched in a stronger language using a phrase 'shall ensure'[167] when referring to a duty placed upon states, instead of the usual 'shall take the necessary measures to ensure' that is used elsewhere in the Anti-Trafficking Directive. Moreover, such protection is additional to a set of victims' rights in criminal proceedings established by the Directive 2012/29/EU, which signals that the EU's commitment to rights protection is still deeply rooted in the law enforcement realm.

This group of obligations includes, first, access 'without delay, to legal counselling, and, (...) to legal representation, including for the purpose of claiming compensation',[168] which shall be free of charge where the victim does not have sufficient financial resources. Second, states are required to provide 'appropriate protection on the basis of individual risk assessment',[169] which includes the protection from retaliation, intimidation, and from the risk of being re-trafficked.[170] Finally, the protection of victims includes 'specific treatment aimed at preventing secondary victimisation' during investigation, prosecution or trial, without prejudice to the rights of the defence and according to an individual assessment of the personal circumstances of the victim.[171]

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[166] Anti-Trafficking Directive art 12.

[167] ibid arts 12 and 17.

[168] ibid art 12 (2).

[169] ibid art 12 (3).

[170] ibid, recital 18.

[171] ibid art 12 (4).

The recent publication of the European Commission[172] makes a parallel between the described protection measures and the positive obligation to take operational measures established by the *Rantsev* case. However, unlike these obligations, the *Rantsev* positive obligation to take appropriate measures to remove an individual from the trafficking situation or the risk thereof, is not limited to the conduct of any criminal investigation or proceedings.[173]

Nevertheless, the overview of the relevant provisions in this section shows that these instruments establish obligations that are clear, precise and couched in strongly protective language. As such, they represent an important tool for the Strasbourg Court in shaping and clarifying the content of positive obligations established in *Rantsev*, which was further elaborated in Section 7 of this chapter.

6. Victim protection outside the criminal justice context

Measures of victim protection outside the criminal process against traffickers are concerned with three main aspects: victim safety, material assistance, and their legal status. The relevant provisions include both emergency protection as well as measures of longer-term assistance and support. Victims usually need protection much before their official identification can be completed. For that reason, some protection measures are owed as soon as there are reasonable grounds to believe that a person might be a victim whereas other more extensive measures of protection are due only after the official identification process. As noted in Recital 18 of the Anti-Trafficking Directive, assistance and support are crucial for trafficked persons to be able to effectively

[172] European Commission, 'The EU Rights of Victims of Trafficking in Human Beings' (2013) 16.

[173] See Chapter 6.

exercise their rights. However, the question is whether these measures themselves also constitute victims' human rights, especially in light of their resource-intensive character? This section outlines and explains the provisions that guarantee victim protection and support outside of the criminal justice context, before examining, in Section 7 of this chapter, the possibility of framing these as positive obligations within Article 4 ECHR. This section first discusses the victim identification process that is vital for ensuring adequate protection, followed by a discussion of measures aimed at ensuring the goals of victim protection.

6.1. Victim identification

The Anti-Trafficking Convention emphasizes the paramount importance of victim identification[174] both for the protection of the victims' rights laid down in the Convention, and for criminal proceedings against traffickers where they represent invaluable witnesses. The duty imposed upon states is to 'adopt such legislative or other measures as may be necessary to identify victims'[175] emphasizing the need for having a qualified and trained officials and ensuring that the different authorities collaborate with each other as well as with relevant support organisations.

Article 11(4) of the Anti-Trafficking Directive requires states to establish appropriate mechanisms, aimed at the early identification of, assistance to and support for victims in cooperation with relevant support organizations. This provision contains no conditions or restrictions and 'unequivocally applies to all victims of trafficking,

[174] Anti-Trafficking Convention art 10.

[175] ibid art 12 (2).

regardless of sex, immigration status, ethnic origin, citizenship or country of origin or any other status'.[176]

Importantly, since the identification process is 'tricky and necessitates detailed enquiries',[177] which may well take time, some duties emerge as soon as the competent authorities consider that there are reasonable grounds to believe that a person is a victim. Thus, one of the most critical state obligations is the obligation not to remove a presumed victim from its territory until the identification process has been completed.[178] Nevertheless, even though each of the GRETA's country reports stress that victims of trafficking 'must be identified and recognised as such in order to avoid police and public authorities treating them as "irregular migrants" or criminals',[179] GRETA expressed well-substantiated concerns about an expedited deportation of presumed victims with an 'illegal' presence in the member state concerned.[180]

Furthermore, the identification process is independent of any criminal proceedings against those responsible for the trafficking.[181] However, in its Second General Report, which highlights issues emerging from the first ten country-by-country monitoring reports, GRETA observed that

> [T]he victim identification system is not sufficiently effective as it risks leaving out those who do not want to co-operate with the law enforcement agencies. Identification of victims of trafficking is done primarily from a law enforcement or illegal immigration perspective, without the involvement of multidisciplinary expertise.[182]

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[176] Joint UN Commentary on the EU Directive 47.

[177] Explanatory report, para 127.

[178] Anti-Trafficking Convention art 10(2).

[179] See the Preamble of any GRETA country evaluation report.

[180] Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA) 'Second General Report on GRETA's Activities' (4 October 2012) GRETA (2012)13 (Second GRETA Report) para 52.

[181] Explanatory Report, para 134.

[182] Second GRETA Report, para 51.

One of the important questions concerning victim identification is related to the status of so called 'historical victims'. This term is used to describe those trafficked persons, who are no longer in a situation of exploitation (or at risk of it) at the time when they come to the attention of the authorities.[183] Thus, the question arises as to whether they retain their victim status and whether the victim's status, in general, is linked to their protection needs.

These situations are likely to arise in the context of the immigration proceedings,[184] or for the application of the non-punishment principle when victim's involvement in criminal activities does not seem to have a direct and immediate link with their trafficking experience.[185]

The justification given for not identifying such individuals as trafficking victims is based on the assumption that the primary aim of the Anti-Trafficking Convention is to offer protection to victims who are, at the time when they come to the attention of authorities, controlled by traffickers, or in imminent danger from them. The argument is that where this is not the case, individuals cease to fall within the protective ambit of the Convention and hence, are not entitled to victim status anymore. Thus, in the case *Y v Secretary of State for the Home Department,*[186] the Claimant challenged a negative

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[183] Adam Weiss and Saadiya Chaudary, 'Assessing Victim Status under the Council of Europe Convention on Action Against Trafficking in Human Beings: the Situation of "Historical" Victims' (2011) Journal of Immigration Asylum and Nationality Law.

[184] SB (PSG - Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 00002. Nguyen (Anti-Trafficking Convention: respondent's duties) [2015] UKUT 170 (IAC) (25 March 2015); Atamewan, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 2727 (Admin) (06 September 2013); Haile, R (on the application of) v Secretary of State for the Home Department [2015] EWHC 732 (Admin) (27 March 2015).

[185] *R v N* [2012] EWCA Crim 189; *R v LM and Others* [2010] EWCA Crim. 2327; *W and X* (Leave Stage) [2011] NIQB 76.

[186] *Y v SSHD* [2012] EWHC 1075 (Admin).

identification decision based on the finding that ‘she had had ample time for reflection and recovery, had moved on with her life, and was no longer a victim of trafficking within the terms of the Convention.’[187] However, the Court agreed with such a view and held that ‘[t]he Convention clearly envisages that victim status, in the sense of someone requiring that assistance and protection, may be time-limited, but that the time will vary from case to case.’[188]

This approach has, nevertheless, been rightly criticised. In the report assessing UK compliance with the Anti-trafficking Convention, GRETA urged the British authorities

> [T]o revisit the guidance given to Competent Authorities on so-called “distant in time /historic claims”, with a view to ensuring that all victims of trafficking are identified as such.[189]

The UK courts have since revised their position noting that ‘[t]here is nothing in Article 4 [Anti-trafficking Convention] which indicates that someone may be a "victim" for certain purposes but not for others at any particular stage when his case is being considered.’[190] Accordingly,

> To take an extreme case, even a person who was trafficked to the United Kingdom 30 years ago and thereafter managed to create a new life for himself would, if he then came forward and claimed he was the victim of trafficking ,

[187] ibid [10].

[188] ibid [46].

[189] GRETA, ‘Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by UK’ (First evaluation round, 12 September 2012) GRETA(2012) 6, para 85.

[190] *R (Atamewan) v Secretary of State for the Home Department* [2014] 1 WLR. 1959 [70]. See also *Nguyen (Anti-Trafficking Convention: respondent’s duties)* [2015] UKUT 170 (IAC) (25 March 2015) [44]-[47].

> be entitled to the benefit of the Article 10(2) process of deciding whether there were 'Reasonable Grounds' for believing he was trafficked.[191]

6.2. Pre-identification measures of protection

Measures that belong to this group apply to victims before they are formally identified as victims of human trafficking. They arise as soon as authorities have reasonable grounds to believe that the person concerned is a victim and are concerned with three main aspects of victim protection: material assistance,[192] safety,[193] and immigration status.[194]

The Anti-Trafficking Convention grants presumed victims a reflection and recovery period 'of at least 30 days'[195] during which they cannot be removed from the member state concerned and are provided with emergency assistance. This 'emergency package' is aimed to to assist victims in their physical, psychological and social recovery and includes a range of substantive benefits.[196]

Whereas the reflection and recovery period is primarily established to prevent the expulsion of victims who are 'illegally present' at the territory of a member state,

[191] *Nguyen (Anti-Trafficking Convention: respondent's duties)* [2015] UKUT 170 (IAC) (25 March 2015) [46].

[192] Anti-Trafficking Convention art 12 (1); Anti-Trafficking Directive art 11 (5).

[193] Anti-Trafficking Convention art 12 (2). It is notable that the Anti-Trafficking Directive art 11 contains the provision of assistance and support, whereas protection measures envisaged in this instrument are only provided in the framework of criminal investigations and proceedings (art 12).

[194] Anti-Trafficking Convention art 13. The Anti-Trafficking Directive does not legislate on this point.

[195] Anti-Trafficking Convention art 13 (1). Whereas the reflection and recovery period is primarily established to prevent the expulsion of victims who are 'illegally present' at the territory of a member state, its overall goal is to enable a presumed victim 'to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities'.

[196] Anti-Trafficking Convention arts 12 (1) and (2); The Anti-Trafficking Directive art 11.

its overall goal is to enable a presumed victim 'to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities'. Therefore, emergency assistance and protection is available to *any* presumed victim of trafficking, and not only to those with irregular immigration status.[197] Furthermore, the provision of emergency assistance and the reflection and recovery period are not dependant on victims' cooperating with the investigative or prosecution authorities.[198]Nevertheless, this guarantee has a substantial limitation since it cannot exclude the obligation to testify when that is required by a judge, given that in the law of many countries it is compulsory to give evidence if requested to do so.[199]

Similarly, the Anti-Trafficking Directive includes measures of assistance and support that aim at securing the well being and subsistence of *any* victim of trafficking.[200] Such support and assistance is provided in order to enable them 'to exercise their rights effectively' and include 'at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers.'[201] The protection should be provided on a consensual and informed basis, and shall include at least

> [S]tandards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information and translation and interpretation services where appropriate.[202]

[197] Explanatory Report, para 147.

[198] Explanatory Report, para 175; Anti-Trafficking Directive art 11 (3)

[199] Explanatory Report, para 176.

[200] Anti-Trafficking Directive, Article 11(5) and recital 18. Articles 13 to 16 contain measures concerned with specific assistance, support and protective measures for child victims, due to their particularly vulnerable position.

[201] ibid.

[202] ibid.

In addition to ensuring appropriate and secure accommodation, psychological and material assistance, and access to emergency medical treatment, the 'emergency package' of assistance measures owed to any presumed victim of trafficking also entails ensuring that they are well aware of their legal situation and entitlements and are able to exercise them accordingly. This includes counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand,[203] as well as assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders.[204]

Since many victims do not speak the language of the country they have been brought to for exploitation, the Anti-Trafficking Convention requires states to provide for language aid, which is 'an essential measure for guaranteeing access to rights, which is a prerequisite for access to justice.' [205] Importantly, this requirement is not limited to the right to an interpreter in judicial proceedings. The Explanatory report offers a detailed description of information that ought to be conveyed to persons presumed to be victims of human trafficking, which should enable them to evaluate their situation and make an informed choice from the various possibilities open to them.[206] Being appropriately advised on, and assisted in exercising their legal rights, is the most fundamental component of the victim's legal position. The mandatory language of the provision containing these measures is laudable. Regrettably, GRETA reports pay little attention to this requirement and given that the Convention does not

[203] Anti-Trafficking Convention art 12 (1) (d); The Anti-Trafficking Directive art 11 (5) and (6).

[204] Anti-Trafficking Convention art 12 (1) (e).

[205] Explanatory Report, para 158.

[206] Explanatory Report, para 160.

allow for individual complaints, it remains for national courts to give force to these provisions.

In addition to measures that aim to to assist victims in their physical, psychological and social recovery, the 'emergency package' of measures in the Anti-Trafficking Convention also includes taking due account of victims' safety and protection needs.[207]This includes a range of measures that depend on victims' personal circumstances such as age or gender, the type of exploitation, the country of origin, the types and degree of violence suffered, isolation from his or her family and culture, knowledge of the local language, and his or her material and financial resources.[208]These measures too, do not depend on the victims' willingness to cooperate with authorities or on their immigration status. On the other hand, the protection measures envisaged in the Anti-Trafficking Directive are only provided in the framework of criminal investigations and proceedings.[209] Such an approach ignores the reality of many victims of trafficking who need protection before, beyond and outside the criminal justice process.[210]

Assistance measures that belong to the 'emergency package' are couched in a mandatory language. Thus, the explanatory report to the Convention refers to the assistance measures which states 'must provide' for trafficking victims and to which victims are 'entitled to',[211] emphasizing that the required assistance measures are minimum ones.[212]

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[207] Anti-Trafficking Convention art12 (2).

[208] Explanatory Report, para 164.

[209] Anti-Trafficking Directive art12.

[210] Joint UN Commentary on the EU Directive: A Human Rights Based Approach (November 2011) 42.

[211] Explanatory Report, paras 146-147 and 149.

[212] ibid para 151.

6.3. Post-identification measures of protection

The Anti-Trafficking Convention also contains a more extensive set of measures that apply to those individuals who have been identified as victims of human trafficking by competent authorities. The scope of these post-identification measures is, nevertheless, largely dependant on victim's immigration status. The post-identification duties specifically concerned with victims holding an irregular immigration status regulate residence permits (Article 14) and their repatriation and return (Article 16).

Following the identification by competent authorities, victims who are lawfully resident (nationals and persons who obtained a residence permit according to Article 14) are entitled to further assistance in their psychological, physical and social recovery, beyond the 'emergency package' described above.[213] Interestingly, neither the Anti-Trafficking Convention nor its Explanatory notes specify the duration of the assistance owed to victims beyond the reflection and recovery period. In addition, victims are entitled to the protection of their private life and identity[214] and access to the compensation and legal redress.[215]

Significantly, although the Anti-Trafficking Convention explicitly requires states to ensure that this assistance is not made conditional on a victim's willingness to act as a witness,[216]Article 14 effectively allows states to grant residence permits only to victims who cooperate with the authorities, which makes 'irregular' victims devoid of

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[213] Anti-Trafficking Convention art12 (3)-(7).

[214] ibid art 11. The protection of their private life and identity outside the context of judicial proceedings, which is dealt with in Article 30.

[215] ibid art 15.

[216] ibid art 12 (6).

the protection to which lawfully resident victims are entitled.[217] Namely, states are required to issue a renewable residence permit to victims, 'in one or other of the two following situations or in both': first, when the stay is necessary owing to their personal situation; second, when the stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.[218]Whereas an increasing number of countries recognize the possibility of granting residence permits on both accounts, a number of victims who obtain residence permits on account of their personal circumstances is miniscule.[219] It is, therefore, clear that beyond the 'emergency package', any access to the protection and assistance is entirely dependant on the victim's immigration status and, thus, beyond their control, except when they are able to exchange it for cooperation with the law-enforcement authorities.

The margin left to the states in dealing with theses issues is appalling. Rafaelli observes that 'the broadness of State discretion thus allows national policies to undermine some of the most useful protective measures.'[220] Thus, the Anti-Trafficking Convention rightly instructs states to take into consideration a range of circumstances including victim's safety, state of health, family situation, etc.[221] when deciding on issuing residence permits based on the personal situation. At the same time, it allows states to completely sidestep these requirements by giving them freedom to chose whether to include this legal basis in their legislation or not.

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[217] Explanatory Report, para 169.

[218] Anti-Trafficking Convention art 14.

[219] The author was able to see statistics provided by Member States in confidential replies to GRETA questionnaires in the first evaluation round during her research visit to GRETA. Some of these statistics are included in the GRETA evaluation reports that are public. See also Fourth GRETA Report, 48-50.

[220] Raffaelli, 'The European Approach to the Protection of Trafficking Victims' (n 113) 211.

[221] Explanatory Report, paras 183-184.

When it comes to the repatriation and return of victims, this 'shall be with due regard for the rights, safety and dignity of that person (...), and shall preferably be voluntary.'[222] In that respect, the Convention expressly refers to the jurisprudence of the European Court of Human Rights regarding Article 3 in extradition and deportation cases that needs to be considered when organizing victims' return.[223] Moreover, GRETA expanded this requirement noting that 'due regard for the rights, safety and dignity' of victims also implies protection from re-trafficking,[224] and not just from the risk of being subjected to torture or to inhuman or degrading treatment or punishment. It remains to be seen whether and how the Strasbourg Court will approach the issue of preventing deportation on the basis of the risk of re-trafficking. Still, as Chapter 6 (Section 4) of this thesis shows, the scope for such an action is rather limited.

The Anti-Trafficking Convention also requires states to provide, in its domestic law, for the right of victims to compensation from the perpetrators.[225] Whereas obtaining such compensation naturally follows the conduct of criminal proceedings, in order to secure the effective exercise of this entitlement, the Anti-Trafficking Convention requires states to ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and

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[222] Anti-Trafficking Convention art 16 (2).

[223] Explanatory Report, para 203.

[224] GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by UK' (First evaluation round, 12 September 2012) GRETA(2012) 6, para 312; GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France' (First evaluation round, 28 January 2013) GRETA(2012)16, para 198; GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy' (First evaluation round, 4 July 2014) GRETA(2014)18, para 175.

[225] Anti-Trafficking Convention art 15 (3). For a more detailed overview of the issues of compensation, see Organization for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights (ODIHR), 'Compensation for Trafficked and Exploited Persons in the OSCE Region' (Warsaw 2008).

administrative proceedings in a language which they can understand.[226] In addition to the information and counselling that is part of the ‘emergency package’ described above, these provisions establish the right to legal assistance and to free legal aid in compensation proceedings ‘under the conditions provided by its internal law.’[227] Although this provision does not give the victim an automatic right to free legal aid, the explanatory report is reminiscent of the Strasbourg jurisprudence, which recognises, in certain circumstances, the right to free legal assistance in a civil matter on the basis of Article 6(1) ECHR that must be taken into consideration by domestic courts.[228]

Furthermore, although the traffickers bear the burden of compensating the victims, recognizing that ‘in practice there is rarely full compensation whether because the trafficker has not been found, has disappeared or has declared himself bankrupt’,[229] the Anti-Trafficking Convention requires states to take steps to guarantee compensation of victims. While they are left with the choice of means to comply with that duty, states must establish the legal basis of compensation, the administrative framework and the operational arrangements for compensation schemes. It is clear that this creates a duty of means and not the end. Nevertheless, while understandably states may be called to provide compensation when a trafficker has no means, through the previously established schemes, the other two situations listed in the explanatory report remain highly dubious. Namely, with due respect to the drafters intents, if the trafficker ‘has not been found, [or] has disappeared’, it is virtually impossible that the victim will be provided with compensation, since establishing the basis for calculating such

[226] Anti-Trafficking Convention art 15.

[227] ibid art 15 (2).

[228] Explanatory Report, para 196.

[229] ibid para 198.

compensation[230] remains inseparable from the circumstances of the trafficking offence. This is further evidenced by the GRETA observation that '[a]t present, even when there are possibilities in law for granting compensation to victims, in practice this right remains theoretical and few victims benefit from compensation schemes.[231]

Although the Anti-Trafficking Convention does not explicitly address that question, the immigration status must not preclude victims' right to compensation established in Article 15. This could also be inferred from the explanatory report, which notes that 'it would be very difficult for them to obtain compensation if they were unable to remain in the country where the proceedings take place' but does not rule out such possibility.[232] Also, in the 2013 General report on GRETA's activities, the President of GRETA noted that 'it is not acceptable that compensation is denied to some victims despite what is stipulated in the Convention because they have left the country where judicial proceedings were instituted'.[233]

The EU Anti-Trafficking Directive does not distinguish between pre- and post-identification measures of victim protection and assistance. Thus, assistance and support under Article 11 are guaranteed 'as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to [human trafficking].'[234] Nevertheless, whereas measures of victim protection and assistance are extensive in scope, ranging from assistance and health care to labour

[230] According to the Explanatory Report, para 197, the compensation is pecuniary and covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced).

[231] Second GRETA Report, para 60.

[232] Explanatory Report, para 192.

[233] Third GRETA Report, Introduction by the President of GRETA.

[234] Anti-Trafficking Directive art 11 (2).

rights, rights regarding access to justice and to a lawyer, and on the possibilities of claiming compensation, they are subject to important limitations.

Thus, the provision of these measures to victims who do not reside lawfully in the Member State concerned is only made unconditional during the reflection period.[235] Hence, following the end of the reflection period, further access to these rights is entirely dependant on the victim's immigration status.

The Anti-Trafficking Directive, however, does not deal with the conditions of the residence of the trafficking victims, which is regulated by Directive 2004/81/EC[236] and Directive 2004/38/EC.[237] The Directive 2004/81/EC conditions give residence permits to the victims of trafficking who are third country nationals on their cooperation with the authorities.[238] Hence, while Article 11 (3) requires that assistance and support for a victim are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial, it is obvious that the

[235] Anti-Trafficking Directive, Recital 18. The Anti-Trafficking Directive does not guarantee the reflection and recovery period. Instead, this is regulated by the Directive 2004/81/EC (n 112). Article 6(1) of the Directive 2004/81/EC prescribes that the duration and starting point of the reflection and recovery period is to be determined according to national law. Article 6 (2) of Directive 2004/81/EC stipulates that during the reflection period and while awaiting the decision of the competent authorities, the third-country nationals concerned shall have access to the appropriate treatment and it shall not be possible to enforce any expulsion order against them. Article 7 (1) specifies the measures that are included in 'the appropriate treatment' including, inter alia, granting standards of living capable of ensuring their subsistence and access to emergency medical treatment to the third-country nationals who do not have sufficient resources. According to the Joint UN Commentary on the EU Directive, 43 'the reference in Article 11(1) to assistance and support before criminal proceedings is indeed an acknowledgement of the need for a reflection and recovery period.'

[236] Directive 2004/81/EC (n 112).

[237] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ LL 158/77.

[238] According to the Report from the Commission to the European Parliament and the Council of 15 October 2010 on the application of Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (COM(2010) 493) '[T]he number of victims of trafficking in human beings is manifestly much higher than the number of temporary residence permits issued on the basis of this directive per year. Consequently, the impact of the directive in protecting victims and dismantling traffickers' networks seems to be insufficient.' See also Raffaelli, 'The European Approach to the Protection of Trafficking Victims' (n 113) 206-210.

support and assistance to victims who are third-country nationals beyond the reflection period heavily depends on their role in the criminal proceedings against traffickers.[239] Accordingly, 'where proceedings against the traffickers are not envisaged or the victim has not cooperated with any investigation, there is no clear requirement for an EU Member State to grant a residence permit.'[240] If they choose to cooperate and take part in the ongoing proceedings, they would be entitled to further assistance. Such arrangements, however, may negatively affect those trafficked persons who do wish to testify and cooperate, but who are not required as witnesses because they possess no relevant information or because the perpetrators do not reside in the country, but who may equally require protection and assistance.[241] Such a victim would be left with no protection from retaliation, intimidation, and from the risk of being re-trafficked.[242] Moreover, even if victims participated in these trials, once the trial is over, victims lose all their rights and can be returned to their home countries, without attention being paid to the risks they might face for having testified in the criminal proceedings.[243]

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[239] The linking of assistance and protection to cooperation with national criminal justice agencies is reportedly prevalent in many countries. See E-Notes, 'Report on the Implementation of Anti-trafficking Policies and Interventions in the 27 EU Member States from a Human Rights Perspective' (2008 and 2009); Office of the High Commissioner for Human Rights (OHCHR), 'Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary' (2010) 142.

[240] *Handbook on European Law Relating to Asylum, Borders and Immigration* (edition 2014, European Union Agency for Fundamental Rights, Council of Europe) 46.

[241] Joint UN Commentary on the EU Directive 46-47.

[242] The recent case of *L.R. v. United Kingdom* (App. No.49113/09) is illustrative. Namely, the applicant was trafficked to the United Kingdom from Albania and forced into sexual exploitation at a nightclub. She escaped and reported the case to the police. She cooperated fully throughout the subsequent investigation, providing statements against her trafficker and identifying him in an identity parade. The Crown Prosecution Service, however, decided not to prosecute the trafficker because of the lack of evidence. As a result, the United Kingdom refused the applicant's asylum application that she had filed on the basis of the risk of reprisals and re-trafficking that she faced if deported, despite the even greater risk of harm from her trafficker and his associates due to their awareness of her cooperation with the police. The friendly settlement was made with the UK government and the applicant was granted refugee status in the United Kingdom. See Chaudary, 'Trafficking in Europe: An Analysis of the Effectiveness of European Law' (n 3) 90-91.

[243] Elaine Pearson, 'Half-hearted Protection: What Does Victims Protection Really Mean for Victims of Trafficking in Europe, (2002) 10 Gender and Development 56.

On the other hand, it is not clear whether victims who do reside lawfully in the Member State concerned, and who do not wish to collaborate with state authorities are entitled to continuous assistance and support, and when such entitlements terminate. The Anti-Trafficking Directive does not legislate on the long-term assistance and protection needs of adult victims of trafficking. Thus, the only clue as to the duration of the support and assistance is contained in the Recital 18, which notes that

> Where necessary, assistance and support should continue for an appropriate period after the criminal proceedings have ended, for example if medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim' s statements in those criminal proceedings.

Furthermore, free legal counselling and representation, including for the purpose of claiming compensation, is only guaranteed in the context of criminal proceedings against traffickers, and excludes those numerous victims subject to immigration trials or criminal proceedings for offences they committed themselves.

Finally, the obligation for Member States to ensure that human trafficking victims have access to existing schemes of compensation to victims of violent crimes of intent,[244] clearly depends on the conduct and the outcomes of criminal proceedings against traffickers.

The overview of the provisions of the Anti-Trafficking Convention and the Anti-Trafficking Directive reveals that while both instruments insist on detaching victim protection from criminal proceedings against traffickers, many measures of protection and assistance are dependant on the victim's immigration status, which, in turn, mainly rests on their participation in criminal trials. Consequently, protection and

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[244] Anti-Trafficking Directive art 17.

assistance available to victims with irregular immigration status is only unconditional during the reflection and recovery period, regardless of their individual needs. Unfortunately, regardless of being proclaimed as one of the main goals of the anti-trafficking instruments, victim protection remains subject to the states' immigration and criminal justice interests, thus 'reflecting the member states' desire to protect themselves from illegal migration rather than of accepting that trafficking in human beings is a crime and that its victims must be protected.'[245]

The following section provides a comprehensive analysis of the described obligations in the light of the positive obligations established under the ECHR, discussed in Chapter 6. The analysis aims to expose the extent to which the provisions of the anti-trafficking instruments could shape human rights obligations under the ECHR thus creating an important synergy between these two bodies of law.

7. Evaluation of the victim protection measures established by the specialized anti-trafficking instruments and their relationship with positive duties under Article 4 ECHR

Chapter 6 was a detailed exploration of the positive obligations under Article 4 ECHR. Due to a limited engagement of the European Court of Human Rights with Article 4 ECHR, the chapter expanded the analysis to include case law on Articles 2 and 3, which is used as *tertium comparationis* given the 'absolute' nature of these three rights.[246] The analysis is confined to states' positive obligations that stem from Articles 2, 3 and 4 in situations where these rights are threatened by actions of private

[245] PACE Opinion 253 (2005) (n 86) para 8.

[246] The term 'absolute rights' refers to rights contained in articles 2, 3, 4(1) and 7. However, the term 'non-derogable' has been suggested as a more accurate. See Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th ed, OUP 2010) 37.

individuals. Consequently, Chapter 6 examines the extent to which states are obliged to protect vulnerable individuals from private acts that infringe upon 'the basic values of the democratic societies making up the Council of Europe.'[247] It was noted that the full extent of such obligations 'has yet to be fully established with the Court continuing to add to their number'.[248]

Chapter 6, thus, classified positive obligations in situations of private violations into two main categories: general and specific. General duties are concerned with the existence of preconditions for the effective protection of fundamental rights from private persons. These require having in place an adequate legislative and administrative framework capable of providing effective protection of individual rights accompanied by institutional arrangements to enforce such a legal framework. Specific duties, on the other hand, are concerned with concrete steps that states have taken in individual cases to put those legislative provisions in effect and include a range of measures. These include both procedural and operational actions taken by authorities. The procedural obligations require states to conduct an effective investigation into an act alleged to have engaged the respective right. The operational duties require removing victims from a situation or the risk that threatens the right in question.

More specifically, the analysis of the ECtHR case law in Chapter 6 demonstrates that Article 4 ECHR imposes upon states the following duties, which have been identified in the *Rantsev* decision. First, states have a *general* positive obligation to put in place an appropriate legislative framework to ensure the practical and effective protection of the rights of victims. This includes criminal law but also 'general legal and administrative framework and (...) the adequacy of the immigration

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[247] *Siliadin v France* (2006) 43 EHRR 16 [82]; *Rantsev v Cyprus and Russia* (n 1) [277] and [282]-[283].

[248] Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd edition, OUP 2009) 20.

policy applied'.[249] Secondly, states have a *specific* obligation to carry out an effective investigation once a credible account of a conduct engaging Article 4 ECHR is brought to their attention, even without a complaint from or on behalf of the victim. In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, states are also subject to a duty in cross-border trafficking cases to co-operate effectively with the relevant authorities of other states concerned in the investigation of events that occurred outside their territories. Thirdly, Article 4 ECHR imposes upon states 'in certain circumstances' an obligation to take operational measures to protect victims, or potential victims, of treatment in breach of that Article.[250] This duty mirrors the duty first established under Article 2 ECHR in *Osman* and applies only when authorities were aware, or ought to have been aware of the circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, subjected to such treatment.[251]The obligation to take operational measures extends only as far as to require authorities to remove an individual from an exploitative situation or the risk thereof. It is, therefore, carefully framed to avoid excessive burdens.[252]

Alongside the duties established in Chapter 6, Sections 5 and 6 of the present chapter analysed a broad range of victim protection measures established under the trafficking-specific instruments and the Anti-Trafficking Convention, in particular. This raises a question of the extent to which the two sets of duties - under Article 4 ECHR and under the Anti-Trafficking Convention – overlap. To the extent that these

[249] *Rantsev v Cyprus and Russia* (n 1) [284]-[285].

[250] ibid [286]; *CN v United Kingdom* (2013) 56 EHRR 24 [67].

[251] *Osman v UK* (2000) 29 EHRR 245 [115]-[116].

[252] Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Julian Roberts and Lucia Zedner (eds), *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (Oxford University Press 2012).

obligations do not overlap, the question is whether there can be a justification for an expansion of Article 4 ECHR to accommodate some, or potentially all, protection measures from the the Anti-Trafficking Convention, as suggested by Chaudary earlier in this chapter.[253]

The purpose of this section is to assess the measures of victim protection under the anti-trafficking instruments and examine the possibility of reading these under Article 4 ECHR in order to determine where the line is to be drawn between victim protection measures and their rights justiciable under the ECHR. It is important to note that some of the obligations from the anti-trafficking instruments may also be framed under other human rights, such as Articles 3 and 8 ECHR in deportation cases.[254]

7.1. Victim protection in the criminal justice context

The obligations placed on states in the criminal justice context by the anti-trafficking instruments are aimed at ensuring victims' access to justice through an appropriate legal framework, which enables investigations, prosecutions and adequate punishment of traffickers, and provides for the opportunity to obtain legal redress. These obligations do not establish a right to have a trafficker punished in each individual case, nor do they require that victims are guaranteed compensation. Nevertheless, states must put in place adequate mechanisms and procedures that are capable of securing such

[253] Chaudary, 'Trafficking in Europe' (n 3) 94.

[254] See Chapter 6 Sections 3 and 4.

outcomes. As already seen in Chapter 6, these obligations have also been established under Article 4 ECHR by the Strasbourg Court in the *Rantsev* case.[255]

The provisions dealing with substantive criminal law also include an obligation concerned with the non-punishment of victims of human trafficking for 'unlawful activities' which they have been compelled to commit in the course, or as a consequence of being trafficked.'[256]However, this principle raises a number of important questions concerning the interaction between human rights and criminal law, which exceed the scope of this thesis.

When it comes to victim protection during and within criminal investigation and trial, such protection measures are available to victims who choose to participate in criminal investigations and proceedings against traffickers and are primarily aimed at securing their safety. The relevant provisions[257] are intended to provide effective and appropriate protection from potential retaliation or intimidation both within and outside criminal proceedings against traffickers. This group contains both substantive and procedural obligations, which have also been guaranteed by numerous other international instruments.[258] The recent publication of the European Commission[259] makes a parallel between these protection measures and the positive obligation to take

[255] *Rantsev v Cyprus and Russia* (n 1) [284]-[285].

[256] Anti-Trafficking Convention art 26; Anti-Trafficking Directive art 8.

[257] Anti-Trafficking Convention arts 28 and 30; Anti-Trafficking Directive arts 12 and 15.

[258] Council of Europe, Committee of Ministers, Recommendation Rec (97) 13 of the Committee of Ministers to member states concerning intimidation of witnesses and the rights of the defence (10 September 1997); Council of Europe, Committee of Ministers, Recommendation Rec (2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice (20 April 2005); Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57, Chapter VI; UN General Assembly, United Nations Convention against Transnational Organized Crime (8 January 2001) A/RES/55/25, arts 24 and 25.

[259]European Commission, 'The EU Rights of Victims of Trafficking in Human Beings' (2013) 16.

operational measures established by the *Rantsev* case. Still, unlike these obligations, the *Rantsev* positive obligation to take appropriate measures to remove an individual from the trafficking situation or the risk thereof is not limited to the conduct of any criminal investigation or proceedings.[260] On the other hand, while the *Rantsev* judgement outlines the duty to take operational measures to protect victims only in general terms, the anti-trafficking instruments elaborate the required measures in greater detail.[261] Therefore, these specific requirements ought to influence the approach of the European Court of Human Rights when assessing state compliance with the operational duty to protect victims of trafficking.

When it comes to victim protection during and within criminal investigation and trial, these obligations may conflict with the defendants' rights. Where such a conflict arises, it will circumscribe the specific duties imposed on States under Article 4. The parallel could be drawn with the Strasbourg Court's approach in *Osman* where it established that protective duties must be balanced with the relevant obligations arising out of Article 6 as well as other rights of the defendants. *Osman*, thus, emphasizes the

> [N]eed to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 [right to liberty] and 8 [right to private life] of the Convention'.[262]

The protections of Article 4 can therefore only go so far, and it is necessary to ensure the appropriate balance between the defence rights and the interests of victims and

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[260] See Chapter 6.

[261] Anti-Trafficking Convention art 28 (2); Anti-Trafficking Directive art 12.

[262] *Osman v UK* (2000) 29 EHRR 245 [116].

witnesses.[263] This balance constitutes an inherent limitation on the extent to which the Strasbourg Court can use Article 4 to protect victims in the criminal justice process.

The protection of victims ‘in the course of judicial proceedings’, required by Article 30 of the Anti-Trafficking Convention, obliges State Parties to adapt their judicial procedure so as to protect victims’ privacy and ensure their safety. However, the Explanatory note explicitly states that this provision is only compulsory as to the objectives but leaves it to the Parties to decide how to attain the objectives.[264] The Explanatory report, nevertheless, lists some of the means that may achieve these objectives without unjustifiably interfering with defence rights, drawing on the case-law the European Court of Human Rights as a guide.[265] These include non-public hearings, using audio-visual technology for taking evidence and conducting hearings, recordings of testimony and anonymous testimony.

In the case *Doorson v the Netherlands*, which concerned an applicant convicted of drug trafficking on the basis of anonymous witness statements who feared a reprisal from him, the Strasbourg Court held:

> It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting states should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled.[266]

[263] Anti-Trafficking Convention art 30. See also the Explanatory report paras 300-302.

[264] Explanatory Report paras 306-326.

[265] ibid paras 307-326.

[266] *Doorson v. the Netherlands* (1996) 22 EHRR 330 [70].

Witness anonymity may pose a particular challenge to the proper exercise of defence rights under Article 6 paragraphs 3(d) and 1.[267] On the one hand, if such anonymity were to be refused 'much information needed if crimes are to be punished would never be brought to the knowledge of the prosecuting authorities.'[268] On the other hand, to safeguard the rights of the defence, judicial authorities must adequately counterbalance the handicaps under which the defence labours as a result of witness anonymity.[269]

Accordingly, in *Doorson v the Netherlands* the Court held that 'principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.'[270] Evidently, the Court is open to balancing the fair trial guarantees from Article 6 ECHR in order to ensure that life, liberty or security of person protected by other, substantive provisions of the Convention, 'are not unjustifiably imperilled'. However, the process of reconciling the State's positive duties in respect of victim-witnesses and the fair trial rights of defendants is said to be 'multifaceted, relating to the context of the investigation and trial as a whole, the particular vulnerability of the witness-victim and the countervailing measures adopted by the judicial authorities in protecting the defendant's fair trial rights.'[271]

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[267] As a general rule art 6 (1) and (3) (d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage. See *Ludi v Switzerland* (1992) Series A No 238 [47].

[268] *X v Belgium* (App no. 8417/78) (4 May 1979) page 207.

[269] *D v Finland* (App 30542/04) (7 July 2009) [43].

[270] *Doorson v the Netherlands* (n 266) [70].

[271] Liora Lazarus, 'Advice for the Stern Review: The Human Rights Framework Relating to the Handling, Investigation and Prosecution of Rape Complaints' in UK Government Equality Office, 'A Report by Baroness Vivien Stern CBE of an Independent Review into how Rape Complaints are Handled by Public Authorities in England and Wales: The Stern Review' (Annexe A) 133.

Still, the use of anonymous testimony has to be justified by the circumstances of the case[272] and the Court stressed that it is for the national courts to examine how serious and well-founded are the reasons for witness anonymity in the particular case.[273] Nevertheless, in the *Doorson* judgment the Court accepted use of anonymous testimony even in the absence of any specific threats made by the defendant. It held that

> [T]he decision to maintain anonymity cannot be regarded as unreasonable per se. Regard must be had to the fact, as established by the domestic courts and not contested by the applicant [Mr Doorson], that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them.[274]

However, the Court emphasized that a conviction should not be based either solely or to a decisive extent on anonymous statements.[275]

Importantly, in analysing the evolution of the Strasbourg case law with regards to this requirement, the Explanatory Report to the Anti-Trafficking Convention concluded that

> [I]t can no longer be stated that Article 6, as interpreted by the Court, necessarily requires - *regardless, in particular, of the decisiveness of the anonymous testimony for the conviction decision* - that the defence be enabled to observe, face to face, the reactions of anonymous witnesses to its direct questions.[276]

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[272] *Kok v the Netherlands* [2000] ECHR 706.

[273] *Visser v the Netherlands* (App 26668/95) (14 February 2002) [47].

[274] *Doorson v. the Netherlands* (n 266) [71].

[275] ibid [76].

[276] Explanatory Report para [323] relying on the judgement in *Kok v the Netherlands* (n 269) (emphasis added).

However, recent case law contradicts the approach of the Explanatory note. In the case of *Breukhoven v. the Czech Republic*,[277] the applicant was convicted of trafficking in human beings as regards three women from Romania. The Czech Regional Court found that these three victims had been lured from Romania under the false pretext of work as bartenders in the Czech Republic and that the applicant had subsequently forced them to prostitute themselves by threatening violence against their families. The applicant contended that his right to a fair trial had been breached because he had been convicted solely on the testimony of the witnesses whom he had had no opportunity to question at any stage of the proceedings. Namely, the three victims gave their testimonies at the initial stage. These interviews were conducted in the presence of a judge in accordance with domestic Code of Criminal Procedure as an urgent measure because the women said that they wished to return to Romania and never come back to the Czech Republic. Neither the applicant nor his lawyer were present at these interviews and the applicant did not even know about them as they were carried out before he was charged.[278] The Strasbourg Court was, thus, called upon to determine whether, in order to establish the applicant's guilt regarding this crime, the domestic courts relied on any other evidence, apart from these witness statements given at the investigation before the applicant was charged and whom he was not able to have cross-examined at any stage of the proceedings, and if so, whether this violated Article 6 ECHR.

Both the Government and the Czech Constitutional Court sought to justify their actions by the serious nature of the applicant's crimes, which seriously interfered with the victims' human rights' referring, in this connection, to the positive obligation of States to combat trafficking in human beings, established in *Rantsev*. The ECtHR

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[277] *Breukhoven v the Czech Republic* (App 44438/06) (21 October 2011).

[278] ibid [7].

noted, however, that the *Rantsev* judgment ‘did not indicate that the positive obligation of States to prosecute traffickers go as far as infringing the defence rights of persons charged with trafficking.’ [279]

The Court, thus, concluded that the applicant’s conviction for trafficking in human beings was based solely on the testimony of the witnesses who did not appear at trial and whom he had no opportunity to question at any time during the proceedings, and that this procedural failure could not be justified by the particular context of the present case, which is a serious crime of sexual exploitation. [280]

While the Court showed some empathy for the vulnerability of the victims and their plight, the fact that the domestic courts made no effort to secure their presence at the trial or to interview them in their home country, and that ‘no measures were taken by the domestic authorities to counterbalance the handicaps under which the defence laboured’,[281] were decisive in finding a violation of Article 6 (1) and (3) (d) of the Convention.

This shows the determinedness of the Court not to give away the Article 6 safeguards too easily even when it comes to the most serious crimes (or especially then) and even when other fundamental rights are at stake. Therefore, when seeking to reconcile the competing interests of the victim-witness and the defendant, the Court has suggested that ‘only such measures restricting the rights of the defence which are strictly necessary are permissible under Art.6.’[282] Thus, for example, in the case of *SN v Sweden*,[283] the Court found that conviction based largely on the evidence obtained from

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[279] ibid [55].

[280] ibid [57].

[281] ibid.

[282] *PS v Germany* (2003) 36 EHRR 61[23].

[283] (2004) 39 EHRR 13.

the audiotape of an interview with the victim-witness, conducted on the basis of pre-agreed questions where counsel were not present did not encroach Article 6 ECHR unjustifiably.

Importantly, in all the cases quoted, the European Court of Human Rights has discussed interference with the defendants' Article 6 rights in the interest of protecting victims and witnesses, and ruled on the impact of these limitations on the overall fairness of the criminal proceedings.[284] Therefore, the ECtHR has not been called upon to pronounce whether and under which circumstances such limitations *must be* imposed in order to protect rights of victims and witnesses. In other words, the Court has not elaborated on the states' obligation to protect victims and witnesses in criminal proceedings in general. This is understandable, since 'Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration.'[285]

Therefore, while protection of victims and witnesses may well require certain limitations of the defence rights, Article 6 does not itself establish any obligation in that regard. Moreover, protection during criminal investigation and trial can be sought to secure 'life, liberty or security' of person as well as 'interests coming generally within the ambit of Article 8'[286] and it is not clear whether Article 4 ECHR would add any substantial value to it.

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[284] *Axen v the FRG* (1983) Series A No 72; *Schenk v Switzerland* (1988) Series A No 140; *Doorson v. the Netherlands* (1996) 22 EHRR 330; *SN v Sweden* (2004) 39 EHRR 13; *Bricmont v. Belgium* (1989) Series A No 158; *Saïdi v France* (1993) Series A No 261-C; *Kostovski v the Netherlands* (1989) Series A No 166; *Ludi v Switzerland* (1992) Series A No 238; *Van Mechelen and Others v the Netherlands (1997) 25 EHRR 647*; *Kok v the Netherlands* [2000] ECHR 706.

[285] *Doorson v the Netherlands* (n 266) [70]. See also Ben Emmerson, Andrew Ashworth, Alison Macdonald, *Human Rights and Criminal Justice* (3rd edition, Sweet&Maxwell 2012) 823-832.

[286] ibid.

7.2. Victim protection outside the criminal justice context

The obligations placed on states by the anti-trafficking instruments outside the criminal justice context are intended to provide to victims (and to presumed victims) access to material assistance and access to safety that are independent of their participation in criminal investigations and proceedings against traffickers. These include, first, mandatory and unconditional provision of emergency assistance and support during the reflection period, which arise the moment authorities had a reasonable grounds suspicion that an individual might be a victim.[287] Secondly, this group includes obligations concerned with further protection of, and assistance to those victims who are lawfully resident in the member state. These include assistance to victims in their psychological, physical and social recovery, beyond the 'emergency package', protection of their privacy, and access to compensation and legal redress.[288]

While both anti-trafficking instruments explicitly require states to ensure that assistance is not made conditional on a victim's willingness to act as a witness, in reality such a requirement is skewed by a wide discretion given to states regarding the granting of the residence permits.[289] Therefore, for victims with an irregular immigration status, material assistance and support are only unconditional during the mandatory reflection and recovery period. Moreover, the Anti-Trafficking Directive only guarantees the provision of assistance and support (Article 11) whereas protection

[287] Anti-Trafficking Convention arts 11 and 12 (1) and (2); Anti-Trafficking Directive arts 11, 13 and 14.

[288] Anti-Trafficking Convention art 12 (3) – (7); Anti-Trafficking Directive arts 13, 14 and 16 (The Anti-Trafficking Directive does not legislate on the long-term assistance and protection needs of adult victims of trafficking).

[289] GRETA admitted in its latest report that since Article 14 of the Anti-Trafficking Convention allows parties to make the issuing of a temporary residence permit conditional on co-operation with law enforcement authorities, 'it seems that in some cases this blocks unconditional access to assistance for foreign victims.' See Fourth GRETA Report 44.

measures are solely provided in the framework of criminal investigations and proceedings (Article 12). This is criticised as inadequate since ‘victims of trafficking may be in need of protection before, beyond and outside the criminal justice process.’[290]

Nonetheless, the measures of assistance and protection within the ‘emergency package’ are couched in the strong language. They include: the right to be identified, the right to information and counselling about their rights and available services, the right to the reflection and recovery period, and the right to the emergency material assistance and the protection of safety (The last requirement is established only by the Anti-Trafficking Convention). According to the President of GRETA, these entitlements represent the set of ‘the victims’ fundamental rights enshrined in the Convention’.[291] Notwithstanding the President’s optimism, these ‘rights’ *currently* go beyond what is required by the ECHR.

The provision of material assistance and support has not been expressly read into the ECHR and, therefore, recourse to the Strasbourg court has not yet been confirmed as a viable option for victims in these circumstances. Some authors argued that certain provisions of the Anti-Trafficking Convention can develop ‘direct entitlements for individuals, such as the prohibition on removal from the territory before the identification process has been completed (...), the right to assistance measures during the identification procedure (...), and specific rights for children’.[292]

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[290] Joint UN Commentary on the EU Directive 42.

[291] Third GRETA Report, Introduction by the President of GRETA. He adds to this list the right to compensation and non-punishment for illegal acts which victims are compelled to commit by traffickers.

[292] Follmar-Otto and Rabe, ‘Human Trafficking in Germany’ (n 108) 37.

In addition, the Group of Experts on Trafficking in Human Beings of the European Commission,[293] expressed the opinion that immediate practical measures aimed at the protection of victims (or potential victims) of trafficking identified in *Rantsev* include: the securing of the immediate physical safety of the trafficked person, or person at risk of being trafficked; their physical, psychological and social recovery, with the immediate provision of information about their rights and options in a language that they understand; referral to assistance and support with the aim of long-term social inclusion.[294] What is more, the Group argued that such measures 'might include, but are not restricted to': ensuring that the person has legal assistance and access to justice; evaluating the need for short or longer-term international protection, whether through refugee status or subsidiary/complementary protection; safe and dignified repatriation involving cooperation with the source State and relevant NGOs and following an individual risk assessment.[295]

The question, however is, whether such an extensive set of measures expands the scope of Article 4 in such a way that it distorts its nature and purpose.

The ruling in *Rantsev* seems to imply that the appropriate measures of victim protection are only those required *to remove a person from the situation or risk* of being, trafficked or exploited.[296] This clearly requires a person to be facing an actual or imminent threat. Therefore, providing *immediate* and *basic* protection and assistance[297] may well be in the function of one's removal from the situation or risk. On this

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[293] Group of Experts on Trafficking in Human Beings of the European Commission, Opinion on the Decision of the European Court of Human Rights in the Case of Rantsev v. Cyprus and Russia, (22 June 2010) Opinion Nº 6/2010.

[294] ibid para 9.

[295] ibid para10.

[296] *Rantsev v Cyprus and Russia* (n 1) [286] (emphasis added).

[297] Anti-Trafficking Convention arts 12 (1) and (2); Anti-Trafficking Directive art 11.

interpretation, a more extensive set of measures aimed at providing for a victim's full recovery, although required by the Anti-Trafficking Convention, could not be successfully implied into Article 4 without significantly distorting the Court's ruling. So far, the protective obligation under Article 4 ECHR includes both pre-emptive intervention as well as measures after the act has taken place, but only if both are related to the ongoing threat. The content of such a duty will undoubtedly depend on the circumstances of the case and the victim's protection needs.

One of the reasons for a limited approach to Article 4 protective obligations can be found in the fact that the Anti-Trafficking Convention has established its own mechanism for monitoring states' compliance, and such a mechanism does not establish the right to hear individual victim complaints. Hence, while states could have opted for creating an individual complaints mechanism, they clearly chose a different route. Therefore, in the light of its perceived 'democratic deficit',[298] it may not be appropriate for the Strasbourg Court to seek to establish duties on the basis of the anti-trafficking instruments beyond those accepted by States.

Nevertheless, it should be noted that almost all Member States of the Council of Europe, which are also Parties to the ECHR, have signed the Anti-Trafficking Convention,[299] thus expressing the willingness to abide by its provisions. Therefore, states that have ratified the Anti-Trafficking Convention are 'fully bound by it' in the words of the Court of Appeal of England and Wales.[300] On the other hand, states that had signed but not yet ratified it[301] are 'subject to the attenuated obligation under

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[298] Sandra Fredman, *Human Rights Transformed: Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) Chapter 4.

[299] Only the Russian Federation and Czech Republic have not yet signed the Anti-Trafficking Convention.

[300] *R v LM and Others* (n 185) [2].

[301] Turkey and Lichtenstein.

Article 18 of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat its object and purpose.'[302] Furthermore, as a consequence of these duties being undertaken, many states have indeed adopted laws that provide measures of protection and support to victims. Thus, the Court in *Rantsev* noted that Cypriot authorities did not even attempt to comply with its national legislation on human trafficking that contain provisions for victims' protection such as accommodation, medical care and psychiatric support. [303] Clearly, even though the Strasbourg Court may not be entitled to impose such protective measures itself, let alone rule on their scope, when the state already has such laws in place, it may well be required to comply with them. What is more, such measures do not in any way contravene the rights and freedoms of potential offenders, which could have provided an argument for their restraint.

Significantly, the ECtHR stated in *Opuz* that

> [I]n interpreting the provisions of the Convention and *the scope of the state's obligations* in specific cases the Court will also look for any consensus and common values emerging from the practices of European states and *specialised international instruments* (…).[304]

This statement, together with the *Rantsev*'s explicit acknowledgment that the extent of positive obligations arising under Article 4 must be considered within the context of the provisions of the Palermo Protocol and the Anti-Trafficking Convention, supports the argument that obligations contained in the Anti-Trafficking Convention may well inform the Article 4 obligation to provide practical and effective protection of victims' rights. Such a conclusion would be in accordance with the Court's proclaimed need for

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[302] *R v LM and Others* (n 185) [2].

[303] *Rantsev v Cyprus and Russia* (n 1) [298].

[304] *Opuz v Turkey* (2010) 50 EHRR 28 [164] (emphasis added).

'a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers.'[305]

Thus, it may well be argued that were such obligations to be established under Article 4 ECHR, they could be framed similarly to positive obligations concerning the fundamental right to education.[306] Namely, the ECtHR clarifies that this right does not oblige states to make education available; it guarantees 'a right of access to educational institutions *existing* at a given time'. [307] Moreover, this right 'by its very nature calls for regulation by the State', thus imposing a positive duty on the State. Such regulation 'may vary in time and place according to the needs and resources of the community and of individuals.'[308] Furthermore, educational institutions have to be accessible to everyone without discrimination.[309] Accordingly, given that most states have established certain mechanisms for providing assistance and support to victims of trafficking (however imperfect),[310] it could be argued that they are required to ensure that victims have equal access to these.[311] However, since such assistance and support

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[305] *Rantsev v Cyprus and Russia* (n 1) [285].

[306] Article 2 of Protocol No. 1 ECHR.

[307] *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium* (Belgian Linguistic Case) (1968) 1EHRR 252 [4] (emphasis added).

[308] ibid [5]. However, this is not an absolute right; limitations must be foreseeable for those concerned and must pursue a legitimate aim. See *Ali v the United Kingdom* (App 40385/06) (11 January 2011).

[309] *DH v Czech Republic* (GC) [2008] ECHR 646; *Oršuš and Others v Croatia* (2011) 52 EHRR 7; *Horvath and Kiss v Hungary* (App 11146/11) (29 January 2013).

[310] In 28 country evaluation reports, GRETA has urged the authorities to improve different aspects of the provision of assistance to victims of trafficking. See Fourth GRETA Report 42-45.

[311] On the fundamental principle of equality of opportunity in education see also OHCHR, Committee on Economic, Social and Cultural Rights, 'General Comment 13 on the right to education (article 13 of the Covenant)' (2 December 1999) E/C.12/1999/10; UN OHCHR, Special Rapporteur on the right to education, Kishore Singh, 'Report to the Human Rights Council on the promotion of equality of opportunity in education' (18 April 2011) A/HRC/17/29; UNESCO, 'Results of the Seventh Consultation of Member States on the measures taken for implementation of UNESCO's Convention and Recommendation against Discrimination in Education (1960)' (17 August 2007) Document 177 EX/36.

measures are often resource intense, it is clear that they could only amount to obligations of means, not the end.

In addition, the sub-group of protective obligations outside of the criminal justice context established by the Anti-Trafficking Convention are so called ‘status-related duties’ that are specifically concerned with victims with irregular immigration status and regulate the issue of residence permits, their repatriation and return.[312] The chapter revealed that these obligations are couched in a discretionary language, which allows states to make them dependant on the victim’s cooperation with authorities in criminal proceedings. However, in spite of these limitations and the fact that the implementation of these provisions rests on the national courts, recent developments in the UK jurisprudence look promising. Furthermore, such developments have established that the Anti-Trafficking Convention offers better protection against deportation than the ECHR.

Thus, in the case of a trafficked domestic worker from Tanzania, the UK Upper Tribunal (Immigration and Asylum Chamber) found it difficult to accept that ‘the removal of the appellant would constitute a further breach of the protective obligations inherent in Article 4 of the [ECHR]’ due to the alleged risk of being re-trafficked.[313] However, since the Tribunal previously determined a breach of the appellant’s rights under Article 4 ECHR,[314] ‘which breach we are satisfied has exposed the victim to harm in this country’,[315] it ruled that this finding impacted on the question

[312] Anti-Trafficking Convention arts 14 and 16.

[313] *EK* (Article 4 ECHR: Anti-Trafficking Convention) Tanzania v Secretary of State for the Home Department [2013] UKUT 313 (IAC) [45].

[314] On the basis of the Government’s failure to comply with the protective arrangements set out in its own policy designed to provide protection to individuals required by Article 4 ECHR. *EK* (Article 4 ECHR: Anti-Trafficking Convention) Tanzania v Secretary of State for the Home Department [2013] UKUT 313 (IAC) [29]-[42].

[315] ibid [63].

of whether the appellant should be removed. Accordingly, since the appellant's medical condition is linked to the previously established breach of her rights under Article 4 ECHR, the Tribunal concluded that the State should recognise a degree of responsibility for it.[316] The Tribunal effectively claimed that the duty to grant a residence permit on personal grounds arising out of Article 14 of the Anti-Trafficking Convention was stronger because the state previously violated its obligations under Article 4 ECHR. Furthermore, the Tribunal also held that the very high standard for engaging the Article 3 ECHR non-deportation obligation may not necessarily be required by the the Anti-Trafficking Convention.[317]

This sheds an important light on the potential of the Anti-Trafficking Convention and shows that even though this instrument does not establish the individual complaints mechanism, well-articulated domestic litigation in countries where it applies directly, or has been incorporated into a national legislation, will ultimately secure the enforcement of its protective measures. Moreover, this case exemplifies an important interplay between the protective guarantees in the ECHR and the Anti-Trafficking Convention, where the former lays down a general guidance and the latter clarifies and specifies this by outlining concrete requirements.

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[316] ibid [64].

[317] ibid [63]-[64]. The Strasbourg Court reiterated principles applying to situations where Article 3 may be engaged by the expulsion of a person afflicted with any serious physical or mental illness in *N v UK* (2008) 47 EHRR 39 [42]-[45]. The Court thus stated that 'The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.' Such 'very exceptional circumstances' were met in *D v UK* (1997) 24 EHRR 423, where the applicant was critically ill and appeared to be close to death, and could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support. The Court in N concluded that it should maintain such the high threshold, which is justified by the fact that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. However, the Tribunal in EK noted that the guidance given in paragraph 183 of the Explanatory Report to the Anti-Trafficking Convention 'seems to contemplate a quite different standard from the very high one described in N v The United Kingdom.'

Accordingly, victim protection outside of the criminal justice context could be framed within Article 4 ECHR in the following way. First, these obligations may be covered by the Rantsev *general* duty to establish an 'adequate' legal framework that contains 'the spectrum of safeguards (...) to ensure the practical and effective protection of the rights of victims or potential victims of trafficking.'[318] What is adequate in each case will be judged by the standards required by the Anti-Trafficking Convention as well as GRETA assessments in individual country reports. The Strasbourg Court was explicit that the adequate legal framework refers to regulatory measures as well as immigration rules, and not just criminal law provisions.[319] Moreover, a *specific* obligation to provide immediate protection of victims or potential victims of trafficking may well be interpreted to require, as suggested by the Group of Experts on Trafficking in Human Beings of the European Commission,[320] a range of substantive assistance and protection measures laid down in the Anti-Trafficking Convention. However, this obligation would only guarantee access to *existing* assistance and protection schemes in states, and the standard for assessing state compliance would be the one established in the right to education cases, as explained above.

When it comes to the Anti-Trafficking Directive, it is hard to determine which of the described duties is unconditional, sufficiently clear and precise to create a direct vertical effect. As noted above, most of the obligations required from states 'to take the necessary measures to ensure' a certain action or outcome and do not guarantee the action or outcome itself. The strongest duties are imposed with respect to the conduct

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[318] *Rantsev v Cyprus and Russia* (n 1) [285]

[319] ibid [284].

[320] Group of Experts on Trafficking in Human Beings of the European Commission, Opinion on the Decision of the European Court of Human Rights in the Case of Rantsev v. Cyprus and Russia, (22 June 2010) Opinion Nº 6/2010.

of investigations into and prosecution of offences,[321] the victims' rights in criminal investigations and proceedings,[322]some provisions regarding the protection of child victims,[323] and securing access to the existing schemes of compensation.[324]

According to the European Commission's mid-term report,[325] in 2013, thirteen Member States[326] were subject to infringement procedures because they failed to notify the Commission of any transposing legislation, as required by Article 22. The European Commission has released its first progress report to the European Parliament and the Council assessing the extent to which the Member States have taken the necessary measures in order to comply with the Anti-Trafficking Directive.[327] To date, 26 out of 27 Member States to which the Directive applies have notified the Commission of full transposition. However, the report highlights the 'worryingly low' level of prosecutions and convictions for human trafficking and the fact that victims are frequently refused assistance at police stations or misidentified as offenders, and subsequently prosecuted and convicted. The report further warns of an inadequate treatment of victims during criminal proceedings, who are often subject to intimidation and secondary victimisation and notes that gender and age-specific assistance and support are still inadequate.

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[321] Anti-Trafficking Directive art 9.

[322] ibid art 12.

[323] ibid arts 13-15.

[324] ibid art 17.

[325] European Commission, 'Mid-term Report on the Implementation of the EU Strategy towards the Eradication of Trafficking in Human Beings' (17 October 2014) COM(2014) 635 final.

[326] Austria, Cyprus, France, Germany, Greece, Ireland, Italy, Luxemburg, Malta, Netherlands, Portugal, Slovakia, Spain.

[327] European Commission, 'Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims' (19 May 2016) COM(2016) 267 final.

Overall, this section has provided a comprehensive assessment of the victim protection measures established by the anti-trafficking instruments and clarified the ways in which these have been, or could be framed within Article 4 ECHR. Whereas the Strasbourg Court did acknowledge 'the paucity of case law on the interpretation of art.4 in the context of trafficking cases, *in particular* in relation to the extent to which art.4 requires Member States to take positive steps to protect potential victims of trafficking *outside of the framework of criminal investigations and prosecutions*',[328] it did very little to develop and elaborate such obligations. The thesis, therefore, offers invaluable guidance on how these obligations could be formulated in future.

8. Conclusion

This analysis of the anti-trafficking instruments reveals that the Council of Europe Anti-Trafficking Convention offers so far the most comprehensive protection for trafficking victims. Nevertheless, its enforcement is not in the hands of individual victims unless, depending on the constitutional system of a state, the Convention is either directly applicable or is implemented through the adoption of a statutory instrument. In addition, the Convention is said to leave 'too much discretion to State parties, and an evaluation of its validity will only be possible by examining how States will decide to use their discretion in implementing it.' [329]

Any criticism of the Anti-Trafficking Convention for the perceived flaws in providing adequate protection for victims of trafficking, needs to be seen in the light of

[328] *Rantsev v Cyprus and Russia* (n 1) [200] (emphasis added).

[329] Raffaelli, 'The European Approach to the Protection of Trafficking Victims' (113) 213.

its drafting history and the fact that the dominant position of the European Commission acting on behalf of the EU Member States prevented any agreement on stricter standards beyond what was then community law.[330] This is particularly applicable to laws on residence[331] and the lack of success in separating victims' rights from cooperation in criminal proceedings.[332]

The provisions of the subsequent Anti-Trafficking Directive are modelled on the Anti-Trafficking Convention but are less detailed and more narrowly focused on the criminal aspect of the phenomenon. With respect to their enforcement, it is still early to determine which of the described duties will be considered unconditional, sufficiently clear and precise to create a direct vertical effect.

Importantly, the chapter demonstrated that while significantly contributing to victim protection, neither the Anti-Trafficking Directive, nor the Anti-Trafficking Convention represent human rights instruments. Accordingly, the obligations contained in these instruments do not *necessarily* and *automatically* amount to individually enforceable human rights obligations on their own.

Nevertheless, obligations established by the specialised anti-trafficking instruments are important for two reasons. First, as seen in the recent jurisprudence in the UK, such obligations are binding on the Member States as a matter of international law.[333] Secondly, as this and the previous chapter reveal, some of the obligations contained in the anti-trafficking instruments have been *recognised* as human rights obligations under the ECHR. Still, the Strasbourg Court is yet to rule on whether more substantial protection measures could fall within the Convention's protective ambit.

[330] Council of Europe, Parliamentary Assembly, 'Draft Council of Europe Convention on Action Against Trafficking in Human Beings' Recommendation 1695 (2005) 1, para 4.

[331] Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (OUP 2008) 145.

[332] Follmar-Otto and Rabe, 'Human Trafficking in Germany' (n 108) 38.

[333] *R v LM and Others* (n 185) [2].

This chapter demonstrated obvious potential of the provisions of the Anti-Trafficking Convention to influence the approach of the ECtHR in further developing human rights safeguards required under the ECHR.

Whether, and to what extent, the Strasbourg Court will be prepared to follow such a lead depends not only on its perception of its own role among the myriad of specialized anti-trafficking institutions and instruments, but also on the type of cases that reach Strasbourg. Therefore, it is particularly important for the human rights community to submit well-argued cases which challenge the Court to engage with these complex questions and this chapter aimed to provide useful guidance in that respect.

CONCLUSION

Any study of human trafficking is doomed to be incomplete, the reason being a sheer depth and breadth of the problem that involve diverse practices and call for comprehensive solutions. As such, human trafficking engages a myriad of different disciplines and methodological approaches. It is precisely because of the complexity of the subject matter that there is a nearly universal agreement on the need for a comprehensive, multidisciplinary, 'integrated and holistic' approach both to studying the problem and particularly to developing solutions to it. For that reason, the approach used in this thesis, focusing exclusively on human rights law, and on one human right in particular, may appear somewhat incomplete and myopic.

However, while integrated and holistic multidisciplinary studies are indispensable for understanding the trafficking problem and for developing comprehensive strategies to address it, so too are studies that provide an in depth analysis of one particular framework or instrument. Thus, the analysis in the thesis exposes many ambiguities, misconceptions and a lack of depth in studying the human rights law approach to human trafficking, and the role of the right to be free from slavery more specifically, that a study of their role (alone) in addressing the exigencies of human trafficking is indispensable. Such a study does not itself preclude or intend to diminish the importance of other approaches, which are a necessary and important contribution to the scholarship and action on this pressing problem of the modern world.

This conclusion is not aimed at reiterating all the findings of the thesis. Instead, it is intended to highlight the most important questions the thesis has addressed and to emphasize its original contribution to an understanding of the problem of human trafficking and mechanisms for addressing it, as well as to draw attention to the thesis' contribution to an understanding of human rights law, more generally.

The aim of the thesis, however, was not to provide a complete account of the role of human rights law in addressing human trafficking. In fact, the thesis only focused on the right to be free from slavery, servitude and forced labour, itself one of the least theorised and adjudicated human rights. Specifically, the analysis focused on legal instruments and jurisprudence on a European level, largely because Europe has established, so far, the most comprehensive and articulated human rights framework in general, and with regard to human trafficking, in particular.

The analysis of the problem of human trafficking in the context of the right to be free from slavery, servitude and forced labour, offered in this thesis, is both conceptual and normative. In its former capacity, it elucidates and explains often confused, conflated and under-theorised concepts used in different academic, legal and political contexts. These include, *inter alia*, the notions of 'modern slavery', 'exploitation', and the concept of 'human trafficking' itself, which are addressed and elaborated in Part I (Chapters 2 to 5) of the thesis. Doctrinally, the thesis offers a meticulous analysis of legal instruments and available jurisprudence on this topic. Normatively, this analysis offers a roadmap for navigating through a congested area of legal and policy instruments explaining the existent state obligations in this field and revealing the potential for furthering these in future litigations.

Studying the role of human rights law and the right to be free from slavery in addressing the problem of human trafficking has proved to be a challenging task, not least because the thesis has had to follow a 'moving target'. At the beginning of research only two judgements before the Strasbourg Court (being the most active and authoritative human rights adjudicating body) dealt specifically with practices associated with human trafficking, with only one explicitly mentioning trafficking (in the context of potential exploitation of prostitution of others). Over the years, however, cases have piled up bringing issues such as domestic servitude at the forefront. While the ECtHR has declined to rule on the question of non-deportation of trafficking victims in all cases submitted so far, there is currently a pending case on the principle of non-punishment of trafficking victims for crimes they have been ‘compelled’ to commit. This illustrates the potential for expanding the scope of state obligations presently established under this right and signals numerous opportunities for human rights activists and scholars to engage with the issue. The thesis has therefore sought to provide a roadmap for future research and litigation pursuits in this field.

Unfortunately, the growing practice of the ECtHR on this subject-matter has not brought more clarity or consistency in this area. While human trafficking has been unequivocally read into the right to be free from slavery, servitude and forced labour as a stand alone prohibition in the seminal *Rantsev* judgement, a number of conceptual and practical questions concerning the interpretation of this right have been left open. Is trafficking slavery or *vice versa*? What is the scope of the right to be free from slavery? What are the state obligations arising out of this right? What role do specialised anti-trafficking instruments play in interpreting the obligations under the ECHR? These are some of the important questions addressed throughout the thesis. Moreover, the thesis exposed and explored more general questions posed by reading human trafficking into the right to be free from slavery, servitude and forced labour in Article 4 ECHR that are relevant for an understanding of human rights law beyond the context of human trafficking: Do ‘absolute’ rights impose absolute obligations? What is the role of human rights law in protecting vulnerable individuals from non-state actors? Is there a difference in how positive obligations apply in cases of non-state violations and what is the relationship between positive duties and remedies? What is the relationship between human rights and other international instruments and legal frameworks?

The thesis has engaged with these questions providing a comprehensive and insightful analysis that elucidated both the theoretical foundations and conceptual boundaries of the right, and specific *legal* obligations arising out of it. Therefore, the contribution of this analysis to the overall understanding of the problem of human trafficking and mechanisms for addressing it is obvious and so is its contribution to an understanding of human rights law.

In that light, the following findings are offered as the main contribution of the thesis to the scholarly and general debates.

The thesis emphasizes the dual nature of human trafficking – as a crime as well as a potential human rights violation. Chapter 2 thus explains the difference in the way in which the universal definition of human trafficking applies in the contexts of criminal law and human rights law. Accordingly, contrary to the widely held views, Chapter 3 explains why an act of human trafficking is not *per se* a human rights *violation* unless state officials have been directly involved in it, or have failed to discharge one of their positive obligations established by human rights law.

Building on this premise, Chapters 3 to 5 explain how and why human trafficking engages the right to be free from slavery, servitude and forced labour. In particular, the conceptual analysis of this right in Chapter 4 engages with slippery slopes resulting from the use of popular 'umbrella' terms such as 'modern slavery' and 'labour exploitation'. Significantly, Chapters 3 and 4 demonstrate that human trafficking is distinct from exploitative practices of slavery, servitude and forced labour that represent its purpose. To show this, the thesis uses the 'key distinction' explained in the thesis introduction (Section 1.4.), which highlights the difference between trafficking as a process and exploitative practices as a condition that is its end purpose.

Moreover, one of the main arguments defended in the thesis is that although human trafficking may and often does violate many rights, the reason why it conceptually falls within the right to be free from slavery, servitude and forced labour is the purpose of 'exploitation' of victims common to all conducts prohibited by this right. Hence, Chapter 5 conducts a ground-breaking analysis of the notion of exploitation in the context of human trafficking offering a plausible account of elements of this notion shared by all practices falling within the right to be free from slavery, servitude and forced labour.

Moving on from the conceptual issues, Part II of the thesis focuses on positive duties arising out of Article 4 ECHR. Chapter 6 thus presents a comprehensive and unique analysis of the Strasbourg case law on Articles 2, 3 and 4, focusing in particular on jurisprudence concerning the protection of vulnerable individuals. This chapter provides an important contribution to an understanding of absolute rights breached by private individuals. In particular, this analysis illustrates the difference between the scope of the right and the scope of responsibility in situations of private violations of 'absolute' rights, which is identified as another one of the three 'key distinctions' used as a conceptual tool throughout the thesis. This leads to a conclusion that whereas the prohibition contained in these rights is absolute, state positive obligations are not. Chapter 6 also offers a classification of positive obligations identified in the case law analysed, providing a prodigious analysis of Article 4, its current reading and potential for further development.

In addition, Chapter 7 offers a detailed analysis of the provisions of specialised anti-trafficking instruments and assesses their potential to inform positive obligations under Article 4 ECHR, which is found missing in the current scholarship. Significantly, it is shown that obligations contained in the specialised anti-trafficking instruments have often been wrongly labelled as human rights obligations. Drawing attention to the 'key distinction' between human rights and victim protection measures, Chapter 7 demonstrates that while the latter may inform the former, they could not be considered *ipso facto* human rights obligations.

Finally, such a conclusion lays grounds for a more general conclusion espoused in the thesis, which emphasizes the imperative of juxtaposing human rights and other branches of law and policy measures to ensure adequate protection of victims. This point is illustrated in Chapter 7 using examples from the UK case law. Accordingly, the thesis acknowledges that the role of human rights law and of the right to be free from slavery specifically, in addressing the problem of human trafficking, while significant, is by all means limited. Human rights law is not a panacea for human trafficking nor is it the most potent weapon at hands of victims. Instead, the effective strategy requires the synergy of different legal frameworks and policy actions.

Still, human rights law has a power to stir the debate, to show directions and provoke actions on a national level, not least because governments seek to avoid public humiliation that a violation of an 'absolute' right may provoke. Moreover, the language of human rights is animating and holds a strong political currency. Like the law enforcement narrative, the human rights rhetoric is highly populistic, and as such, easily comprehensible and thus useful for engaging popular sentiment (refocusing attention from a vile criminal to a helpless victim). This may well be the reason why the human rights narrative dominates current debates on human trafficking, and why many other discourses (labour, migration, etc.) are trying to use human rights as a vehicle to advance their goals. However, the thesis is focused not on the human rights *rhetoric* but on the human rights *law*, and that requires far more than using a popular label to discuss relevant questions. It calls for identifying provisions, articulating rules and obligations, and analysing actions and jurisprudence of those responsible to address the problem in the light of the relevant norms. The thesis has engaged with this weighty task with a view to both enrich scholarly debates and to inform future legal actions. The time will tell if it succeeded in either of these two ambitious goals.

APPENDIX

International and Regional Initiatives against Trafficking in Human Beings

The United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) - launched in March 2007 by the International Labour Organization (ILO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC), the International Organization for Migration (IOM) and the Organization for Security and Cooperation in Europe (OSCE)

http://www.ungift.org/knowledgehub/en/about/index.html

The Inter-Agency Coordination Group against Trafficking in Persons (ICAT) - established in 2007, as a policy forum mandated to improve coordination among UN agencies and other relevant international organizations (it is consisted of the 18 organizations)

http://www.unodc.org/unodc/en/human-trafficking/index.html?ref=menuside

UNODC Blue Hart Campaign

http://www.unodc.org/blueheart/en/about-us.html

UN OHCHR, Special Rapporteur on Trafficking Persons, Especially in Women and Children

http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx

UN OHCHR, Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences

http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx

International Organisation for Migration (IOM), Counter Trafficking initiative

http://www.iom.int/counter-trafficking

International Labour Organisation (ILO), Action against trafficking in human beings http://www.ilo.org/sapfl/Informationresources/ILOPublications/WCMS_090356/lang--en/index.htm

The EU Anti-Trafficking initiative 'Together against Trafficking in Human Beings'

http://ec.europa.eu/anti-trafficking/index.action?breadCrumbReset=true

OSCE, Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings

http://www.osce.org/secretariat/trafficking

The Bali Process

http://www.baliprocess.net/

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