

Child Trafficking on Rise: Legal Analysis of the Main International Anti-Trafficking Documents

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Table of Contents

INTRODUCTION	2
1. ANALYSIS OF THE MAIN ASPECTS OF HUMAN TRAFFICKING	10
1.1. TRAFFICKING IN NUMBERS	10
1.1.1. ILO STATISTICS ON TRAFFICKING IN CHILDREN	13
1.2. HUMAN TRAFFICKING, SLAVERY AND CRIMINAL JUSTICE.....	14
1.3. HUMAN TRAFFICKING, SLAVERY AND INTERNATIONAL HUMAN RIGHTS LAW.....	18
1.4. CAUSES OF TRAFFICKING	20
1.5. TYPES OF TRAFFICKING.....	23
1.6. CONSEQUENCES OF TRAFFICKING	23
2. INTERNATIONAL LEGAL FRAMEWORK OF PROTECTION AGAINST TRAFFICKING IN CHILDREN	26
2.1. UN CONVENTION ON THE RIGHTS OF CHILD 1989.....	27
2.2. THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY	28
2.3. THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT	29
2.4. ILO CONVENTION No.182 CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR	31
2.5. ILO CONVENTION No. 138 ON THE MINIMUM AGE FOR ADMISSION TO EMPLOYMENT AND WORK	32
2.6. HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER-COUNTRY ADOPTIONS	32
3. COMPARISON OF THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING AND PALERMO PROTOCOL	34
3.1. LEGAL ANALYSIS AND COMPARISON OF THE SUBSTANTIVE PROVISIONS OF THE PALERMO PROTOCOL AND THE COUNCIL OF EUROPE CONVENTION	35
3.1.1. DEFINITION AND THE ELEMENT OF CONSENT.....	35
3.1.2. SCOPE OF APPLICATION	38
3.1.3. PROTECTION OF VICTIMS	42
3.2. LEGAL ANALYSIS AND COMPARISON OF THE PROCEDURAL PROVISIONS OF PROTOCOL AND CONVENTION	48
3.2.1. ENFORCEMENT AND MONITORING MECHANISM.....	48
CONCLUSION	53

Executive summary

The international community has made great progress recently in creating a legal framework to define and prohibit human trafficking. The Palermo Protocol made a good start and has widespread support. The Council of Europe Convention tries to go further, and includes monitoring and accountability mechanisms. In order to evaluate and reconsider the present anti-trafficking legislation these two international anti-trafficking documents are compared in this thesis in their procedural and substantive provisions in order to find the best strategy to combat trafficking in children. It is argued that the Council of Europe Convention is not a perfect anti-trafficking instrument either but due to its special measures for child protection and children-rights approach it offers more protection to children. Thus, it can be taken as a starting point for the ‘rebuilding’ the international legal system for preventing and combating trafficking in children, and for new national laws as well. This legal analysis suggests that the natural progression of anti-trafficking legislation includes the accelerating adoption of national laws enabling, facilitating, and mandating focused law enforcement campaigns against human trafficking of the most vulnerable victims, our children.

Introduction

Abandoned by parents, left with no money, no education and no hope for a better future, trafficked by her supposed boyfriend to a foreign land, forced to be a sex slave for older men – Lilja, a pretty girl from a poor family, has never pictured such a life even in her worst dream, and yet this had become her destiny. No knight came to rescue her, but instead night after night came our neighbors to Lilja, with complete impunity, and not one of us helped Lilja in the least way. Humiliated, beaten, tortured, and forgotten, Lilja, like so many others, could no longer bear her tragic life, and knowing of no other means, at the age of 16 Lilja jumped from a bridge to terminally end her suffering.¹ There are a million untold stories of equal horror surrounding us at this very moment, while we pretend we live in a civilized age. Shall we reach out to grasp even a single of girl or boy standing on a bridge right now, wishing to finish the nightmare they are living – the hell of a trafficked victim.

More and more children are trafficked for the purpose of exploitation every day and this is done in front of the eyes of the whole international community. Despite the existence of complex international anti-trafficking laws and human rights treaties protecting children from exploitation, the number of trafficked and otherwise exploited children seems to be increasing.²

As the statistics of International Labor Organization reveals “[...] there are 246 million child

¹ Based on true story described by the Swedish director Karl Frederik Lukas Moodysson in the movie called “*Lilja 4-Ever*”(2002) – the story of 16 year-old girl living in unspecified country of former Soviet Union, abandoned by her mother who left to USA leaving her child alone without any money, who was (without knowing and realizing) trafficked to Sweden and sold by her boyfriend for prostitution as a sex slave and as a result committed suicide). The movie received 12 various awards and 11 nominations – available at <http://european-films.net/content/view/682/58/> and <http://www.imdb.com/title/tt0300140/awards>, last time visited on 18 October, 2009.

² Tiefenbrun, S., *Child Soldiers, Slavery, and the Trafficking of Children* (October 2007). TJSL Legal Studies Research Paper No. 1020341, available at SSRN: <http://ssrn.com/abstract=1020341>, last time visited on 20 August 2009, at 11.

laborers in the world, most are in the developing world.”³ This alarming conclusion at the beginning of the 21st century raises many concerns and questions: Is the current international legal framework for the protection of children from trafficking sufficient in addressing this phenomenon? Are we really able to fight against human trafficking or have we just empty rhetoric to placate our guilt? What shall we do about this abhorrent industry?

This thesis examines from the human rights perspective the issue of trafficking as a global phenomenon and its connection to modern forms of human exploitation, focusing particular attention on children.

The aim of this thesis is to provide an in-depth legal analysis of the current international legal framework for the protection and combating trafficking in children from the human rights standpoint, to evaluate its effectiveness and to propose solutions to eliminate this phenomenon. This approach is in accordance with the UN Recommended Principles and Guidelines on Human Rights and Trafficking which states in Guideline 1: “[v]iolations of human rights are both *a cause and a consequence* of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking”.⁴

Until the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter “the Palermo Protocol”)⁵ there was no widely

³ Information available at http://www.ilo.org/public/english/standards/decl/intro/ilo_movie/index_netscape.htm, last time visited on 24 February, 2009.

⁴ *United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking*, E/2002/68/Add.1 (2002), Guideline no. 1, at 1, available at <http://www1.umn.edu/humanrts/instree/traffickingGuidelinesHCHR.html#principles>, last time visited on 20 August 2009, [emphasis added].

⁵ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime*, adopted 15 November 2000, G.A. Res. 25,

accepted shared definition of human trafficking; Gallagher (2006) highlights that it was the Palermo Protocol that introduced the first internationally accepted definition on trafficking.⁶

Article 3 section a) of the Palermo Protocol states:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs.⁷

However, the mere existence of a common definition of trafficking does not by itself solve the problems, but can in fact give rise to many complications. As Rijken (2008) correctly points out, the elements and terms of the definition are not precise, and can lead to various interpretations, but since the definition is the result of the international agreement, it should serve only as the common starting point.⁸

Obokata (2006)⁹ reviews five international legal instruments¹⁰ adopted at the beginning of the 20th century and concludes that at the beginning the opinions on trafficking were influenced by the gender perspective and understood the trafficking in persons mainly as a tool of the

annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force 25 December 2003 (hereafter “the Palermo Protocol”).

⁶ Gallagher, Anne T., *Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments*, European Journal of Migration and Law, Vol. 8, pp. 163-189, 2006, at 165.

⁷ The Palermo Protocol, *supra* at FN 5, Article 3 Section a).

⁸ Rijken, Conny R.J.J. and Koster, D., *A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice* (May 2008), available at SSRN: <http://ssrn.com/abstract=1135108>, last time visited on 20 August 2009, at 2.

⁹ Obokata, T., *Trafficking of Human Beings from a Human Rights Perspective : Towards a Holistic Approach* (2006).

¹⁰ Obokata reviews: *International Agreement for the Suppression of the White Slave Traffics 1904*, (24 UKTS 1) *International Convention for the Suppression of the White Slave Traffics 1910* (20 UKTS 269), *International Convention for the Suppression of the Traffics in Women and Children 1921* (9 LNTS 15), *International Convention for the Suppression of the Traffics in Women of Full Age 1933* (150 LNTS 431) and *Convention for the Suppression of the Traffics in Persons and the Exploitation of Prostitution of Others 1949* (96 UNTS 271) In: Obokata, *supra* FN 9, at 13-18.

commercial sex industry.¹¹ He points out that trafficking can be better understood if analyzed “[using the different aspects of this phenomenon such as] migration, gender, organized crime and human rights. [...] These aspects, however, should not be treated in isolation, because they overlap with one another. Therefore a clear line cannot be drawn among them.”¹²

Obokata also argues that, although trafficking is commonly regarded as “the contemporary form of slavery”, the two phenomena of trafficking and slavery cannot be used interchangeably, as they do not mean the same thing.¹³ He explains that “[a] key element of slavery as stipulated in the Slavery Convention¹⁴ is the right of ownership.”¹⁵ “Trafficking, then, may be treated as slavery simultaneously mainly when people are exploited afterwards by traffickers themselves as this ensures the continuous exercise of the of ownership.”¹⁶ He concludes that “[...] subsequent exploitation [shall be treated as a sufficient], but not a necessary element of trafficking. Such an interpretation of trafficking seems to be in conformity with the definition under [the Palermo] Protocol.”¹⁷

Obokata distinguishes between trafficking and smuggling of human beings.¹⁸ The differences are as follows:

First, [...] smuggling is a voluntary act on part of those smuggled. Second, the services of smugglers end when those smuggled have reached their destination, while trafficking can result in people being subsequently exploited. Third, smuggling entails international movements, whereas trafficking can take place both within and across national frontiers. Fourth, smuggling entails illegal entry

¹¹ Obokata, *supra* at FN 9, at 13.

¹² *Ibid.* at 22 [with reference to whole paragraph]

¹³ *Ibid.* at 18.

¹⁴ The Slavery Convention 1926 (60 LNTS 253).

¹⁵ Obokata, *supra* at FN 9, at 18-19.

¹⁶ *Ibid.* at 20.

¹⁷ *Ibid.*

¹⁸ Protocol against the Smuggling of Migrants by Land, Sea and Air 2001 (A/RES/55/25) (hereinafter “Smuggling Protocol”) defines smuggling in Article 3 as follows: “*The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, or illegal entry of a person into a State Party of which the person is not a national or permanent resident.*”

into a given State, and entry can both be legal and illegal in the case of trafficking.¹⁹

It should be further noted that slavery can exist without trafficking, as when families prostitute their daughters, and that trafficking may occur for purposes of exploitation without any ownership rights, as when Asian girls consent to prostitution in Europe in order to pay family debts. Analysis of the Palermo definition reveals that exploitation can occur even with consent, and thus consent is not a legal defense against the charge of trafficking, because there is still the exploitation of a position of vulnerability. These are fundamental changes in legal thinking that must not be overlooked, because criminalization occurs even when no victim wishes to complain about the situation, and even when not a single law has been broken. Even the mere intention to exploit is sufficient. As intention may be proven, but never disproven, maintenance of the presumption of innocence is critical to avoid potential prosecutorial abuse.

Sanghera (2005) sees the main problem in the lack of a precise distinction of trafficking from other phenomena such as migration and prostitution.²⁰ She argues that attempts to suppress migration or eliminate the sex business in order to avoid trafficking seem idealistic since they did not and will not stop it because “[...] not all victims of trafficking are prostitutes, nor are all prostitutes victims of trafficking.”²¹ She also criticizes the Palermo Protocol as well as other international anti-trafficking legal instruments for the failure to distinguish between trafficking in women and trafficking in children.²² She raises the important question: “Why are women and children clubbed together in anti-trafficking legislation and the dominant trafficking paradigm

¹⁹ Obokata, *supra* at FN 9, at 21 [with reference to the whole paragraph].

²⁰ Sanghera, J., *Unpacking the trafficking Discourse*, In: Kempadoo, K., Sanghera, J., Pattanaik, P., *Trafficking and Prostitution reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (2005), at 10.

²¹ *Ibid.* at 11.

²² *Ibid.* at 13.

when in all other instances, including labor law, great care is being taken to separate child labor from adult labor?”²³

In response to Sanghera, it might be argued that phenomenon of trafficking has been seen from the very beginning as equally affecting both women and children, arising from the same causes, and with the same consequences for both groups. However, this view is flawed in that, although the two groups overlap, women and children have, among others, different needs, problems, status, attitudes towards them by society, and most critically differing capacities of both awareness and self-preservation. Even though there may be many similarities in that both groups represent the most vulnerable ‘souls’ of our society, and in that the causes and consequences of trafficking of these two groups overlap, the differences could impede the fight against trafficking if women and children are classified as one and the same group of victims in subsequent national legislation.

In February 2008 the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter ‘the Council of Europe Convention’) entered into force.²⁴ The definition of trafficking in human beings provided in the Council of Europe Convention is the same as the one in the Palermo Protocol. Even though the Council of Europe Convention is aimed (like the Palermo Protocol) at the protection of both women and children, its child-centered approach is more evident than in the Palermo Protocol. This leads to my hypothesis which I will elaborate in this thesis that the European system of protection and combating

²³ *Ibid.*

²⁴ The Council of Europe Convention on Action against Trafficking in Human Beings 2005 (ETS No.197) (hereinafter “Council of Europe Convention”). 18 states ratified Convention so far: *Albania, Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, France, Georgia, Latvia, Malta, Moldova, Montenegro, Norway, Portugal, Romania, Slovakia*. The Convention has been signed by 22 other Council of Europe member states. This information is available at http://www.coe.int/t/DG2/TRAFFICKING/campaign/default_en.asp, last time visited on 17 November 2008.

trafficking in children, even if not perfect, is better than the international one under the Palermo Protocol due to its more developed approach to children's rights.

The question principally examined in this thesis is: Why and in what way is the European system of prevention and combating trafficking in children both more sufficient and effective than the international system under the Palermo Protocol?

These sub-questions will be answered as well: Whether, and to what extent, can the Council of Europe Convention be taken as a starting point for the improvement of protection of children against trafficking? Can we expect it to promote a better understanding of, and protection against, the trafficking of children?

I will argue that the current international legal framework for preventing and combating trafficking in children is insufficient and ineffective due to the absence of the special international anti-trafficking legal instrument aimed at children only. I will then compare substantive and procedural provisions of two main anti-trafficking legal instruments i.e. the Palermo Protocol and the Council of Europe Convention and argue that the Council of Europe Convention is not a perfect anti-trafficking instrument either but due to its special measures for child protection and children-rights approach it offers more protection to children. Thus, it can be taken as a starting point for the 'rebuilding' the international legal system for preventing and combating trafficking in children, and for new national laws as well. This legal analysis of two most important anti-trafficking documents suggests that the natural progression of anti-trafficking legislation includes the accelerating adoption of national laws enabling, facilitating, and mandating focused law enforcement campaigns against human trafficking of the most vulnerable victims, our children.

I will also address the human rights aspects of trafficking in children, namely the international human rights laws applicable to this problem (rights of the victims as well as the obligation of state and non-state actors) and will also deal with its causes and consequences in order to provide clearer guidance and basis for evaluating the present legal system for preventing and combating trafficking in children.²⁵ The comparison of two main legal instruments – the Council of Europe Convention and the Palermo Protocol will also closely examine monitoring and enforcement mechanisms of these instruments in order to establish which of them provide more effective and sufficient protection for children against trafficking. The Council of Europe Convention is a very new instrument and thus there are not many authors or organizations dealing with its effectiveness and practical applications or potential problems. Since it is in operation for only about one year there is no international case law or other analysis of its functioning. Moreover, due to the fact that it is completely new document there is no empirical data available on its operation and effectiveness. Therefore, the first reasonable step seems to be its comparison vis-à-vis other similar instruments, mainly the Palermo Protocol in order to identify its potential weaknesses and strengths. This can provide us with a starting point for the following fights against unwanted phenomenon of human trafficking.

²⁵ Obokata, *supra* FN 9, at 6: “An examination reveals that trafficking is increasingly viewed from a human rights perspective. It is also argued that a human rights framework is beneficial because it not only allows different actors to pay close attention to the plight of victims, but also promotes a holistic approach to trafficking in which due consideration is given to wider issues such as the causes and consequences of the practice.” In: Obokata, *supra*.

1. Analysis of the main aspects of human trafficking

Understanding the problems behind trafficking in children requires a detailed review of its main aspects i.e. causes, types and consequences. These aspects provide guidance in finding the best solutions. Only after we understand these aspects can we proceed to the evaluation of the legal instruments aimed at prevention and combating trafficking in humans and to propose appropriate solutions to its elimination.

1.1. Trafficking in numbers

Before we proceed to the analysis of the types, causes and consequences of trafficking in human beings, we shall ask ourselves why this fight against trafficking is so important. Aren't there other more important problems in the world that need to be solved? The answer is relatively simple: firstly, the existing statistics reveal horrifying numbers of victims of trafficking which shows the big extent of this problem; secondly, this problem concerns the most vulnerable persons of our society – our children; and thirdly, since there is lack of precise data available the problem might be even more wide-spread than we thought. This might also be caused by the fact that the international community started only very recently to realize the seriousness of this problem and adopted certain legal instruments. The Council of Europe Convention was adopted only very recently. This shows that trafficking in human beings and fight against it is only at its very beginning.

The most important thing that we should realize is that one of the biggest problems of human trafficking in general is lack of precise and concise statistical data on its scope and geographical patterns (not to mention that data on demand or prices are not available and are impossible to

gather). As a consequence, during the research and preparation of this thesis, I observed that the most frequently cited statistical information on trafficking in human beings is the US Department of State Trafficking in Persons Reports issued annually.²⁶ The remaining information gap impedes an objective, neutral and comprehensive overview of the problem. Additional sources of information would be necessary to create a more comprehensive and balanced view of this phenomenon.

This information gap is partly filled by the most recent report of the United Nations Office on Drugs and Crime on February 2009, which reviewed the situation and legislation on the trafficking in human beings in 155 countries for the period of 2003-2008.²⁷ The information contained in the report is shocking. The report states the following:

- “[T]wo out of every five countries covered by the report have not recorded [any] conviction [for the crimes of trafficking].”²⁸
- “Statistical bias” was identified since sexual exploitation was “the most [frequently] documented type of trafficking” [(by 79% of the countries)]; whereas forced labor was documented by only 18% of the countries. There is a lack of records of the other forms of trafficking such as “[...] forced or bonded labor; domestic servitude and forced marriage; organ removal; and the exploitation of children in begging, the sex trade and warfare.”²⁹

²⁶ US Department of State Trafficking Reports 2001-2009, available at <http://www.state.gov/g/tip/rls/tiprpt/index.htm>, last time visited on 23 February 2009.

²⁷ Global Report on Trafficking in Persons : Human Trafficking – A Crime that Shames Us All, United Nations Office on Drugs and Crime (UNODC), February 2009, available at http://www.unodc.org/documents/Global_Report_on_TIP.pdf, last time visited on 20 October 2009.

²⁸ *Ibid.* at 6.

²⁹ *Ibid.* [with reference to the whole paragraph].

- Trafficking mostly occurs on the national or regional level perpetrated by people of the same nationality as their victims.³⁰
- “Many African countries still do not have [anti-trafficking legislation], or [their laws] criminalize only some aspects of [...] trafficking.”³¹
- The majority of the convictions for the crime of human trafficking are from only a few countries – some of them rich, but others poor, which means that the fight against trafficking is not dependent on state income but “[...] is essentially a product of individual national initiative.”³²
- Only 27 countries (17%) have a “[s]pecific offence of trafficking in persons restricted to some forms of exploitation and to some categories of victims (e.g. trafficking for sexual exploitation, child trafficking) [...].”³³
- The majority of all anti-trafficking laws have been adopted only very recently which shows that prior to the adoption of the Palermo Protocol most countries had no legislation whatsoever specifically combating trafficking in persons.³⁴ 45% of the countries with anti-trafficking laws passed them for the first time only after entry into force of the Palermo Protocol.³⁵

³⁰ *Ibid.* at 7.

³¹ *Ibid.* at 9.

³² *Ibid.*

³³ *Ibid.* at 22.

³⁴ *Ibid.*

³⁵ *Ibid.* at 24.

- 20% of the countries were without any anti-trafficking legislation by November 2008.³⁶
- Approximately 40% of the countries “recorded no convictions during the reporting period.”³⁷
- “About 111 countries provided data on the number of victims officially identified in 2006 [(21,400 victims in total)]” and only 71 countries were able to provide data for the years 2003-2006 (51,864 victims in total).³⁸ This number seems quite low since it represents 4 years of fighting against trafficking in 71 countries.

As can be seen, the outcome of the report is rather depressing. It confirms that the fight against the trafficking is at its very beginning. Many countries have not even started yet. Many do not distinguish between trafficking in general and trafficking in children. As the report highlights “[t]he lack of specific and/or adequate legislation on trafficking in persons at the national level is one of the major obstacles in the fight against trafficking.”³⁹

1.1.1. ILO Statistics on trafficking in children

International Labor Organization (hereinafter “ILO”) reports the similarly depressing statistical data as mentioned above:

- “[o]f every 100 children in the world today, 16 are child laborers, 12 are in its worst forms and many will never go to school [...];
- there are 246 million child laborers in the world, most are in the developing world;
- 186 million are under the age of 15, some of them are as young as 5;

³⁶ *Ibid.* at 36.

³⁷ *Ibid.* at 40 [emphasis added].

³⁸ *Ibid.* at 48.

³⁹ *Ibid.* at 36.

- 170 million are doing hazardous work [...];
- **8 million** are trapped in its most abhorrent forms – slavery, forced labour, prostitution [...]⁴⁰

These high numbers cannot leave anybody indifferent. 8 million children – this could be the size of population of an average state. These numbers must be lowered. In the 21st century, the century which is supposed to be better, more democratic and creating better place for everybody, something must be done to squeeze these numbers to zero. These numbers reveal also one more important thing i.e. something is wrong with the current international and national systems of protection. The following chapters address these issues in more details.

1.2. Human trafficking, slavery and criminal justice

In 1970 the International Court of Justice recognized in the case of **Barcelona Traction** that “[...] an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.”⁴¹ These obligations include “protection from slavery.”⁴² Therefore this international obligation of each state to protect from slavery towards the whole community constitutes “jus cogens principle.”⁴³

⁴⁰ Information available at http://www.ilo.org/public/english/standards/decl/intro/ilo_movie/index_netscape.htm, last time visited on 24 February, 2009 [with reference to the whole paragraph; emphasis added].

⁴¹ *Barcelona Traction, Light and Power Co., Limited, (Belgium v. Spain)* 1970 I.C.J. 3, 32 (I.C.J.) (February 5, 1970), paragraph 33 [with reference to the whole paragraph, emphasis added].

⁴² *Ibid.* at paragraph 34.

⁴³ Scarpa, S., *Child Trafficking: International Instruments to Protect the most Vulnerable Victims*, 44 Family Court Review 429 (2006), at 436.

As has already been mentioned above, according to the Palermo Protocol definition, human trafficking itself does not necessarily have to result in any of the contemporary forms of exploitation. The important aspect of it is that it is carried out *for the purposes of exploitation*, whether or not the subsequent exploitation actually occurs.

The Rome Statute of the International Criminal Court (hereinafter “Statute of ICC”) defines crimes against humanity as including, inter alia, enslavement, rape, sexual slavery and enforced prostitution⁴⁴ etc. and war crimes as including, inter alia, rape, sexual slavery, enforced prostitution, forced pregnancy, etc.⁴⁵ (however, crimes against humanity are “[...] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”⁴⁶). It provides the definition of enslavement as “[...] the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power *in the course of trafficking* in persons, in particular women and children.”⁴⁷ This definition is in line with the case of **Kunarac** of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”).⁴⁸ It was decided that “[...] enslavement was a crime against humanity and included trafficking in human beings.” “[...] enslavement as a crime against humanity, as defined by reference to “ownership”, was part of customary international law.”⁴⁹ Thus this approach differs from the Palermo Protocol

⁴⁴ Rome Statute of the International Criminal Court U.N. Doc. A/CONF.183/9 (17 July, 1998), available at <http://untreaty.un.org/cod/icc/statute/rome.htm>, last time visited on 20 October 2009, at Article 7, Section 1 c) and g).

⁴⁵ *Ibid.* at Article 8, b) xxii).

⁴⁶ *Ibid.* at Article 7, Section 1.

⁴⁷ *Ibid.* at Article 7, Section 2 c), Article 8 Section 2 (b) xxii) and (e) vi) [emphasis added].

⁴⁸ Edwards, A.: *Trafficking in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, Denver Journal of International Law and Policy (2007) 36 Denv. J. Int'l L. & Pol'y 9, p. 23; for more information see also *Prosecutor v. Kunarac, Kovac and Vukovic* case, Case no. IT-96-23 & IT-96-23/1, Judgement, P P 541-542 (22nd February, 2001), Trial Chamber of the International Criminal Tribunal for the former Yugoslavia [emphasis added].

⁴⁹ *Ibid.* at 23 [with reference to the whole paragraph].

definition that uses the term ‘exploitation’, even though it is not clear what “[...] the real (if any) distinctions are between the two terms.”⁵⁰ It could be argued that exploitation is more inclusive than enslavement, because a person with the volitional power to leave is not technically enslaved, but may still be exploited due to their position of vulnerability or perceived social obligation, such as to pay off family debts or provide for their family. But in any case the existence of these measures strengthens the attitude to trafficking as a criminal law issue.⁵¹

In the Kunarac case the ICTY “[...] accepted, in relation to the trafficking of women in wartime, that enslavement may occur even when the victims still enjoy de jure a certain freedom of movement, but the situation in which they find themselves leaves them with no real choice of escape with the prospect of conducting an independent life.”⁵² The Kunarac case was decided in connection to wartime. However, the Statute of ICC does not require the crimes over which ICC has the jurisdiction to be committed during war. “Therefore, the view expressed by the ICTY on enslavement may well serve as a precedent should a similar case be brought in a peacetime context.”⁵³

Despite the fact that there is no case related to this issue yet, the criminal organizations specializing in trafficking with (or without) cooperation with the national authorities, mainly those specialized in international organized crime, might easily fall within the provisions of Article 7 of Statute of ICC and thus commit a crime against humanity if their activity can be

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Pocar, F., *Human Trafficking: A Crime against Humanity* In: Savona, E. U., Stefanizzi, S., *Measuring Human Trafficking, Complexities and Pitfalls* (2007), at 10.

⁵³ *Ibid.*

classified as “[...] widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁵⁴

In the most recent ICC case of **Thomas Lubanga Dyilo**⁵⁵ issued by the Pre-trial Chamber I on the confirmation of charges, the Chamber confirmed “[...] that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo [the president of UPC – Union des Patriotes Congolais and the Commander in Chief of FLPC - Forces Patriotiques pour la Liberation du Congo⁵⁶] is responsible [...] for the charges of enlisting and conscripting children under age of fifteen years into FPLC and using them actively to participate in hostilities within the meaning of article 8 (2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003[...] [and] within the meaning of article 8 (2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003.”⁵⁷ “The Rome Statute permits Lubanga to be prosecuted for conscripting or enlisting child soldiers into the FPLC, which is a non-governmental force, during both the non-international and international phases of the conflict.”⁵⁸

Thomas Lubanga Dyilo`s proceeding is the second biggest international case dealing with the recruitment of child soldiers which follows the decision in case of **Prosecutor v. Sam Hinga Norman** issued by the Special Court for Sierra Leone in 2004.⁵⁹ The outcome of the case should have a significant impact on the international criminal law with regards to child trafficking. The

⁵⁴ *Ibid.* at 6.

⁵⁵ The Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges, no.: ICC-01/04-01/06, 29th January, 2007, available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF>, last time visited on 20 October 2009.

⁵⁶ *Ibid.* at paragraph 8.

⁵⁷ *Ibid.* at 156.

⁵⁸ Tiefenbrun, *supra* at FN 2, at 69.

⁵⁹ *Ibid.* at 67.

trial began on 29th January 2009⁶⁰ and it is the first case under ICC with victim participation.⁶¹
The proceeding is pending at the moment and additional charges are still being considered.⁶²

1.3. Human trafficking, slavery and international human rights law

The International Covenant on Civil and Political Rights (hereinafter “ICCPR”) and its Article 8 is another binding international legal measure that prohibits slavery and servitude.⁶³ However important this article may seem, the official website of the Human Rights Committee (authorized to give interpretations of the treaty provisions in the form of General Comments) is missing the General Comment on the Article 8.⁶⁴

The connection of Article 8 of ICCPR and human trafficking is expressed in General Comment no. 28 on the interpretation of the Article 3 on the Equality of the Rights between Men and Women:

Having regard to their obligations under article 8, States parties should inform the Committee of measures taken to eliminate trafficking of women and children, within the country or across borders, and forced prostitution. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised, inter alia, as domestic or other kinds of personal service. States parties where women and children are recruited, and from which they are taken, and States parties where they are received should provide information on measures, national or international, which have been taken in order to prevent the violation of women's and children's rights.⁶⁵

⁶⁰ Information available at http://www.trial-ch.org/en/trial-watch/profile/db/facts/thomas_lubanga-dyilo_294.html, last time visited on 20 October 2009.

⁶¹ See <http://www.iccnw.org/?mod=drctimelinelubanga>, last time visited on 20 October, 2009.

⁶² See <http://www.lubangatrial.org/2009/10/14/lubanga-defense-case-delayed/>, last time visited on 20 October, 2009.

⁶³ International Covenant on Civil and Political rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, (hereinafter “ICCPR”), at Article 8.

⁶⁴ Information is available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>, last time visited on 25 February 2009.

⁶⁵ General Comment no. 28 adopted by Human Rights Committee, Equality of Rights Between Men and Women (article 3), P 12, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (29th March, 2000), paragraph 12 [emphasis added, with reference to the whole paragraph].

Nevertheless, there have been only few individual complaints decided under Article 8 and none of them dealt with trafficking.⁶⁶

But the Human Rights Committee frequently refers to trafficking under Article 8 in its State party reports' concluding observations and almost each state is asked about the measures adopted to eradicate trafficking in persons.⁶⁷ In its General Comment no. 17 on the Rights of the Child, the Committee notes that "[t]he main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Covenant."⁶⁸

The International Covenant on Economic, Cultural and Social Rights does not expressly deal with the phenomenon of trafficking and does not include mechanisms to compel the State Parties to adopt measures for the effective fight against it. However, it includes measures aimed at the reduction of unemployment and poverty, two components identified as origins of trafficking.⁶⁹

The conclusion from the above mentioned is that trafficking and enslavement are inter-related. Even though enslavement is sometimes equated with trafficking, the distinction between these two phenomena shall be drawn despite the fact that many forms of exploitation (the reasons for which the people are trafficked) are forms of contemporary enslavement. Nevertheless, they both constitute very serious violations of human rights and deserve the particular attention of the whole international community.

⁶⁶ Edwards, *supra* at FN 48, at 27.

⁶⁷ *Ibid.*

⁶⁸ General Comment no. 17 adopted by Human Rights Committee, Rights of Child (article 24):. 07/04/89. CCPR (7th April, 1989), paragraph 7 [emphasis added].

⁶⁹ Edwards, *supra* at FN 48, at 28, see also International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly on 16 December 1966, entered into force on 3 January 1976, available at <http://www2.ohchr.org/english/law/cescr.htm>, last time visited on 24 November, 2009.

However, there are other forms of human trafficking that are not connected with enslavement, such as trafficking for the purpose of organ removal. Opinions differ whether forced marriages constitute enslavement. These forms of trafficking shall not be marginalized since they equally constitute gross violations of human rights that deserve punishment.

1.4. Causes of trafficking

This section more closely examines the causes of trafficking in human beings, particularly children. Generally, the causes of trafficking in human beings as such are mainly poor economic conditions,⁷⁰ the high demand for trafficked people,⁷¹ discrimination on various grounds,⁷² humanitarian crisis,⁷³ restrictive immigration laws and policies and strict border controls,⁷⁴ changes in family and ethical values,⁷⁵ globalization,⁷⁶ situation in the country or region of origin (e.g. poor economic situation, lack of effective legal system)⁷⁷, etc.

When we look at the numbers of child victims of trafficking (as demonstrated above) we can ask ourselves the question why there are so many child victims and why mostly children are trafficked. One very convincing answer might be the following – “[w]ithin families struggling for survival, children are ‘the most vulnerable segment of the social pyramid’ and thus the most susceptible to trafficking.”⁷⁸

⁷⁰ Obokata, *supra* at FN 9, at 42.

⁷¹ *Ibid.* at 43.

⁷² *Ibid.* at 44.

⁷³ *Ibid.* at 45.

⁷⁴ *Ibid.*

⁷⁵ Tiefenbrun, *supra* at FN 2, at 13.

⁷⁶ *Ibid.* at 14, see also Chuang, Janie A., *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*. Indiana Journal of Global Legal Studies, Vol. 13, No. 1, Winter 2006, available at SSRN: <http://ssrn.com/abstract=990086>, last time visited on 20 February, 2009, at 140.

⁷⁷ Rijken, *supra* at FN 8, at 5.

⁷⁸ Jullien, K., *The Recent International Efforts to End Commercial Sexual Exploitation of Children*, 31 Denv. J. Int'l L. & Pol'y 579 (2003), at 583 In: Garrard, V., *Sad stories: Trafficking in children – Unique situations requiring new solutions*, Georgia Journal of International and Comparative Law (2006), at 153 [emphasis added].

“Cultural factors also expose children to exploitation. For example, the perception in many countries of children as financial assets leads families to exploit children as an extra source of income. Also, prejudice against women leads to exploitation of young girls who have fewer rights.”⁷⁹ Gender aspect plays a crucial role here, since obviously young girls are seen as much weaker victims and thus an easy target. Girls have a higher market value as trafficked goods, but in some societies unexploited girls have a negative market value. Boys carry on the family business and can bring in lucrative dowry, but girls given away in marriage must be accompanied by an often prohibitively expensive dowry.

In many countries women in general, not to speak about young girls, have no voice and are perceived as something less valued than men, or even livestock – and this all is happening with the state’s acquiescence or at least as a consequence of the state’s inadequate protection. “[...] the marginalization of women in society and feminization of poverty render women and children more vulnerable to being trafficked.”⁸⁰

The most important cause of trafficking in general is obviously the high demand for trafficked victims. If there were no demand, no victims would be supplied.⁸¹ This can be demonstrated by an example from child sex tourism. “A retired U.S. schoolteacher describes his trips to Mexico and Columbia where he had sex with a fourteen-year-old and fifteen-year-old, stating: I’m helping them financially. If they don’t have sex with me, they may not have enough food. If someone has a problem with me doing this, let UNICEF feed them. I’ve never paid more than twenty dollars to these young women, and that allows them to eat for a week.”⁸² “Sadly the

⁷⁹ *Ibid.* at 154 [with reference to the whole paragraph].

⁸⁰ Scarpa, *supra* FN 43, at 430.

⁸¹ See also *Ibid.*

⁸² Edelson, D., *The Prosecution of Persons Who Sexually Exploit Children in Countries Other than Their Own: A Model for Amending Existing Legislation*, 25 Fordham Int’l L.J. 483 (2003) In: Garrard, *supra* FN 78, at 156 [with reference to the whole paragraph].

practice of using child prostitutes is on rise due to the ever-growing demands of the sex industry.”⁸³ It is thus obvious that the only effective fight against trafficking in human beings is the fight against the high demands for trafficked persons (no matter for what reasons they were trafficked). This might include more effective legislation for persecuting the users and providers of services offered by trafficked victims. Similar provisions have been adopted in the Council of Europe Convention (as described in the Chapter III below). Because only when we eliminate (or at least diminish) the demand, can we successfully diminish the number of victims supplied. This has been confirmed also by UN Recommended Principles and Guidelines on Human Rights and Trafficking which states in Recommended Principle no. 4 “[s]trategies aimed at preventing trafficking shall address demand as a root cause of trafficking.”⁸⁴

The critical gap in the effective fight against trafficking is police corruption⁸⁵, which can vastly contribute to an enormous spread of trafficking in human beings and impunity of the perpetrators. If police closes its eyes instead of sincere and full involvement in effective fight against trafficking in human beings, there can be no success and trafficking will continue to spread and increase. However, if on the other hand police has clean hands and real courage and energy to eliminate this unwanted phenomenon, there is a hope that more and more perpetrators will be brought to justice. The effective fight against police corruption should therefore never be underestimated.

⁸³ Hotaling, N., & Levitas-Martin, L., *Increased Demands Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women*, 13 Hastings Women's L.J. 117, 188-119 (2002) In: Garrard, *supra* FN 78, at 156.

⁸⁴ UN Recommended Principles and Guidelines on Human Rights and Trafficking, *supra* FN 4, at Recommended Principle no. 4.

⁸⁵ Scarpa, *supra* FN 43, at 430.

1.5. Types of trafficking

This section examines and describes the different types of exploitation related to trafficking in human beings such as defined in the Palermo Protocol and Council of Europe Convention. Article 3 of the Palermo Protocol states that “[e]xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁸⁶ However, this list is not exhaustive and there are other forms of exploitation like forced marriages,⁸⁷ recruitment as child soldiers,⁸⁸ child camel jockey,⁸⁹ illegal adoptions⁹⁰ or trafficking in organs⁹¹ etc. As it was already mentioned, the exploitation itself does not have to occur in order to classify an offence as trafficking. The important thing is that trafficking is done *for the purpose of exploitation*. This is reflected in both Council of Europe Convention and the Palermo Protocol.

1.6. Consequences of trafficking

As it has already been mentioned, UN Recommended Principles and Guidelines on Human Rights and Trafficking stresses in Guideline 1 that “[v]iolations of human rights are both **a cause and a consequence** of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking”.⁹²

⁸⁶ The Palermo Protocol, *supra* at FN 5, Article 3.

⁸⁷ See <http://www.forcedmarriage.nhs.uk/casestudies.asp>, last time visited on 10 October 2009.

⁸⁸ Tiefenbrun, *supra* at FN 2, at 1.

⁸⁹ *Facts about children trafficked for use as camel jockeys*, US. Department of State Fact Sheet, August 8, 2005, available at <http://www.state.gov/g/tip/rls/fs/2005/50940.htm>, last visited on 16 November, 2008.

⁹⁰ Scarpa, *supra* FN 43, at 431.

⁹¹ *Ibid.*

⁹² UN Principles and Guidelines on Human Rights and Trafficking, *supra* FN 4 [emphasis added, with reference to the whole paragraph].

This section describes human rights violations as the consequences of human trafficking based on the ICCPR (Article 6, 7, 8)⁹³ and the Convention on Human Rights and Fundamental Freedoms (Article 2, 3, 4) (hereinafter “ECHR”).⁹⁴

Both ICCPR and ECHR prohibit torture, inhuman or degrading treatment (Articles 7 and 3 respectively)⁹⁵ as well as slavery and forced labor (Article 8 and 4 respectively).⁹⁶ Since trafficking in human beings can amount to torture, inhuman or degrading treatment, or even to slavery or forced labor, not only it represents a criminal offence (sometimes even a war crime or crime against humanity)⁹⁷ but it also constitutes one of the most serious human rights violations in breach of both international legal instruments.

In addition, when trafficking in human beings results in death of victim, this is obviously a breach of Article 2 of ECHR and Article 6 of ICCPR – the right to life. Strasbourg organs as well as Human Rights Committee have held that states have not only a negative obligation not to interfere with these rights, but also a positive obligation to adopt all necessary measures to protect and ensure them⁹⁸ (as to the right to life states are, for example, obliged to carry effective investigations into death of victims).⁹⁹

⁹³ ICCPR, *supra* FN 63.

⁹⁴ Convention on Human Rights and Fundamental Freedoms, as amended by its Protocols, Rome, 4.XI.1950, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>, last time visited on 19 October 2009 (hereinafter “ECHR”).

⁹⁵ ECHR, *supra* FN 94, at Article 3, ICCPR, *supra* FN 63, at Article 7.

⁹⁶ ECHR, *supra* FN 94, at Article 4, ICCPR, *supra* FN 63, at Article 8.

⁹⁷ For more information see FN 45.

⁹⁸ General Comment no. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26/05/2004, CCPR/C/21/Rev.1/Add.13, available at <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>, last time visited on 10 October 2009.

⁹⁹ See for example *McBride v. United Kingdom* (ECtHR), Application no. 1396/06, decision of 9 may 2006; *Angelova v. Bulgaria* (ECtHR), Application no. 38361/97, decision of 13 June, 2002.

Depending on the type of trafficking i.e. for what purposes victim is trafficked, other human rights may be breached as well – right to liberty and security,¹⁰⁰ right to a fair trial¹⁰¹ (in cases where proper and fair state enforcement mechanism is missing) etc.

Seeing trafficking as a gross human rights violation represents a big progress in approach towards this phenomenon and a positive sign on a way of its elimination. If it is not only seen as an ordinary criminal offence but also as a breach of international legal norms, not only individuals can be prosecuted, but also states themselves might be held responsible and the whole international community must get involved in finding effective solutions.¹⁰²

¹⁰⁰ ECHR, *supra* FN 94, at Article 5, ICCPR, *supra* FN 63, at Article 10.

¹⁰¹ ECHR, *supra* FN 94, at Article 6, ICCPR, *supra* FN 63, at Article 14.

¹⁰² For more information see Barcelona Traction case, *supra* FN 41.

2. International legal framework of protection against trafficking in children

This section describes and critically evaluates the international legal instruments aimed at the protection and combating certain forms of slavery and trafficking in children, in particular UN Convention on the Rights of the Child,¹⁰³ Optional Protocol on the Involvement of Children in Armed Conflict,¹⁰⁴ Optional Protocol on the Sale of Children, Prostitution, and Pornography,¹⁰⁵ ILO Convention No.182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor¹⁰⁶, ILO Convention No. 138 on the Minimum age for Admission to Employment and Work¹⁰⁷ and Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoptions.¹⁰⁸

As it can be deduced from the legal instruments enumerated above, there is *no specific* international anti-trafficking legal instrument aimed at the protection of children only from trafficking. All of those instruments are aimed either at the protection of children in general or at certain types of slavery. None of those documents focus particularly on trafficking in children in a more general and global scale, which represents the basic failure in effectively combating trafficking in children and its prevention worldwide. This is because only a comprehensive and unified approach that includes and takes into account all possible aspects of trafficking in children in a global scale can be successful.

¹⁰³ UN Convention on the Rights of the Child 1989 (A/RES/44/25) (hereinafter “the CRC”).

¹⁰⁴ Optional Protocol on the Involvement of Children in Armed Conflict 2000 (A/RES/54/263).

¹⁰⁵ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (A/RES/54/253).

¹⁰⁶ ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor 1999 (No. 182, 2133, UNTS 161) (hereinafter “the Child Labor Convention”).

¹⁰⁷ ILO Convention on the Minimum age for Admission to Employment and Work 1973 (No. 138, 1015 UNTS. 297) (hereinafter “the Minimum Age Convention”).

¹⁰⁸ Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoptions, adopted on 29 May 1993, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69, last time visited on 5 October 2009.

2.1. UN Convention on the rights of Child 1989

UN Convention on the Rights of Child (hereinafter “the CRC”) is one of the most widely accepted international instruments with 193 parties.¹⁰⁹ However, it was not adopted with its basic aim to fight against trafficking in children that would require a more detailed and extensive approach.¹¹⁰ Articles 32, 34, 35 and 36 are the only ones (out of 54) referring directly or indirectly to trafficking as such. Article 32 protects children from economic exploitation and dangerous work conditions and calls for the adoption of specific child-oriented legislation, hours-regulation and employment conditions as well as appropriate sanctions to ensure enforcement.¹¹¹

Article 34 “[protects children] from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”¹¹²

Article 35 “[...] [prohibits] the abduction of, the sale of or traffic in children for any purpose or in any form.”¹¹³ Article 36 “[...] [seeks to protect] the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.”¹¹⁴

¹⁰⁹ Information available at

<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=133&chapter=4&lang=en>, last time visited on 15 February, 2009, see also Tiefenbrun, *supra* at FN 2, at 30.

¹¹⁰ Garrard, *supra* FN 78, at 166.

¹¹¹ The Convention on the Rights of Child, *supra* at FN 103, Article 32.

¹¹² *Ibid.* at Article 34 [with reference to the whole paragraph].

No matter how exhaustively the CRC addresses all possible aspects of child welfare, including the four above-mentioned articles, the main problem is its missing enforcement mechanism.¹¹⁵ Another major shortcoming of the CRC is that although it forbids conscription of minors to direct combat units, states may still conscript minors to supposedly non-combat units, and still accept minors as combat “volunteers”,¹¹⁶ even though in wartime there is often little distinction between voluntary and involuntary actions. Children older than 15 and not placed in direct combat are not protected, nor are children between 15-18 years of age who seem to voluntarily join the armed forces.¹¹⁷ Therefore two subsequent Optional Protocols were adopted to overcome the problems of CRC. However, the Optional Protocols did not attain such a high number of parties as the CRC did and have their shortcomings as well.

2.2. The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography entered into force on 18th January, 2002 and so far 131 States became parties to it.¹¹⁸ It urges states to penalize sale of children for the purpose of sexual exploitation, organ transfer or forced labor,¹¹⁹ illegal adoption,¹²⁰ child prostitution¹²¹ and child pornography.¹²² It is the first

¹¹³ *Ibid.* at Article 35.

¹¹⁴ *Ibid.* at Article 36.

¹¹⁵ Garrard, *supra* at FN 78, at 166.

¹¹⁶ Convention on the Rights of Child, *supra* at FN 103, Article 38, Section 2.

¹¹⁷ Tiefenbrun, *supra* at FN 2, at 27-28.

¹¹⁸ Information available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=136&chapter=4&lang=en>, last time visited on 15 February, 2009.

¹¹⁹ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, *supra* at FN 105, Article 3, Section 1 a) (i) a, b and c.

¹²⁰ *Ibid.* at Article 3, Section 1, a) (ii).

¹²¹ *Ibid.* at Article 3, Section 1, b).

¹²² *Ibid.* at Article 3, Section 1, c).

international legal document that defines the ‘sale of children’¹²³ as “[...] any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”¹²⁴ It demands from the states to protect the child victim’s rights and interests¹²⁵ and allows the extradition of criminals by making all the offences mentioned in the Protocol extraditable.¹²⁶ However, it lacks the effective enforcement mechanism and set of remedies for the victims since it only calls for the regular reporting to the Committee on the Rights of Child on the measures taken to implement the Protocol.¹²⁷

2.3. The Optional Protocol on the Involvement of Children in Armed Conflict

The Optional Protocol on the Involvement of Children in Armed Conflict came into force on 12th February, 2002 and has 127 parties.¹²⁸ It includes special measures on the recruitment and involvement of the child soldiers (persons under 18) by States and orders them “[...] to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”¹²⁹ It is evident from the language of the Protocol that it does not prohibit the ‘indirect participation’ of children in the hostilities¹³⁰ and thus leaves a big gap in the effective protection of the child soldiers.

¹²³ Tiefenbrun, *supra* at FN 2, at 33.

¹²⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, *supra* at FN 105, at Article 2 a).

¹²⁵ *Ibid.* at Article 8.

¹²⁶ *Ibid.* at Article 5.

¹²⁷ *Ibid.* at Article 12, section 1.

¹²⁸ Optional Protocol on the Involvement of Children in Armed Conflict, *supra* FN 104, see also United Nations Treaty Collection, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=135&chapter=4&lang=en>, last time visited on 15 February, 2009.

¹²⁹ Optional Protocol on the Involvement of Children in Armed Conflict, *supra* at FN 104, Article 1 [emphasis added].

¹³⁰ Tiefenbrun, *supra* at FN 2, at 31.

Article 4, Section 1 stipulates that “[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”¹³¹ It urges “States Parties [to] take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.”¹³² States shall provide the victims with “[...] all appropriate assistance for their physical and psychological recovery and their social reintegration.”¹³³ Again the proper enforcement mechanism is missing except the reporting duty of the state to the Committee on the Rights of Child on the measures taken to implement the Protocol.¹³⁴ The effective implementation of the Protocol is thus left in the hands of the individual states, which weakens the important role of the Protocol. Moreover, the definition of the child soldier is missing as well. It is argued that the term ‘child soldiers’ shall not be confused with the term ‘combatant’ under the international humanitarian law. Children have other rights to be protected in armed conflict either as civilians or as the combatants. “The problem is that a child soldier who is not in an official “army” and who is fighting but non-consensually is arguably neither a civilian nor a combatant and thus totally unprotected.”¹³⁵

Although one could argue that extra legislation is not needed because kidnapping is still a crime, victims within militia who somehow complain to authorities would be swiftly executed. Unsurprisingly, few complain. Furthermore, many “non-combat” units are attacked and must defend themselves, so the distinction between combat and non-combat units is theoretical at best. Therefore it is critical for the protection of minors to prohibit their military participation of any kind, and to harshly prosecute anyone even passively allowing such participation.

¹³¹ Optional Protocol on the Involvement of Children in Armed Conflict, *supra* at FN 104, Article 4, Section 1.

¹³² *Ibid.* at Article 4, Section 2.

¹³³ *Ibid.* at Article 6, Section 3.

¹³⁴ *Ibid.* at Article 8, Section 1.

¹³⁵ Tiefenbrun, *supra* at FN 2, at 33.

2.4. ILO Convention No.182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor

The Child Labor Convention in its Article 3 sets the definition of ‘the worst forms of child labor’ as following:

“(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”¹³⁶

Here again trafficking is equated with slavery as the worst form of human rights violations. However, the Child Labor Convention is another legal instrument without proper and effective enforcement mechanisms and thus it leaves to its parties the implementation and enforcement of its provisions.

¹³⁶ Child Labor Convention, *supra* at FN 106, Article 3 [with reference to the whole paragraph, emphasis added].

2.5. ILO Convention No. 138 on the Minimum Age for Admission to Employment and Work

Article 2, Section 3 of the Convention stipulates that the minimum age for employment of children “[...] shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.”¹³⁷ “[A] Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, [can] initially specify a minimum age of 14 years.”¹³⁸ If the health, safety or morals of child can be endangered, the minimum age for employment shall be 18 years of age,¹³⁹ and under certain exceptions, 16 years of age.¹⁴⁰ Even though the Convention provides a good initial basis for protection of children in employment relations as well as the protection of their potential abuse, the biggest shortcoming of the Convention is that Member States “whose economy and administrative facilities are insufficiently developed” can limit the scope of application of this Convention.¹⁴¹ In addition, there are many other exceptions to its full application as to the types of work performed by children or various age limits which makes the Convention rather ineffective.¹⁴²

2.6. Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoptions

Despite the great idea behind the adoption of this instrument, its limits are reflected mainly in Article 2 which states that it applies only when “[...] a child habitually resident in one

¹³⁷ Minimum Age Convention, *supra* FN 107, at Article 2, Section 3.

¹³⁸ *Ibid.* at Article 2, Section 4.

¹³⁹ *Ibid.* at Article 3, Section 1.

¹⁴⁰ *Ibid.* at Article 3, Section 3.

¹⁴¹ *Ibid.* at Article 5, Section 1.

¹⁴² For example see *Ibid.* at Article 6 and 7.

Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin."¹⁴³ This means that only children of State Parties are protected by this Convention and it cannot be applied universally to everyone. This is problematic since there are only 81 State Parties to the Convention.¹⁴⁴

The conclusion from the above mentioned is that despite the existence of various legal instruments for the protection of children in different areas of their life, there is no specific international instrument aimed at trafficking in children only. Therefore, there cannot be an effective and comprehensive approach to eliminate trafficking in children. As it was already mentioned earlier children have different needs, different status in society, different rights, their trafficking might have different causes and consequences etc. Thus, putting their protection into one document with other groups such as adults in general or women does not seem such a good idea and can slow down or even endanger the effective combat against their exploitation. Since the specific legal instrument aimed at trafficking in children only is missing, we can now rely only on more general international documents e.g. the Palermo Protocol and the Council of Europe Convention to see whether the effective combat against child trafficking is possible. These issues shall be addressed in the following chapters.

¹⁴³ Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoptions, *supra* FN 108, at Article 2.

¹⁴⁴ Information available at http://www.hcch.net/index_en.php?act=conventions.status&cid=69, last time visited on 20 October 2009.

3. Comparison of the Council of Europe Convention on Action against Trafficking and Palermo Protocol

This section compares two main anti-trafficking instruments – the Palermo Protocol and the Council of Europe Convention in order to evaluate the present international and European system of protection against trafficking of children. The legal analysis and comparison of the substantive and procedural provisions of both documents will be discussed and evaluated below and the summary of main differences will be given.

As stated in its Article 1, the Palermo Protocol (together with the Smuggling Protocol and the Firearms Protocol¹⁴⁵) supplements the United Nations Convention against Transnational Organized Crime adopted by United Nations in 2000.¹⁴⁶

The Palermo Protocol has been taken as ‘the starting point’ for many national, regional or international laws related to trafficking and the Council of Europe Convention was not an exception.¹⁴⁷ Five years elapsed between the adoption of the Palermo Protocol and the Council of Europe Convention. The drafters of the Council of Europe Convention tried to learn from the mistakes and weaknesses of the Palermo Protocol.¹⁴⁸ The Preamble of the Council of Europe Convention emphasizes the necessity to advance the protection which the Organized Crime Convention and Palermo Protocol provide and to improve the standards set up by them.¹⁴⁹ This

¹⁴⁵ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (A/55/383/Add.2, entered into force on 3 July 2005) (hereinafter “the Firearms Protocol”).

¹⁴⁶ United Nations Convention against Transnational Organized Crime (A/AC.254/4/Add.3/Rev.5) (hereinafter “the Organized Crime Convention”), adopted by United Nations on 15 November, 2000, available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>, last time visited on 20 October 2009.

¹⁴⁷ Gallagher, *supra* FN 6, at 165.

¹⁴⁸ *Ibid.*

¹⁴⁹ The Council of Europe Convention, *supra* at FN 24, Preamble.

is reflected in a more developed approach established in the Council of Europe Convention that will be discussed in this chapter.

3.1. Legal Analysis and Comparison of the Substantive Provisions of the Palermo Protocol and the Council of Europe Convention

3.1.1. Definition and the element of consent

The Council of Europe Convention and the Palermo Protocol contain an identical definition of ‘trafficking in persons’.¹⁵⁰ The definition of trafficking in both documents is as follows:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs.’¹⁵¹

The reason why the definitions are identical is explained in the Explanatory Report on the Convention as “[the] importance to use the definition of trafficking [...] on which there is international consensus.”¹⁵² The definition of trafficking includes three basic elements which must be present together:¹⁵³

- “the action of: ‘recruitment, transportation, transfer, harboring or receipt of persons’;

¹⁵⁰ The Palermo Protocol, *supra* at FN 5, Article 3, Section a); The Council of Europe Convention, *supra* at FN 24, Article 4, Section a).

¹⁵¹ The Palermo Protocol, *supra* at FN 5, Article 3, Section a); The Council of Europe Convention, *supra* at FN 24, Article 4, Section a) [emphasis added].

¹⁵² The Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings, (hereinafter “Explanatory Report”), adopted on 16 May, 2005, available at http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_E.pdf, last time visited on 10 October 2009, at Section 72.

¹⁵³ *Ibid.* at Section 74 and 76.

- 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, which includes ‘at minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or service, slavery or practice similar to slavery, servitude or the removal of organs.’”¹⁵⁴

Both documents include the important provision that “[t]he recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth [...]”¹⁵⁵ (i.e. the means like threat, use of force, coercion, abduction etc.) This indicates (as explained in the Explanatory Report on the Council of Europe Convention) that three necessary elements for constituting the trafficking mentioned above that must be present together when trafficking of adults is in question, do not have to be present at all if the child is involved.¹⁵⁶ Both documents define ‘child’ as “[a] person under the eighteen years of age.”¹⁵⁷

Since the Palermo Protocol has been criticized for including in its text terms that are rather vague and which can lead to various interpretations,¹⁵⁸ Council of Europe adopted the

¹⁵⁴ *Ibid.* at Section 74 [with reference to the whole paragraph, emphasis added].

¹⁵⁵ The Palermo Protocol, *supra* at FN 5, Article 3, Section c); The Council of Europe Convention, *supra* at FN 24, Article 4, Section c).

¹⁵⁶ The Explanatory Report, *supra* at FN 152, Section 76

¹⁵⁷ The Palermo Protocol, *supra* at FN 5, Article 3, Section d); The Council of Europe Convention, *supra* at FN 24, Article 4, Section d).

¹⁵⁸ Rijken, *supra* at FN 8, at 2.

Explanatory Report in order to cast more light on the terms of the Council of Europe Convention.¹⁵⁹

Section 87 of the Explanatory Report states that “[u]nder the definition, it is not necessary that someone have been exploited for there to be trafficking in human beings. It is enough that they have been subjected to one of the actions referred to in the definition and by one of the means specified “for the purpose of” exploitation. Trafficking in human beings is consequently present before the victim’s actual exploitation.”¹⁶⁰ This is particularly important since what matters the most is the intention to exploit a person and not the exploitation itself. Many times the victims of trafficking are able to escape before their exploitation but this does not mean that a criminal offence was not committed by the perpetrators. The mere intention to exploit is sufficient grounds to prosecute, otherwise traffickers would seldom be prosecuted, as their actions occur prior to and usually without knowledge of final exploitation.

The positive aspect of both instruments is that they include the same provision regarding the consent of the victim, namely the irrelevance of the victim’s consent to exploitation.¹⁶¹ This is important since many victims are deceived by the traffickers and tricked into unforeseen traps of exploitation (e.g. young girls are ‘fooled’ by their ‘boyfriends’ to voluntarily leave the family with them with the promise of a good paid job in other country or town and subsequently sold for prostitution as the sex slaves¹⁶²). “Fraud and deception are frequently used by traffickers, as

¹⁵⁹ The Explanatory Report, *supra* at FN 152, Section 71 and following. See also UN Legislative Guide to the Palermo Protocol, fully referenced in FN 175 below.

¹⁶⁰ *Ibid.* at Section 87 [emphasis added].

¹⁶¹ The Palermo Protocol, *supra* at FN 5, Article 3, Section b); The Council of Europe Convention, *supra* at FN 24, Article 4, Section b).

¹⁶² see movie “*Lilja 4-Ever*”(2002), *supra* FN 1.

when victims are led to believe that an attractive job awaits them rather than the intended exploitation.”¹⁶³

Moreover, the Explanatory Report states: “[...] while someone may wish employment, and possibly be willing to engage in prostitution, that does not mean that they consented to be subjected to the abuse of all kinds.”¹⁶⁴

Unlike the Palermo Protocol, the Council of Europe Convention includes the definition of the ‘victim’ as “any natural person who is subject to trafficking in human beings as defined in this article.”¹⁶⁵ This is particularly important in relation to protection of victims under Chapter III of the Council of Europe Convention that applies specifically to victims only.¹⁶⁶

3.1.2. Scope of application

The scope of the application of the two documents differs significantly and can greatly influence the future effective prevention and combating trafficking in human beings as well as the protection of victims. Gallagher (2006) correctly points to the fact that even though the Palermo Protocol is a rather new document, due to the rather quick evolution of knowledge on trafficking, it appears already “a little old fashioned.”¹⁶⁷ This is reflected in its scope of application.

Article 4 of the Palermo Protocol states “[t]his Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and

¹⁶³ The Explanatory Report, *supra* at FN 152, Section 82 [emphasis added].

¹⁶⁴ *Ibid.* at Section 97 [emphasis added].

¹⁶⁵ The Council of Europe Convention, *supra* at FN 24, Article 4 Section e).

¹⁶⁶ *Ibid.* at Chapter III.

¹⁶⁷ Gallagher, *supra* at FN 6, at 165.

involve an organized criminal group, as well as to the protection of victims of such offences.”¹⁶⁸

Since the Palermo Protocol (according to its Article 1) supplements the Organized Crime Convention, it shall be interpreted together with this Convention.¹⁶⁹

Article 3 section 2 of the Organized Crime Convention states that “[...] an offence is transnational in nature if:

- a) It is committed in more than one State;
- b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- d) It is committed in one State but has substantial effects in another State.”¹⁷⁰

Thus, the scope of the Palermo Protocol explicitly excludes the types of trafficking that take place within only one state (as to its preparation, planning, direction or control, or its substantial effects). Moreover, since the act of trafficking must involve an organized criminal group, acts committed by “individual traffickers” are not covered by Palermo.¹⁷¹

Moreover, trafficking is not only the domain of organized criminal groups. Many poor families sell their children for prostitution or to religious cults.¹⁷² The Human Rights Watch Report of 2000 speaks about the involvement of relatives, friends, acquaintances, individual

¹⁶⁸ The Palermo Protocol, *supra* at FN 5, Article 4 [emphasis added].

¹⁶⁹ *Ibid.* at Article 1.1.

¹⁷⁰ The Organized Crime Convention, *supra* at FN 146, Article 3, Section 2 [with reference to the whole paragraph, emphasis added].

¹⁷¹ Obokata, *supra* at FN 9, at 24.

¹⁷² Sen, Pritha, *Combating Human Trafficking Through Social Policing* (December 31, 2006), available at SSRN: <http://ssrn.com/abstract=981487>, last time visited on 16 March, 2009, at 3; see also Bagheri, Alireza, *Asia in the Spotlight of the International Organ Trade: Time to Take Action*. Asian Journal of WTO & International Health Law and Policy, Vol. 2, No. 1, pp. 11-24, March 2007, available at SSRN: <http://ssrn.com/abstract=1019746>, last time visited on 16 March, 2009.

agents or brokers involved in trafficking.¹⁷³ “Legitimate entities such as private corporations (e.g. construction, textile, garments) job recruitment agencies, overseas marriage consultant agencies have become part of trafficking. Moreover, it has recently been discovered that the members of national armed forces or international peacekeeping missions also participate in trafficking.”¹⁷⁴ Therefore the limited scope of the Palermo Protocol seems critical in effective combating and prevention of trafficking in human beings.

Maybe due to all these concerns the Legislative Guide for the Implementation of the Palermo Protocol¹⁷⁵ has been adopted in order to provide clearer guidance as to the meaning of various vague provisions of rather limited and restrictive scope. For example (due to big criticism of the limited scope of application of the Palermo Protocol) it states in its Section 25 that “[...] domestic offences should apply even where transnationality and the involvement of organized criminal group do not exist.”¹⁷⁶ “The Legislative Guide confirmed the broad interpretation given by Travaux Préparatoires for what constitutes child trafficking.”¹⁷⁷ However, it can be concluded that the existence of the Legislative Guide cannot by itself guarantee more effective and flexible implementation of the Palermo Protocol in practice. The Legislative Guide, although of quite a political significance and weight, cannot impose legally binding obligations on any state and thus the less restrictive interpretation of the scope of the Protocol as advised by the Legislative Guide will depend on the political will of the State Party. It will be up to States themselves whether

¹⁷³ *Owed Justice: Thai women trafficked into Debt Bondage in Japan*, Human Rights Watch Report 2000, available at <http://www.hrw.org/reports/2000/japan/3-context.htm>, last time visited on 17 November 2008.

¹⁷⁴ Ruggiero, V., *Trafficking in Human Beings: Slaves in Contemporary Europe*, 25 *International Journal of Sociology of Law* 231 (1997), pp. 260-263, In: Obokata, *supra* at FN 5, at 32.

¹⁷⁵ Legislative Guide for the Implementation of the U.N. Convention against Transnational Organized Crime and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, U.N Office on Drugs and Crime Division for Treaty Affairs, 2004, available at http://www.unodc.org/pdf/crime/legislative_guides/03%20Legislative%20guide_Trafficking%20in%20Persons%20Protocol.pdf, last time visited on 20 October 2009.

¹⁷⁶ *Ibid.* at Section 25.

¹⁷⁷ Scarpa, *supra* at FN 43, at 437.

they will follow the advice provided in the Legislative Guide and will more comprehensively interpret and implement the Palermo Protocol.

The scope of the Council of Europe Convention is more flexible towards the effective prevention and combating human trafficking. In Article 2 it explicitly states that “[t]he Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime.”¹⁷⁸

As the Explanatory Report on the Council of Europe Convention states “[...] the Convention is wider in scope than the Palermo Protocol and, as stated in Article 39, is intended to enhance the protection which the Palermo Protocol affords.”¹⁷⁹

The added value provided by the Council of Europe Convention lies firstly in the affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity, and that greater protection is therefore needed for all of its victims. Secondly, the Convention’s scope takes in all forms of trafficking (national, transnational, linked or not to organized crime, and for purposes of exploitation) in particular with a view to victim protection measures and international cooperation.¹⁸⁰

The explanatory Report further explains the scope of the Council of Europe Convention in Section 80 when it states that the trafficking in persons can be constituted even if the person crossed the border legally and is lawfully present in the particular state.¹⁸¹

Thus, the Council of Europe Convention is both more comprehensive and detailed than Palermo.

¹⁷⁸ The Council of Europe Convention, *supra* at FN 24, Article 2.

¹⁷⁹ The Explanatory Report, *supra* at FN 152, Section 61.

¹⁸⁰ *Ibid.* at Section 36 [emphasis added].

¹⁸¹ *Ibid.* at Section 80.

3.1.3. Protection of victims

Since the Council of Europe Convention, unlike the Palermo Protocol, contains a specific definition of the victim, it provides a clearer and more effective basis for the protection of victims of trafficking. Section 39 of the Explanatory Report, when explaining the term ‘action’ in the title of the Convention, highlights the significant aspect of the Convention i.e. “ [...] that the Convention provides not only the legislative measures but also other initiatives to be taken to combat trafficking in human beings. Action against trafficking in human beings should be understood to include prevention and assistance to victims as well as criminal law measures designed to combat trafficking.”¹⁸²

The disadvantage of the Palermo Protocol is its absence of the connection between the “prosecution of perpetrators and protection of victims [...]”¹⁸³

The big problem arises also in victim identification. As Gallagher explains:

[The Palermo] Protocol (together with its sister instrument, the Migrant Smuggling Protocol) created, for the first time, a distinction between “innocent” and “complicit” victims of illegal migration practices. Implementation of the new distinction between trafficked persons and smuggled migrants has proved to be both difficult and controversial. The failure of either Protocol to provide guidance on the identification issue is a significant weakness. Experience is now showing that failings in the critical identification process inevitably compromise the object and purpose of any agreement on trafficking.¹⁸⁴

The Legislative Guide for the Implementation of the Palermo Protocol divides the provisions in the Protocol between obligatory and optional ones. For example the provisions on the social assistance and protection of victims (Article 6, paragraph 3),¹⁸⁵ special needs of children

¹⁸² The Explanatory Report, *supra* at FN 152, Section 39 [emphasis added].

¹⁸³ Gallagher, *supra* at FN 6, at 165.

¹⁸⁴ *Ibid.* at 166.

¹⁸⁵ The Legislative Guide, *supra* at FN 175, at Section 62-64.

(Article 6, paragraph 4)¹⁸⁶ and provisions on status of victim (Article 7)¹⁸⁷ belong to optional ones¹⁸⁸ due to the fact that “[...] the high costs of these benefits and the fact that they apply to all States parties in which victims are found, regardless of the level of socio-economic development or availability of resources, precluded these from being made obligatory.”¹⁸⁹ This division of norms according to its binding character weakens the whole system of protection of victims and in the long run the whole process of combating trafficking in human beings. The protection of victim shall be the corner stone of any anti-trafficking instrument because it focuses not only on the causes of trafficking, but it looks at this phenomenon more comprehensively and takes into consideration also its consequences. The absence of the proper victim protection system in the Palermo Protocol (namely its non-binding nature) is one of the biggest failures of the anti-trafficking system established by the Palermo Protocol.

The Council of Europe Convention approaches the question of protection of victims in much complex and comprehensive way. Whole Chapter III is dedicated to the protection of victims, promotion of their rights and securing gender equality.¹⁹⁰ Even though the Palermo Protocol also contains special Chapter II dealing with the protection of victims, the provisions of the Convention are more detailed and more comprehensive, and more importantly – they are, unlike the ones in the Palermo Protocol, mandatory for all State Parties. Article 10 of the Convention specifically deals with victim identification and provides the guarantees for the victims not to be deported¹⁹¹ and gives the benefit of the doubt to minors whose age is uncertain - until the

¹⁸⁶ *Ibid.* at Section 65-67.

¹⁸⁷ *Ibid.* at Section 68.

¹⁸⁸ *Ibid.* at Section 62-68, see also Scarpa, *supra* at FN 43, at 437 [with reference to the whole paragraph].

¹⁸⁹ The Legislative Guide, *supra* at FN 175, at Section 62, see also Scarpa, *supra* at FN 43, at 437.

¹⁹⁰ The Council of Europe Convention, *supra* at FN 24, Chapter III.

¹⁹¹ *Ibid.* at Article 10, Section 1 and 2.

identification process has officially finished.¹⁹² The similar provisions are missing in the Palermo Protocol. “The failure of [Palermo] Protocol to provide guidance on the identification issue is a significant weakness. Experience is now showing that failings in the critical identification process inevitably compromise the object and purpose of any agreement on trafficking.”¹⁹³ Since the Council of Europe Convention now includes detailed provisions on victim identification it seems that its drafters have learned from the failures of the Palermo Protocol.¹⁹⁴

In addition to this, there are special measures for the protection of minors such as securing their legal representation by the guardian or (if it is in their best interest) contacting their family members.¹⁹⁵ Similar provision is again missing in the Palermo Protocol. The States are obliged to protect the private life of the victims and shall ensure that the information regarding the victims of trafficking are not disclosed to public save in special circumstances (e.g. when there is a need to locate their family members or it is for the “well-being and the protection of the child”).¹⁹⁶

The very important provisions in the Council of Europe Convention are contained in Article 12 which deals with the assistance to victims. This is one of the provisions of the Convention that really reflect a deep victim-oriented approach of the Convention. States are obliged to secure at minimum the following:

- a) standards of living capable of ensuring their subsistence through such measures as: appropriate and secure accommodation, psychological and material assistance;
- b) access to emergency medical treatment;
- c) translation and interpretation services [...];

¹⁹² *Ibid.* at Article 10, Section 3.

¹⁹³ Gallagher, *supra* at FN 6, at 166.

¹⁹⁴ *Ibid.*

¹⁹⁵ The Council of Europe Convention, *supra* at FN 24, at Article 10, Section 4 a) and c).

¹⁹⁶ *Ibid.* at Article 11, Section 2.

- d) counseling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
- e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
- f) access to education to children.¹⁹⁷

This article is significant also because it explicitly states that any assistance to victims of trafficking shall not be “made conditional on his or her willingness to act as a witness.”¹⁹⁸

Chapter III also includes the articles on residence permit, compensation and legal redress and repatriation and return of victims.¹⁹⁹ For example States are obliged to provide legal aid free of charge to trafficking victims under the same conditions as established in their national laws.²⁰⁰ As to compensation, the Council of Europe Convention establishes “the right of the victims to compensation from the perpetrators” and when this is not practically possible, it urges States to create special fund or adopt social assistance and social integration programs for victims of trafficking.²⁰¹

Moreover, all probable victims of trafficking shall be given “a recovery reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to make an informed decision on cooperating with the competent authorities.”²⁰² During this period the person concerned shall be provided with the same assistance as the recognized victims of trafficking.²⁰³

¹⁹⁷ *Ibid.* at Article 12, Section 1 [with reference to the whole paragraph].

¹⁹⁸ *Ibid.* at Article 12, Section 6.

¹⁹⁹ *Ibid.* at Article 14, 15 and 16 respectively.

²⁰⁰ *Ibid.* at Article 15, Section 2.

²⁰¹ *Ibid.* at Article 15, Section 3 and 4.

²⁰² *Ibid.* at Article 13, Section 1.

²⁰³ *Ibid.* at Article 13, Section 2.

Another important provision strengthening the child protection is Article 16 which states that “[c]hild victim shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interest of the child.”²⁰⁴ The aim of this Article is to ensure that child victims will not, when returned back home, fall again in the hands of the traffickers (or family members who would sell them again for the purpose of trafficking and following exploitation) and to ensure that their life would not be endangered. The best interest of the child shall be a guiding principle when applying this Article. The return of victims shall be secured in such a way as to “avoid re-victimization.”²⁰⁵

Article 17 shall be also mentioned as an important part of victim protection which deals with gender equality and obliges States to use “gender mainstreaming in development and assessment of the measures [for the protection of victims].”²⁰⁶ This is significant since not all victims have the same needs and not all targeted people are victims of the same or similar type of trafficking. The gender aspect, even when dealing with child victims, shall play a crucial part in adopting measures to enhance and promote the victim protection.

In addition to all these provisions, Article 26 on Non-punishment shall be highlighted since it establishes the ‘possibility’ for the State Parties not to prosecute victims of trafficking if they were involved in illegal activities “to the extent that they have been compelled to do so.”²⁰⁷ Although he would prefer that states be prohibited from prosecution of coerced acts, Gallagher (2006) correctly concludes “[t]he importance of this provision, despite its unfortunate wording, cannot be overestimated. As in all other parts of the world, trafficked persons in Europe have regularly been detained and then either prosecuted or deported, usually for offences related to

²⁰⁴ *Ibid.* at Article 16, Section 7.

²⁰⁵ *Ibid.* at Article 16, Section 5.

²⁰⁶ *Ibid.* at Article 17.

²⁰⁷ *Ibid.* at Article 26.

their immigration status or their involvement in the sex industry.”²⁰⁸ If States continue to punish victims of trafficking for their unintentional involvement in the unlawful activities (such as illegal border crossing etc.), the effective fight against the elimination of phenomenon of trafficking will be seriously weakened. If victims have no fear of being criminally prosecuted for their illegal contribution in the process of trafficking, the chances of their more frequent and effective cooperation with national authorities will increase and would positively influence the overall national and international combat against traffickers.

On the other hand, if prosecution of coerced acts were absolutely forbidden, prosecutors would have the burden of proof beyond a reasonable doubt that no coercion existed, which would give and all trafficked persons complete immunity from all prosecution regardless of actions, no matter how banal.

Last but not least Article 19 shall be mentioned as a new tool in effective combating trafficking in persons and providing indirect help in victim identification and protection. This Article criminalizes the use of services performed by the victims of trafficking.²⁰⁹ Even though the wording of the Article is rather weak since it only recommends State Parties “to consider adopting [...] measures [...] to establish as criminal offence [...] the use of services which are the object of exploitation [...] with the knowledge that the person is a victim of trafficking [...],”²¹⁰ the significance of this Article is immense. It provides very good basis to fight against the demand that lies behind the trafficking and to prosecute the owners of the facilities who knowingly use the victims of trafficking and where it is difficult to prove the intention.²¹¹ It will,

²⁰⁸ Gallagher, *supra* at FN 6, at 178.

²⁰⁹ The Council of Europe Convention, *supra* at FN 24, at Article 19.

²¹⁰ *Ibid.* [emphasis added].

²¹¹ Gallagher, *supra* at FN 6, at 183.

however, depend on the political will of the States to implement this provision into their legal systems and enforce it in practice.

3.2. Legal analysis and comparison of the procedural provisions of Protocol and Convention

3.2.1. Enforcement and monitoring mechanism

While the Palermo Protocol does not even mention in its text the word ‘monitoring’, the Council of Europe Convention has a separate chapter that deals with it in all particular details. This is another innovative element of the Council of Europe Convention that establishes a special monitoring mechanism in its Chapter VII. The existence of the effective monitoring mechanisms is an inevitable part of any successful tool aimed at combating trafficking since it allows to see and evaluate the real impacts of the existing legal instrument(s) and its(their) implementation in practice. It also helps to gather fresh and real data on all aspects of phenomenon of trafficking, its patterns, causes, trends or any other developments.

The monitoring mechanism is therefore an important tool which provides the necessary feedback and is very basis for evaluation of success or failure of existing combating mechanisms (both the legal instruments and their implementation). A monitoring mechanism goes hand in hand with effective enforcement of any existing legal tool. The existing monitoring mechanism created by the Council of Europe Convention is not an exception.

Article 36 of the Council of Europe Convention is a legal basis for creation of the ‘Group of experts on action against trafficking in human beings’ (in the Convention as well as in this thesis

referred to as “GRETA”)²¹² – the monitoring body established by the Council of Europe Convention. GREATA shall have 10-15 members elected by the Committee of Parties for the period of four years.²¹³ Article 37 establishes another monitoring organ called the Committee of Parties that shall be created by representatives of Committee of Ministers of the Council of Europe and representatives of other Convention Parties that are not members of the Council of Europe.²¹⁴ These two bodies will play crucial part in securing the effective and successful implementation of the Council of Europe Convention.

One of the main tasks of GRETA shall be evaluation procedure that will deal with the parties of the Convention and fulfillment of their responsibilities under the Convention (implementation of the Convention, measures adopted etc.).²¹⁵ Thus it has a great impact on actual enforcement of the Convention in practice. It will prepare the draft report afterwards where the suggestions and proposals or observation on all these aspects of the implementation of the Convention shall be included and which will be sent to States concerned and to the Committee of Parties.²¹⁶ The most interesting and also important aspect of this procedure is that this monitoring organ “may request information from civil society”²¹⁷ and may organize country visits.²¹⁸ This is particularly important since it can provide a new independent and objective source of information on the actual implementation of the Convention in practice (e.g. from NGOs or other national stakeholders that may share different views on the implementation of the Convention than the official authorities of the States).

²¹² The Council of Europe Convention, *supra* at FN 24, Article 36, Section 1.

²¹³ *Ibid.* Article 36, Section 2.

²¹⁴ *Ibid.* Article 37, Section 1.

²¹⁵ *Ibid.* Article 38, Section 1 and 5.

²¹⁶ *Ibid.* Article 38, Section 5.

²¹⁷ *Ibid.* Article 38, Section 3.

²¹⁸ *Ibid.* Article 38, Section 4.

The Committee of Parties (based on the work previously done by GRETA) can adopt recommendations to the Parties of the Convention “a) concerning the measures to be taken to implement the conclusions of GREATA, if necessary setting a date for submitting information on their implementation, and b) aiming at promoting co-operation with that Party for the proper implementation of the presents Convention.”²¹⁹ Even though the recommendations of the Committee of Parties are not legally binding in nature, they are of great political influence and weight and can have actual and real positive impact on the States` fulfillment of their international obligations under the Council of Europe Convention. Moreover, since the report and conclusions of GRETA are made public,²²⁰ they put the Parties to the Convention under the public scrutiny and can thus also create another source of political pressure on the States.

The Palermo Protocol, like many other international legal instruments, lacks any enforcement or monitoring mechanism. There is not even a duty of the signatories to periodically report on the fulfillment of their obligations under the Protocol, no controlling or judicial body, no possibility to carry out country visits.²²¹ “Rather, the Protocol encourages cooperation between States through information exchange. Similarly, the UN Convention against Translational Organized Crime, the parent treaty, does not set up a proper enforcement mechanism. Instead, it establishes a conference aimed [...] to ‘promote and review implementation of the Convention.’”²²² Despite the fact that States agreed in Conference in 2004 on filling out the

²¹⁹ *Ibid.* Article 38, Section 7.

²²⁰ *Ibid.* Article 38, Section 6.

²²¹ Edwards, *supra* at FN 48, at 21.

²²² *Ibid.*

questionnaire on the implementation of the Palermo Protocol, less than half of the states actually answered and returned the questionnaire.²²³

As already stated, unlike the Palermo Protocol, which does not have any monitoring or enforcement mechanisms, the Council of Europe Convention has both. Even though the actual enforcement of the provisions of the Convention might be dependent on the political will of the Parties to the Convention, the existence of the clear monitoring and enforcement mechanism is the first step to its real implementation. The system is similar to the enforcement mechanism established under the Convention on Human Rights and Fundamental Freedoms²²⁴, where the enforcement of the judgments of the European Court of Human Rights is secured by the Committee of Ministers of the Council of Europe, which is regarded as one of the most effective regional human rights enforcement mechanisms²²⁵ and therefore it can be presumed (and hoped) that this success will be repeated by the mechanism established by the Council of Europe Convention.

However, the negative light on the implementation of judgments under ECHR has been cast by recent progress report of the rapporteur of Committee of Legal Affairs and Human Rights on Implementation of judgments of European Court of Human Rights presented to Parliamentary Assembly of Council of Europe in August 2009.²²⁶ It reveals that 36 out of 47 states of Council

²²³ Conference of the Parties to the U.N. Convention against Transnational Organized Crime, October 10-21, 2005, Review of the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, P 11, U.N.Doc. CTOC/COP/2005/3 (September 14, 2005). In: Edwards, *supra* at FN 46, at 21.

²²⁴ ECHR, *supra* FN 94.

²²⁵ See for example Sweet Stone A., Mathews, J., *Proportionality Balancing and Global Constitutionalism*, Columbia Journal of Transnational Law, 47 Colum. J. Transnat'l L. 72, 2008, at 145.

²²⁶ Implementation of judgments of European Court of Human Rights, progress report of rapporteur of Committee of Legal Affairs and Human Rights, AS/Jur (2009) 36, issued on 31 August 2009, available at http://www.assembly.coe.int/CommitteeDocs/2009/ejdoc36_2009.pdf, last time visited on 20 October 2009.

of Europe are in breach of their international obligations to implement on time and effectively the judgments of European Court of Human Rights.²²⁷ This shows that even ECHR enforcement mechanism, which is many times seen sufficient, has also its shortcomings and much bigger political will and pressure is needed for it to be more effective. Nevertheless, it still can serve as a good starting point in rebuilding current international anti-trafficking legislation.

²²⁷ Buyse, A., Implementation of Judgments Worsening (2009), available at <http://echrblog.blogspot.com/2009/09/implementation-of-judgments-worsening.html>, last time visited on 20 October 2009.

Conclusion

The current international legal framework for the prevention and combating trafficking in children in general is insufficient and ineffective due to the absence of the special international anti-trafficking legal instrument aimed at children only, and also because of its weak enforcement mechanism. However, in comparison with the international system of protection and combating trafficking in children represented by the Palermo Protocol, as it has been shown, the European system under the Council of Europe Convention against Trafficking, even if not perfect, is better than the Palermo Protocol framework due to its more developed child-rights approach.

The Palermo Protocol has been taken as ‘the starting point’ for many national, regional and international laws related to trafficking and the Council of Europe Convention was not an exception.²²⁸ Five years elapsed between the adoption of the Palermo Protocol and the Council of Europe Convention. The drafters of the Council of Europe Convention learned from the mistakes and weaknesses of the Palermo Protocol.²²⁹ The Preamble of the Council of Europe Convention emphasizes the necessity to advance the protection which the Organized Crime Convention and Palermo Protocol provide and to improve the standards set up by them.²³⁰ This is reflected in the more comprehensive approach established in the Council of Europe Convention.

The Council of Europe Convention represents an important development in the protection from and combating human trafficking mainly due to the revolutionary nature of some of its provisions e.g. it defines the victim of human trafficking (thus providing a clearer and more

²²⁸ Gallagher, *supra* FN 6.

²²⁹ *Ibid.*

²³⁰ The Council of Europe Convention, *supra* at FN 24, Preamble.

effective basis for the protection of victims of trafficking), special protection to children, possibility for the state authorities to recognize previous conviction of accused in foreign courts, and to consider the criminalization of those knowingly using the services of victims of trafficking,²³¹ and most importantly it contains a monitoring and enforcement mechanism.

Due to the reasons mentioned above (mainly due to the fact that it contains meaningful and important substantial and procedural provisions) the Council of Europe Convention can be taken as a starting point for the improvement of protection of children against trafficking. Due to its victim-centered (and child-centered) approach, it can promote a better understanding of trafficking and better protection of children.

Even though the number of trafficked victims seems to be increasing, we have before us an opportunity for great progress in the fight against trafficking. Every child saved is a success. Each victim is a cry for greater political will and unified action of the entire international community. Countries first need to adopt the Palermo Protocol and other international anti-trafficking instruments and implement the provisions into domestic legal systems. Next establish effective enforcement at the national level and international cooperation within the greater international community. The legal analysis of the Palermo Protocol and the Council of Europe Convention suggests that the natural progression of anti-trafficking legislation includes the accelerating adoption of national laws enabling, facilitating, and mandating focused law enforcement campaigns against human trafficking of the most vulnerable victims, our children.

As the Special rapporteur on trafficking in persons, especially women and children, Mrs. Ezeilo once highlighted “[s]tates are urged to work towards a global plan of action to combat trafficking and to improve cooperation through bilateral and multilateral agreements for joint

²³¹ Gallagher, *supra* at FN 6, at 187.

actions against human trafficking among countries of origin, transit and destination.”²³² This way there is a hope for improvement. It’s up to us. But we must never forget what former UN Secretary General Boutros Boutros-Ghali once said: “It has long been recognized that an essential element in protecting human rights was a widespread knowledge among the population of what their rights are and how they can be defended.”²³³ Education and awareness is therefore a critical step in any successful fight against human rights violations. Our campaign against human trafficking is not an exception.

Eight million children are currently enslaved, raped, or even cut to pieces. Although the poor are the most likely victims, to protect our own freedoms we must protect the freedom of all, and if we do not work together to crush human trafficking, the next child could even be yours.

²³² Report by the Special rapporteur on trafficking in persons, especially women and children – Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural rights, including the Right to Development, A/HR/10/16, submitted to General Assembly and Human Rights Council on 20 February, 2009, available at <http://www2.ohchr.org/english/issues/trafficking/docs/HRC-10-16.pdf>, last time visited on 20 October 2009, at 26.

²³³ Boutros Boutros-Ghali, Sixth UN Secretary General (1992-1996), see <http://www.un.org/cyberschoolbus/humanrights/resources/quotable.asp>, last time visited on 20 October 2009.

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