The Extent of State Obligations in Preventing and Combating Trafficking in Human Beings: Challenges and Perspectives for a European Human Rights-Based Approach

by

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Abstract

Trafficking in human beings is a complex social phenomenon, a crime and a violation of basic human rights and has, as such, triggered a comprehensive response including through human rights law. However, despite the advancements in addressing trafficking in line with a human rights paradigm, its requirements often remain unclear leading to lack of action or improper response.

The present work examines, within the European setting, some of the theoretical challenges that obstruct the understanding of state obligations related to trafficking under a human rights approach. These challenges relate to the very definition of trafficking, the questions as to its capacity to generate human rights obligations with the states and its connection with other human rights. The analysis leads to common human rights framework under which trafficking is to be addressed, namely the states' duties to respect, protect and fulfil human rights in order to prevent and prosecute trafficking as well as protect its victims.

In this endeavour, the author takes note of the latest developments in the European human rights law with regards to trafficking, brought about by the ECtHR's decision in the case of Rantsev v Cyprus and Russia.

Table of Contents

Introduction **1**

Chapter 1: Trafficking in human beings: history, current knowledge and definition **8**
1.1 Historical development of international law on THB *8*
1.2 Current knowledge about THB *13*
1.3 A common definition: restrictive or inclusive? *17*
1.3.1 The international definition 17
1.3.2 The scope of definition: underinclusive? 19
A. Transnationality 20
B. Consent-nullifying means 22
C. Exploitation: fighting the process or the result? 23
D. Methods of trafficking and jurisdiction 25
1.4. Conclusion *26*

Chapter 2: Trafficking in Human Beings and Human Rights **28**
2.1 Is trafficking really a human rights issue? *29*
2.2 How does European human rights law address trafficking? *34*
2.2.1 Human rights and causes of THB 36
2.2.2 Human rights and the crime of trafficking 40
A. Prohibition of torture, inhuman and degrading treatment 41
B. Prohibition of slavery 45
C. A right not to be trafficked? 49
2.3. Conclusion *51*

Chapter 3: European states' human rights obligations in relation to trafficking in human beings **53**
3.1 The due diligence standard *54*
3.2 The duty to respect *56*
3.3 Duty to protect *61*
3.4 The duty to fulfil *64*
3.5.An overarching obligation - the duty to identify *65*
3.5.1 Legal requirements 67
3.5.2 Challenges and areas for intervention 70
3.6 A differentiated approach to state obligations *73*
3.7 Conclusion *76*

Final conclusion **78**

Bibliography **81**

Introduction

A recent European conference, held in Budapest, which brought together experts in trafficking in human beings (THB) from all over Europe[1] and which I had the opportunity to attend, was concluded with a rather optimistic statement. Since the hectic period of the late 1990's and the early 2000s, when the international community embarked on addressing the issue of THB, to today, the European states have succeeded in making a first major step: develop elaborate and comprehensive legislation. So it is high time to proceed with the next step – implementation. That is to say, the process of production and proliferation of international, regional and domestic legal norms designed to address trafficking has reached a crucial point where this product is good enough to be used in effectively tackling the problem of THB.

Such a conclusion may seem only natural and the sequence of developing rules and then implementing them – logical. Yet one intermediate step is crucial – understanding the rules, i.e. taking note of their requirements, implications, nature and reading beyond them into their purpose and, as a result, being able to (fore)see the actions that are required by them. Thus, the progress achieved so far should be seen as an opportunity for reflection. As Anne T. Gallagher puts it in the preface of her comprehensive legal study on THB: "[r]ecent legal developments in the field of human trafficking, in particular the

[1] *European Conference on Contemporary Challenges in Combating Trafficking in Human Beings* organized by the Belgian NGO Payoke. It was the kick-off conference for the European Project *"Joint efforts of Police and Health Authorities in the EU-Member States and Third Countries to Combat and Prevent Trafficking in Human Beings and Protect and Assist Victims of Trafficking"*. A description of the project can be found here: http://ec.europa.eu/anti-trafficking/entity.action;jsessionid=2667PlmVnPYL6nWJjTW1GjQMDQCJ2H2ry2vGQb4yMKL4LV31ZG6Z!511069867?id=0bb8db83-ea50-4217-b44a-3056297e1e70).

expansion of trafficking law […] provide a unique opportunity to clarify the relevant obligations […] with a level of exactness that was never previously possible."[2]

The same is particularly true for the human-rights approach to THB, as the United Nations High Commissioner for Human Rights Navanethem Pillay has recognized: "[d]espite the impressive achievements of the past decade, the rights of individuals and the obligations of states in this area are not widely or well understood".[3] And despite extensive research, I would dare add. In the opinion of the High Commissioner this poor understanding results in only a partial fulfilment of the potential of the international law.[4] It is thus recognized that it is not enough to have a set of (more or less general) legal obligations – the next step is to explicate them in a way that makes them comprehensible within a single framework and applicable. In practical terms, from the international law perspective, this may mean that there is a need to identify the concrete criteria resulting from these obligations that would allow their transposition into national norms so as to allow "higher standards of clarity and specificity so as to permit enforcement in courts of law".[5]

This missing step – of understanding the purpose and the real actions behind abstract norms – is the basic undertaking of this work and the end point of the forthcoming analysis. However, to achieve such a result one has to be aware of the challenges, both conceptual and practical, that impede clarity and understanding.

[2] Anne T. Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010) (Gallagher, *International Law of Human Trafficking*), 7.
[3] UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Right and Human Trafficking, Commentary* (Geneva and New York: United Nations, 2010) (OHCHR, *Commentary on Recommended Principles and Guidelines*), 4.
[4] Ibid.
[5] United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (New York, 2004) (UNODC, *Legilsative Guides*), xv-xvi.

Conceptual difficulties come from the complexity of the *phenomenon* of trafficking itself, from the complex legal *definition* designed to capture it and the complex regime of *norms* that address it.

Trafficking is an international crime and a global business of a protean character – it is dynamic and adaptable to changing economic, social and political factors. As an activity of criminal organizations procuring huge profits, it reacts to the reactions to it, so that criminal activity and international response are in a dialectic relationship, where, unfortunately the legal response is the one to catch up to the new trends in the crime.[6] In other words, a legal regime of human rights can never be said to fully capture the entire picture of human trafficking.

On the other hand, the definition of trafficking is itself complex – it consists of three main elements (action, means and purpose), each comprising a series of forms of conduct or intent. Despite its length and detailed structure, the definition is nevertheless a formal legal category, the scope of which is determined by the meaning given to its terms, many of which remain undefined, providing ground for theoretical battles. The scope and the meaning of the definition are crucial for determining state obligations under international law, including international human rights obligations.

Finally, being faced with a multitude of international and regional norms dealing with THB and the myriad of interpretations these norms are given, it is indeed challenging to read through the complex web of these rules so as to identify one common framework of realizable duties for which accountability can be demanded. As international law is more than univocal binding rules – there are further complications – one has to distinguish

[6] Meredith Flowe, "The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation: Analyzing Current Treatment of Supply And Demand," *North Carolina Journal of International Law and Commercial Regulation*, 35 (2010): 694.

between international, regional and national norms, between hard law and soft law, different branches of law, primary and secondary sources and last but not least between *law as it is* and *as we want it to be.*[7]

Bearing in mind the challenges briefly described above, the purpose of the present thesis is to link together within a convincing theoretical framework the phenomenon of THB, its definition and the human rights standards applicable to it, so as to differentiate a single framework of obligations in the domain of THB owed by the states under the European human rights system, as well as the nature of these obligations and the effects they (should) have on the behaviour of states.

The scope of the present study limits itself to Europe and, more specifically the system of the Council of Europe as the most advanced human-rights based system of dealing with trafficking.

The first chapter focuses on the issues that frame the analysis of the international law of human trafficking, namely the phenomenon of trafficking and the knowledge about it. This is preceded by an analysis of the historical background of the legal regulation and the legal definition of THB. Particular attention is paid to the implications of the international definition and its role for the main topic of the thesis – human rights obligations of the states in the domain of THB. To do this, the chapter will visit the most prominent debates on the scope of the definition of trafficking and its meaning for combating exploitation worldwide. At the same time, the chapter shows that the phenomenon of THB and the legal definition of THB are distinct categories and should be treated as such within the legal analysis. Particularly, the definition is seen as a formal

[7] Gallagher, *International Law of Human Trafficking*, 7

construct agreed upon by states to address the criminal conduct, but which can be given further weigh through interpretation.

The second chapter will focus on the way THB can be framed in human rights terms. Thus I will first of all establish that there is a clear link between THB and human rights, by addressing the main critiques to a 'human rights understanding of trafficking' and showing that there is no conceptual or legal contradiction in finding human rights obligations owed by the state. Then it will be shown how human rights address different aspects and elements of THB. A more difficult issue is addressed further – namely the content of the relationship between the two notions. I will base my analysis on the premise established in the previous chapter – that the definition of THB is formal and should be understood distinctly from the phenomenon of THB – it is an empty vase to be filled with content. Each of the internationally recognized human rights, on the other hand, is a substantial notion, which may or may not fall within the formal definition of trafficking. In line with this reasoning, I will analyze the conclusion of the European Court of Human Rights (ECtHR) as to the relation between THB and Articles 3 and 4 of the European Convention on Human Rights (ECHR),[8] provided for in its judgment in the case of *Rantsev v Cyprus and Russia* to find the conceptual shift that was recognized with this decision – giving a human rights weigh to the definition of THB while not yet recognizing a right to be free from trafficking.[9]

Building on the conclusions of the first two chapters, the third chapter will explicate the human rights obligations owed by the states in the domain of trafficking in human beings,

[8] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.
[9] *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010

by putting emphasis on the most relevant of these obligations and the paradigm that should be followed by European states in discharging them – the due diligence standard and the duties to respect, protect and fulfil.

Being aware of the overwhelming quantity of the existing soft-law and research on the topic, I focused on the most relevant sources that help address the conceptual challenges identified and are most useful in building a unified framework for understanding state human rights obligations with regards to THB in Europe. Thus, I analyse the sharpest critique of the notion of THB and its international definition in the work of James Hathaway and the responses to it, to establish what are the real implications of the THB definition for the state's obligations. I also focus on the debate launched by Ryszard Piotrowicz[10] on the nature of THB and his challenges to its human rights core, but also on the opposing views which frame the issue of THB almost as a separate human right considered in the literature that praises the developments after *Rantsev*. The point of departure therefore is that precisely because of the unprecedented development of anti-trafficking law, not in spite of it, the international counter-trafficking community faces a series of issues rooted in conceptual difficulties: on the one hand, blurry concepts allow states, naturally reluctant to be bound by general rules,[11] to avoid responsibility for breaching international laws. On the other hand, humanists and advocates are tempted to uncritically expand the interpretation of such obligations, which can be equally harmful.[12] Through a close reading of the ECtHR position on the matter, I come to adopt a middle ground between the opposing views, whereby a huge pace in conceiving of THB as a

[10] Ryszard Piotrowicz, "The Legal Nature of Trafficking in Human Beings," *Intercultural Human Rights Law Review,* 4 (2009): 175-203.
[11] Gallagher, *International Law of Human Trafficking*, 7.
[12] Ibid., 8.

human rights issue is marked by *Rantsev* but not to the point of creating an autonomous human right.

The novelty of the work consists in analysing the latest legal developments in establishing the relationship between THB and human rights in the European Context in line with the implications of the international definition of THB as well as the reflection of this relationship on state's human rights obligations with regards to trafficking.

As suggested in the beginning of this introduction, today Europe is, indeed at an advanced point in its endeavour to counteract trafficking in human being, but to make full use of this position, it should first of all be fully aware about what trafficking is and how it is perceived, how it functions today, how it changes and evolves over time and be precise in defining exact actions it should carry out under international and regional instruments in order to effectively tackle THB.

Chapter 1: Trafficking in human beings: history, current knowledge and definition

The famous Sun Tzu formula: "know your enemy" is relevant as ever for the fight against THB. Our knowledge of trafficking defines our action against it and, as it will be shown in this chapter, the legal framing that this action is given. The purpose of this chapter is, first of all, to set up the scene for the further analysis of THB under the human rights regime in Europe and the content of European states' human rights obligations. This will be done by first looking into the historical development of the field, then analyzing the current knowledge about the THB and its limitations and, finally, the understanding of THB as captured in its international definition.

1.1 Historical development of international law on THB

According to a periodization proposed by Prof. Jean Allain, while the nineteen century can be seen as the stage of the abolition of the trade in slaves, the twentieth comprises three periods of (1) colonial domination and abolition of slavery (1920-1945); (2) decline of imperialism and abolition of servitudes (1945-1966) and (3) post-colonial approach to slavery-like practice (1966-1998). The 2000s mark a return from politics to the law in abolishing slavery through imposition of liability of individuals under international criminal law, as distinct from state responsibility under general international law and international human rights law.[13] Thus slavery has been on the global agenda for a while now, and has always been of high priority.

[13] Jean Allain, "Mobilisation of International Law to Address Trafficking and Slavery", presented at the 11th Joint Stanford-University of California Law and Colonialism in Africa Symposium, 19-21 March, 2009, available at lawvideolibrary.com/docs/mobilization.pdf (last accessed – 15 March, 2012): 1.

The reason for the emergence of a particular field of international law concerned with THB is believed to be an age long "shared moral outrage over the plight of trafficked persons",[14] or in a less considerate anthropological formulation, the "moral panic"[15] associated to the phenomenon that "created and sustained a powerful cultural myth" that survived since the beginning of the 20th century to this day.[16] This myth reflecting on the violent sexual exploitation of an idealized victim – a young innocent girl – both pushed the anti-trafficking cause forward gaining political support for intervention and narrowed its scope and empirical foundation.[17]

The states responded to the plight of human trafficking by binding themselves to a series of international instruments and standards aimed at preventing and combating THB and aiding its victims, as well as encouraging global and local action against THB. The historical origin of modern regulation of trafficking is found in the international agreements on slavery concluded at the intersection of the 19th and the 20th centuries[18] and the emergence of a consolidated international movement against "white slavery", that originally sought to abolish regulated prostitution in Europe, distinguishing female sexual slavery from other forms of slavery and later designating recruitment to prostitution by use of force or fraud.[19] The movement resulted in four international conventions on "white slave traffic": International Agreement for the Suppression of the White Slave Traffic (1904),[20] International Convention for the Suppression of the White Slave Traffic

[14] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy", *University of Pennsylvania Law Review* 158 (2010): 1656.
[15] Gallagher, *International Law of Human Trafficking*, 56.
[16] Ibid.
[17] Ibid.
[18] Ibid., 55.
[19] Ibid., 13.
[20] International Agreement for the Suppression of the White Slave Traffic, 1 League of Nations Treaty Series 83, done 4 May, 1904, entered into force on 18 July, 1905.

(1910),[21] International Convention for the Suppression of Traffic in Women and Children (1921)[22] and International Convention for the Suppression of the Traffic of Women of Full Age (1933).[23]

In terms of the *content of the provisions* of the four international instruments, some of the current trends in regulation can be found among them. Thus, the 1904 Agreement contains a clause on border control in view of preventing trafficking,[24] repatriation (both voluntary and claimed "by persons exercising authority" over the victim)[25] facilitated by countries of origin and transit, as well as supervision of employment agencies.[26] Remarkably, the Agreement provides for protection and assistance by "public or private charitable institutions or private individuals offering necessary security" before the repatriation,[27] as well as covering the cost of repatriation by states (when the victim or her family could not afford them).[28] The 1910 Convention adopts a criminalization approach – requiring criminalization of trafficking in adult women[29] and minor girls[30], including these actions in the category of extraditable offenses [31] (origins of the current "punish or extradite" approach to THB can be found here) as well as exchange of information between countries on the criminal records of perpetrators. The 1921

[21] International Convention for the Suppression of the White Slave Traffic, 3 League of Nations Treaty Series 278, done 4 May, 1910, entered into force on 8 August 1912.
[22] International Convention for the Suppression of Traffic in Women and Children, 9 League of Nations Treaty Series 415, done 30 September 1921, entered into force on 15 June 1922.
[23] International Convention for the Suppression of the Traffic of Women of Full Age, 150 League of Nations Treaty Series 431, done 11 October 1933, entered into force on 24 August 1934.
[24] Article 2.
[25] Article 3.
[26] Article 6.
[27] Article 3.
[28] Article 4.
[29] Article 1.
[30] Article 2.
[31] Article 5.

Convention, designed to reinforce and supplement the 1904 and 1910 agreements,[32] reiterates some of their provisions and encourages states to adopt necessary measures to "ensure the protection of women and children seeking employment in another country"[33] as well as ensure "protection of women and children travelling on emigrant ships".[34] Another clause, which finds its reflection in more recent documents, is the one requiring awareness-raising through information not only on the risks of trafficking but also on the assistance available.[35] The 1933 Convention was inspired by the report of the Traffic in Women and Children Committee,[36] and was marked by an expansion of its geographical reach.[37] Besides providing for the irrelevancy of consent, it criminalizes the attempt and preparation of the offense of trafficking.[38]

An analysis of the scope of the agreements above, in terms of the actions states had addressed, shows that they only focused on the recruitment element of the "trafficking process", making the response one-sided. Moreover, they only envisaged women and children as victims of trafficking for purpose of sexual exploitation. However, they set the basis for some of the important provisions that would be further reflected in more recent and comprehensive documents such as the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the*

[32] Roza Pati, "States' Positive Obligations with Respect to Human Trafficking: the European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia,"*Boston University International Law Journal*, 29 (2011) (Pati, "State's Positive Obligations"): 106-107.
[33] Article 6.
[34] Article 7.
[35] Ibid.
[36] Pati, "States' Positive Obligations", 108,
[37] Ibid.
[38] Article 1.

United Nations Convention against Transnational Organized Crime (Palermo Protocol)[39] and the Council of Europe Convention on Action Against Trafficking in Human Beings (European Anti-Trafficking Convention).[40]

The *1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*,[41] in force since July 25, 1951, is an illustrative example of how taking a clear-cut stance in an ideological debate may affect the impact of an international instrument. The preamble of the Conventions recognizes that "prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community." Thus, this instrument takes an abolitionist approach on the issue of prostitution, whereby regulation of trafficking is prohibited, while persons cannot be punished for practicing prostitution.[42] It does not prohibit prostitution or criminalize it, but instead requires states to provide for social and economic measures to discourage it.[43] The Conventions reiterates many of the provisions of older instruments, but also comes up with new rules, such as those addressing the issue of brothels: Article 2 requires the punishment of any person (1) "who keeps or manages, or knowingly finances" a brothel or (2) "knowingly lets or rents a building or other place […] for the purpose of the prostitution of others." It

[39] UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000 (Palermo Protocol).
[40] Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197.
[41] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 UNTS 271, done on 2 december 1949, entered into force on 25 July 1951.
[42] Federico Lenzerini, "International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: Which Gaps are to be Filled?," *Intercultural Human Rights Law Review*, 4 (2009) (Lenzerini, "International Legal Instruments"): 210.
[43] Gallagher, *The International Law of Human Trafficking*, 59.

has been argued that the convention has had an insignificant effect on the international community, "as its ratification rate has remained relatively limited".[44] The Convention succeeded to attract 82 parties by now. It was also predicted, that given the entry into force of the Palermo Protocol, the 1949 convention may come into desuetude, though recent adherence of new countries may be an argument against such a claim.[45]

1.2 Current knowledge about THB

In the great bulk of academic and media reports on the topic, THB is constantly referred to as *modern slavery*, as one of the most serious and at the same time *most profitable*[46] crimes of modernity, affecting *hundreds of thousands people* each year,[47] subjecting them to complex *violations of their human rights*, impairing their physical and psychological integrity, their dignity, freedom and even life. It has been claimed that "ironically, there are more slaves now than there were even at the height of the transatlantic slave trade".[48] People are trafficked for exploitation in sex work and pornography, forced labour, begging, slavery and servitude, for organ removal, forced marriage, involvement in crime or military actions, etc.

[44] Lenzerini, "International Legal Instruments", 210.
[45] Gallagher, *The International Law of Human Trafficking*, 63.
[46] It is usually considered the third most profiting crime after drug and weapon smuggling. See, for example, Victor Malarek, The Natashas: The New Global Sex Trade, Viking Canada (2004), p. 47. Opening Statement of Pino Arlacchi, UN Under-Secretary-General Director-General to the International Seminar on Trafficking in Human Beings, Brasilia, 28-29 November 2000, available at http://www.unodc.org/unodc/en/about-unodc/speeches/speech_2000-11-28_1.html, European Parliamentary Assembly, Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, at 3, CETS No. 197 (2005), available at http://www.coe.int/T/E/human_rights/trafficking/PDF_conv_197_trafficking_e.pdf
[47] According to the US Department of State, annually between 600 and 800 thousands people are trafficked internationally, see: US Department of State, *Trafficking in persons report*, issues of 2003, 2008 and 2010. Available at http://www.state.gov/g/tip/rls/tiprpt/index.htm
[48] Karen E. Bravo, "Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade", *Boston University International Law Journal* 25 (2007)

All of these reports highlight the dimensions of the phenomenon, the injustice and suffering it creates and often provide stories of individual people (usually women and children) which illustrate these sufferings. Such descriptions impress minds, heat up virtuous spirits, provoke outrage and call for immediate priority action, thus creating a huge potential for mobilization.[49] They lay at the basis of comprehensive policies, laws and generous budget spending.[50] It is like giving a new reading to the Dostoyevskian "if there's no God, everything is permitted". Thus the phenomenon has led to the development of the response to it, of which one of the most significant achievements is the elaboration of an international generic definition that would be capable of embracing both the essence but also the various forms the phenomenon takes. However the correspondence between the definition and the phenomenon it attempts to frame is not perfect, precisely because of the fact that they are distinct categories of knowledge – the former being a purely formal description while the latter is the conduct of real people under real situations. With reference to both of these categories our knowledge is subject to limitations.

There are limitations to our knowledge about the phenomenon of THB, which have to be acknowledged.[51] First of all, even though it is generally recognized that trafficking is very widespread globally, attempts to quantify it should be carefully scrutinized, because it may well be the case that numbers are miscalculated, methods deficiently designed and

[49] See, for example, Roza Pati, "States' Positive Obligations": "Unquestionably, trafficking in human beings is modern-day slavery. The barbaric enslavement of society's most vulnerable, an infamy that poisons human society, has continued to linger for centuries, alive and well, causing devastation and human disaster of unforeseen and immeasurable magnitude. Consequently, human trafficking deserves precedence under the hierarchy of evils that overpower the social fabric of our everyday lives. The plague of its casualties is unspeakable […]." ,139.

[50] James C. Hathaway, "The Human Rights Quagmire of "Human Trafficking"," *Virginia Journal of International Law*, 49, no. 1 (2008): 14.

[51] For an example of such a disclaimer, see Gallagher, *International Law of Human Trafficking*, 5-7

criteria wrongly applied.[52] Moreover, it is hard to reach objective data because victims of trafficking, as Tydlum and Brunovskis put it,[53] are a "hidden population" which makes the application of proper sociological methodology quasi impossible. On the other hand "bad data" may lead to harm – waste of money, unfounded panic, increase in prejudice and "the boy who cried wolf" situations. It is enough to think about the "estimated" number of 40000 women expected to be trafficked to Germany to meet the demand in the sex industry during the World Cup 2006, which proved simply wrong.[54] These are only some of the lacks of our empirical knowledge about THB.

On the other hand we have the necessary limitations of a generic definition. To account for such a complex and diverse phenomenon it should fit into similarly complex definitions under international norms. In turn the use of definitions by researchers and policy-makers is itself an important factor in establishing data about THB. Thus, it has been acknowledged that, even though the international community has reached a joint definition of THB in the Palermo Protocol, there is disagreement among researches as to what should be considered as THB when measuring it. This significantly affects the data obtained.[55]

An example of how data on the extent of THB provides justification for political and legal attitudes and actions, on the one hand, and how it is itself being determined by the definitions and their respective interpretation, on the other, is provided by an academic

[52] Ann Jordan, "Fact or Fiction: What Do We Really Know about Human Trafficking?", *Issue Paper 3, Washington College of Law Center for Human Rights & Humanitarian Law* (May 2011) (Jordan, "Fact or Fiction") available at http://rightswork.org/wp-content/uploads/2011/09/Issue-Paper-3.pdf

[53] Guri Tyldum , and Anette Brunovskis, "Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking," *Data and Research on Human Trafficking: A Global Survey* , ed. Frank Laczko and Elzbieta Gozdziak (Geneva: International Organization for Migration, 2005), 18.

[54] Jordan, "Fact or Fiction", 3-4.

[55] Frank Laczko and Elzbieta Gozdziak (eds.), *Data and Research on Human Trafficking: A Global Survey* , (Geneva: International Organization for Migration, 2005), 11.

debate between James C. Hathaway and Anne Gallagher in 2008.[56] Hathaway argues that the international community unjustifiably privileges THB (in terms of attention, discourse, resources and energies) to the detriment of consolidated action against the wider issue of global slavery. He claims that this discriminatory approach is unjustified because it promotes "a very partial perspective on the problem of modern slavery" - trafficking victims (determined as such under the Palermo Protocol) representing only 3% of the slaves worldwide (750,000 of 27 million). On the other hand, Gallagher refutes this reasoning by identifying flaws in the construction and interpretation of his definitions.[57] What this debate illustrates is that very high-scale political claims may be made based on data that, though appearing empirically relevant, is nevertheless contestable. This debate will be revisited in the section 1.3 when the scope and implications of the modern definition of THB is discussed.

The IOM study on THB research, remarked that trafficking research is action-oriented, "with studies often designed to prepare the ground for counter-trafficking interventions".[58] Thus, although often misleading, estimates are necessary – to motivate action and to distribute resources to most affected areas. What is needed is careful consideration of definitions, methodologies and admission of eventual flaws. Another conclusion is that consolidated efforts to improve our knowledge of the phenomenon with the involvement of both social sciences and THB law specialists are needed in order to provide for evidence-based policy and legislation. One example of this approach is

[56] James C. Hathaway, "The Human Rights Quagmire of "Human Trafficking"," *Virginia Journal of International Law*, 49, no. 1 (2008) (Hathaway, "Quagmire of 'Human Trafficking'"): 14,

[57] Anne T. Gallagher, "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway," *Virginia Journal of International Law*, 49, no. 4 (2009) (Gallagher," Quagmire or Firm Ground?"): 796,

[58] Frank Laczko and Elzbieta Gozdziak (eds.), *Data and Research on Human Trafficking: A Global Survey* , (Geneva: International Organization for Migration, 2005), 18.

illustrated by the recently adopted EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, which among its five priorities, includes "[i]ncreased knowledge of and effective response to emerging concerns related to all forms of trafficking in human beings."[59]

1.3 A common definition: restrictive or inclusive?

An accurate determination of state obligations in the domain of THB fundamentally depends on what qualifies as trafficking, or, to be more precise, what did states agree on what to consider as THB and, how, on the other hand, do they implement this understanding in concrete actions.

The same is true about the analysis of the THB in the context of human rights. Talking about human rights obligations specifically, first of all, the definition identifies the acts, which constitute a violation; it further determines the circle of persons whose human rights are to be protected. Last but not least it includes indicia that may hint to the ways in which general formulations of these obligations may be concretized.

1.3.1 The international definition

The Palermo Protocol against Trafficking is rightfully considered to be the apex of the international law efforts to address trafficking in human beings. Both those who applaud it and those who criticize it at least agree on the fact that it is the most comprehensive international regulatory instrument in the field that provides a framework for global action. The biggest accomplishment of the Palermo Protocol on Trafficking in Persons is considered to be its definition of trafficking in persons. The fact that states parties,

[59] European Commission, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*, COM(2012), point 5.

representing different regions and different legal traditions, agreed on a common understanding of what, legally, trafficking should mean is believed to have set parameters for future action in the field.[60] The definition, provided for in Article 3 (a) reads:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

It further explains that:

> Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs

Thus, this definition addresses all persons and not only women and children, there being a quasi-general consensus on this matter during the negotiations of the Protocol.[61] While it was decided to establish a general definition, particular attention was to be paid to women and children. A more contentious matter was deciding on whether the definition of THB should cover the non-coerced adult migrant prostitution.[62] One side in the debate argued that the coercion requirement would unfoundedly legitimize prostitution, while the opposing side was concerned that the lack of this requirement would lead to confusion between THB and migrant smuggling. The debate finally was reduced to establishing whether an express provision should be included stipulating that trafficking may occur "irrespective of the consent of the person".[63] The issue was decided by introducing a specific phrase, reading:

[60] Gallagher, *The International Law of Human Trafficking*, 25.
[61] Ibid., 26.
[62] Ibid.
[63] Ibid., 27.

The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.[64]

The definition, thus construed is composed of three elements: *action (or method), means* (to secure the action) and *purpose* (of exploitation). In order to classify a certain situation as THB the presence of all three elements is required. An exception applies in the case of trafficking in children where the means element is not required.

Significantly the international definition has been *verbatim* transposed into the European regional anti-trafficking instrument – the European Anti-Trafficking Convention – which is considered the avant-garde regional human rights treaty, specifically and comprehensively dealing with THB.

1.3.2 The scope of definition: underinclusive?

The meaning and scope of definition of THB provided in the Protocol is of crucial role in understanding state's obligations in the area of THB under the International Law. The implications of the Palermo Protocol's definition are manifold and some of the most important insights with this regard can be drawn from the critiques that were brought against it.

In particular, drawbacks of the definition were brought into attention, by its comparison to the norms contained in the anti-slavery instruments in force. Thus, in an already mentioned article, James C. Hathaway points out that the trafficking definition under the Palermo Protocol against Trafficking has too narrow a scope because it (1) only extends to cases were a transnational element is present, (2) introduces the requirement of "inappropriate means" (coercion, abuse or deceit should be present in case of adult

[64] Article 3 (b)

victims) and, most importantly, (3) only covers actions that lead to exploitation and not exploitation itself (is process-oriented).[65] Thus, he concludes, the notion of THB under the present international legal framework is "highly circumscribed compared to the legally binding definitions of slavery already adopted".[66] According to him, states focus on THB, as an insignificant portion of the global exploitation because they do not have the will to effectively deal with slavery – rechanneling their resources only to slave trade rather than slavery in general. Thus, according to this analysis, trafficking, while representing only a tiny subset of the global slavery, benefits of an unjustified privileging from the international community. He further finds that the efforts against THB allow states to avoid systematic exploitation (endemic slavery) that is convenient to the "globalized investment and trade".[67] Therefore, in his own words, "the Trafficking Protocol is of marginal significance to the fight against modern slavery."[68]

A. Transnationality

Hathaway's assertion that the notion of THB falls short of covering the predominant exploitation in the world because it necessarily requires an element of transnationality has been deemed only partly true, as noted by Anne Gallagher - "[only] with respect to the interstate cooperation obligations of the Trafficking Protocol".[69] The most important obligation of states under the Protocol – criminalization of trafficking in domestic law, read in conjunction with the Convention against Transnational Organized Crime (Organized Crime Convention), "requires that the offense of trafficking be established in the domestic law of every State Party, independently of its transnational nature or the

[65] Hathaway, "Quagmire of 'Human Trafficking'", 9-11,
[66] Ibid., 11.
[67] Ibid., 5.
[68] Ibid., 12.
[69] Gallagher," Quagmire or Firm Ground?", 812.

involvement of an organized criminal group."[70] She points out that practice shows that states do criminalize trafficking regardless of its transnational element, while subsequent instruments such as the European Anti-Trafficking Convention expressly call for addressing internal trafficking as well.

Indeed, even though, in line with the provisions of the Palermo Protocol and the Convention it supplements, in order for these agreements to apply the elements of transnationality and organized criminality should be present,[71] the text of the definition itself does not require that the crime is of transnational or organized crime character to qualify as THB. Even though the purpose of the Transnational Crime Convention is to regulate state obligations in combating crimes that occur on a transnational level,[72] the domestic definition does not have to fit the same criterion. This is confirmed by the Legislative Guide to the Convention and its Protocols:

"[W]hile offences [covered by the Convention – n.a.] must involve transnationality and organized criminal groups for the Convention and its international cooperation provisions to apply, neither of these must be made elements of the domestic offence."

and further:

"the transnational element and the involvement of an organized criminal group are not to be considered elements of those offences for criminalization purposes."[73]

Furthermore, in the European context, Articles 2 and 18 of the European Anti-Trafficking Convention renders this first critique irrelevant, since they require that

[70] ibid.
[71] Palermo Protocol, Art. 4.
[72] Art 3.
[73] UNODC, *Legilsative Guides*, 10, point 18

conduct described in the definition be made a criminal offence, regardless of the transnational or organized crime character.

B. Consent-nullifying means

The second concern raised by Hathaway is that, by introducing the requirement of „inappropriate means" as an element of trafficking, the definition further narrows the scope counter-trafficking action. In response, Gallagher argues that, despite Hathaway's claim, in practical application, the "means" element does not restrict the scope of the definition. The wide typology of such inappropriate means, and especially the inclusion of the "abuse of the position of vulnerability" makes the definition comprehensive enough to cover the quasi-totality of the situations of enslavement. At the same time, unlike Hathaway, she reads the provision on the "irrelevancy of consent" not as an acknowledgement in the Protocol of "the possibility of valid consent to enslavement",[74] but as a clarification that means of trafficking effectively render void any consent.[75] This argument is also strengthened by the international human rights law principle of inalienability of personal freedom – that makes any consent to give away this freedom void.[76]

Thus, it seems the definition is unambiguous as to the issue of consent. It is deemed irrelevant where any of the means set in the definition have been found. The ambiguity however appears when applying this conclusion in practice, especially where non-violent means are used to submit the victim to trafficking, in particular in the case of "abuse of a position of vulnerability". The latter is understood to refer to any situation in which the

[74] Ibid., 11.
[75] Gallagher," Quagmire or Firm Ground?", 811
[76] Gallagher, *The International Law of Human Trafficking*, 28.

person involved has no real and acceptable alternative but to submit to the abuse involved. In the context of state human rights obligations, the definition implies that Governments should on the one hand address the vulnerabilities that lead the victims into trafficking and, on the other, be able to find and prove the existence of these vulnerabilities when identifying the victim or prosecuting the traffickers. The failure to do so would mean that the distinction between trafficking and consented labour might be blurred, which may lead to misindification, i.e. lack of protection for the (potential) victims of trafficking.

C. Exploitation: fighting the process or the result?

Hathaway's third argument related to the definition gives the most weigh to his conclusion: if trafficking only addresses the process by which people are brought into exploitation and not the exploitation itself, the impact of counter-trafficking measures is significantly reduced.

Indeed, exploitation is not found among the actions listed as the first element of the crime, but only referred to as the purpose, leading Hathaway and others to the conclusion that, unlike provisions that explicitly address exploitation itself, THB leaves the act of exploitation out.

Ambassador Luis CdeBaca, chose to respond to this kind of objections by dismissing their theoretical line in favour of the *de facto* practice of states, referring to this line of arguments as "the Talmudicly rigid insistence on separating the concepts of moving someone into exploitation, and the exploitation itself."[77]

[77] Luis CdeBaca, "Successes and Failures in International Human Trafficking Law", Special Symposium Feature Successes and Failures in International Human Trafficking Law, *Michigan Journal of International Law* 33 (2011): 39

Gallagher's response to Hathaway is to show that the "action" element, in practice, covers exploitation so that "it is difficult to identify a contemporary form of slavery that would not fall within its generous parameters" and the definition envisages both the bringing of the person into exploitation and keeping him or her in the exploitive situation.[78] This "practical argument" is confirmed by a recent research on trafficking for labour exploitation in EU, the authors finding that "states are creative in defining the element of trafficking in the sense that in most of the countries under research the acts are broadly interpreted" (i.e. to include exploitation itself).[79]

This last point, made by Gallagher, can be further developed on the basis of Prof. Jean Allain's reasoning on the notion of exploitation in international law.[80] Labour is seen here, as a "coercion continuum" that goes from benefit, on the one end of the spectrum, to slavery, on the other.[81] Exploitation, the argument goes, is best understood when taking into account the means of coercion for compelling labour.[82] As a practice moves along the "continuum of coercion" becoming more severe it may come within the scope of the trafficking definition. The author emphasizes that "the definition not only sets out the means, by which a person is trafficked, it also is indicative of the means by which a person will be kept in exploitive situations."[83] Mutatis mutandis, it may be argued, that the means by which a person is kept in exploitation may indicate the means by which a

[78] Gallagher," Quagmire or Firm Ground?", 814.
[79] Conny Rijken, (ed.), *Combating Trafficking in Human Beings for Labour Exploitation*, (Nijmegen: Wolf Legal Publishers, 2011), 395.
[80] Jean Allain, "Mobilisation of International Law to Address Trafficking and Slavery", presented at the 11th Joint Stanford-University of California Law and Colonialism in Africa Symposium, 19-21 March, 2009, available at lawvideolibrary.com/docs/mobilization.pdf (last accessed – 15 March, 2012)
[81] Ibid., 2. He further explains that the phrase "at minimum" placed before the list of types of exploitation in the trafficking in persons definition means "not that this is the lower threshold but minimum number of examples of exploitation, which by their nature are maximalist examples of human exploitation."
[82] Ibid., 3.
[83] Ibid., 5.

person is trafficked and is therefore brought in the situation under the definition of trafficking. This would directly address this last definitional concern raised by Hathaway.

D. Methods of trafficking and jurisdiction

The list of *actions* that constitute elements of the crime of THB unambiguously indicate that, in the case of transnational trafficking, not only the country of destination, where the exploitation occurs, is concerned, but also the country of origin and transit. Thus, the recruitment usually would take place in the country of origin, while transportation, transfer, harbouring or receipt of person obviously can take place in any of the three categories of countries before the exploitation takes place. This is important for establishing the jurisdiction of respective states in the cases of THB and, consequently, their responsibility under international law. Thus, in the ECtHR's case of *Rantsev v. Cyprus and Russia*, the latter country's authorities claimed that the application against Russia was inadmissible *ratione loci* because the events in the case took place outside its territory".[84] The Court, however, acknowledged that "the alleged trafficking commenced in Russia" and that Russia undertook international obligations to which it has to comply and "within the limits of its own jurisdiction and powers to protect Ms Rantseva from trafficking and to investigate the possibility that she had been trafficked." The Court, therefore found its competence in this case.[85] Although the court here did not refer to definition elements of the crime of trafficking that may have taken place in Russia, its conclusion did imply a reference to the overarching definition.

[84] *Rantsev v Cyprus and Russia*, para 203.
[85] Ibid., para 207

1.4. Conclusion

As it was shown in the present chapter, some of the crucial concepts approaches but also disagreements and critiques brought to the current international law against THB have their roots in the first instruments dealing with the issue. Still the historical development of anti-trafficking law has been deeply marked with fragmentation. Concepts based on explicit categorization like "white slavery" are illustrative of this process. Different actions that, in their respective times were considered of particular concern in terms of exploitation were individually brought under the attention of the law.[86] A crucial event for overcoming this fragmentation is thought to be the adoption of a single definition within the Palermo Protocol on Trafficking in Persons that may be appropriate to subsume all relevant exploitative practices under one description.[87]

As shown in the present chapter the efficiency and justifiability of action against trafficking is dependent on the knowledge that is available to us about trafficking, but also on the way we conceive of THB – on the interpretation of its definition. This means that there is need for a consistency in applying the international definitions so as to justify the big expectations and resources put into the anti-trafficking movement and to continuously improve the research so as to render action in the field meaningful. Working within one definition and gradually, enriching and expanding the range and the impact of the measures against THB, as illustrated by some far-reaching norms in the European Convention may be the way to go.

The debate on the scope of the definition sets ground for policy preferences – whether the world community should continue to address trafficking as modern slavery, or

[86] Allain, "Mobilisation of International Law", 1
[87] Ibid.

whether it should abandon this concern for a more comprehensive enterprise against slavery worldwide. It was shown however, that most of the concerns related to the elements of the definition are either overcome in practice due to the comprehensive character of the definition or may be solved through a proper interpretation so as to ensure that all serious forms of exploitation can be brought under the trafficking definition and effectively addressed.

Chapter 2: Trafficking in Human Beings and Human Rights

Trafficking is often referred to as "a human rights issue" to be addressed within a "human rights-based approach". Since neither of the two expressions have a definite legal meaning, in a language more familiar to lawyers, THB is said to be a violation of human rights, or to comprise whole range of violations, to which Governments have the responsibility to respond by protecting and promoting the rights of all persons within their jurisdiction.[88] The purpose of this chapter is to explore the legal relationship between THB and human rights under the international law, especially as it is in force today in Europe, by clarifying the extent to which THB can be framed in terms of human rights law. In doing so, it will analyse the involvement of different human rights on different stages of trafficking, which will create a basis for analyzing the implication of human rights norms on concrete state obligations in Europe and defining those state obligations more clearly in the following chapter. In short, this chapter will prove that there is a human rights law regime in Europe governing the domain of THB, so as to make states responsible for breaching their human rights obligations. Another theoretical conclusion of this chapter, based on the prominent *Rantsev* decision is that Europe is increasingly attributing a substantive human rights weigh to the formal notion of THB (discussed in the previous chapter) which, while not yet reaching to a recognition of a right not to be trafficked under the Council of Europe system, nevertheless opens the gates for recognizing that THB is by itself a violation of human rights, even taken separately from the violations of other rights committed in its course.

[88] OHCHR, *Commentary on Recommended Principles and Guidelines,* 77

These conclusions are reached by answering two main inter-related question: (1) is THB really a human rights issue?; (2) How do human rights as international norms relate to THB?

2.1 Is trafficking really a human rights issue?

The first question is a conceptual one related to the legal nature of THB. It is crucial for defining the way in which THB is to be addressed by states. The predominance of one discourse or another in answering it defines practice – of states, international organizations, NGOs, media etc. As the Russian proverb goes "a ship will sail the way you name it." Consequently it is a central question for the topic of the present work.

THB is increasingly being framed as a human rights issue. In the reports of human rights bodies and NGOs, in academia and in political discourse, trafficking is defined as a most serious violation of human rights. However, this insight into the nature of human rights is not free of ambiguities, so that not everyone agrees with such a framing of the phenomenon of THB in the legal realm.

This opposition is illustrated by the argument made by Ryszard Piotrowicz in a 2009 article on the legal nature of THB.[89] He later came to revise his stance on the connection between THB and human rights,[90] but this initial position merits attention and analysis as a line of argumentation that can be, and often indeed is, raised by states to justify their actions or lack of actions in dealing with THB.

[89] Ryszard Piotrowicz, "The Legal Nature of Trafficking in Human Beings," *Intercultural Human Rights Law Review*, 4 (2009) (Piotrowicz, "The Legal Nature of Trafficking"): 175-203,

[90] Ryszard Piotrowicz, "State's Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations", *International Journal of Refugee Law*, 24(2) (2012), 181-201.

In his piece, Piotrowicz straightforwardly states that it's neither true nor of any good to say THB is a breach of human rights (he compares the statement to asserting that two plus two equals five).[91] For him THB is "primarily a matter of criminal law, albeit with a human rights dimension".[92] His main argument, in short, is that trafficking, as it is, is criminal conduct committed by private agents, who cannot be held accountable under the international human rights law. The only way they may be held responsible is through criminal law and tort law. Therefore, being a form of such criminal conduct by privates (just as the theft of a car – an analogy he resorts to repeatedly), and there being no horizontal application of human rights law, THB is not a human rights violation. There is however, according to him, a "human rights dimension to trafficking", which is materialized in the "state's obligation to protect." The distinction, he maintains, is crucial because of two reasons. The first is conceptual – we do not want to name something a human rights violation if it is not. The second reason is practical – treating THB as what it really is – a crime ("albeit with a human rights dimension") will allow us to "use existing law more effectively as well as focusing resources for, and efforts towards, law reform and development more successfully".

The problem with his argument is that it falls short both to conceptually describe what THB is and would also fail to efficiently address THB. To my own mind the whole argument looks like a very complicated word play, the problem identified by the author being easily resolved just by giving things their proper names. That the physical action of THB and the accountability for its result should lie with the same agency is not

[91] Piotrowicz, "The Legal Nature of Trafficking", 175
[92] Ibid., 176

necessarily the case under international human rights law.[93] It is enough to say that one may be killed by a private person and the state may be found liable for breaching his right to life.[94] And it is the case now with trafficking as well, after the European Court of Human Rights' decision in *Rantsev v. Cyprus and Russia*.[95] This is exactly the difference from the criminal law approach, which is crucial – human rights are not primarily concerned with who violates but about who is harmed. Moreover the human rights approach connects the victim to the responsible state in the way that criminal law or tort law does not. In other words, Prof. Piotrowich's reference to Tomuchat's conception of human rights as "designed to reconcile the effectiveness of state power with the protection against that same state power"[96] is no longer an axiom; it is outdated and does not reflect the current state of international human rights law. The emergence of the due diligence standard is an illustration of this shift.[97]

The author quotes the United Nations Human Rights Committee's General Comment No.31, but somehow fails to see how it fatally refutes his own argument. Here's the excerpt:

" The . . . obligations are binding on States and do not, as such, have direct horizontal effect as a matter of international law . . . . However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of

[93] As it will be shown in Chapter 3 when discussing the state's obligations under human rights law to respect, protect and fulfil.
[94] Osman v. United Kingdom, (2000) 29 EHRR 245 (28 October 1998).
[95] Rantsev v Cyprus and Russia (2010) ECHR 25965/04 (7 January 2010), e.g. para 238 (Court finding that there was a state's "obligation to investigate whether there was any indication of corruption") and para 291-293 (the Court found that the general legal and administrative framework in force in Cyprus, including immigration policy "encouraged the trafficking of women to Cyprus")
[96] Christian Tomuschat, *Human Right - Between Idealism and Realism*, (Oxford: Oxford University Press, 2003), 7. Quoted in Piotrowicz, "The Legal Nature of Trafficking", 191
[97] OHCHR, *Commentary on Recommended Principles and Guidelines*, 77

Covenant rights in so far as they are amenable to application between private persons or entities."[98]

It is enough to substitute each time in the text "Covenant rights" with say "the right not to be trafficked",[99] and the passage makes perfect sense, solving all the ambiguities as to the nature of trafficking as a human right violation. There is no logical flaw in the following proposition: if states are found in breach of human rights obligations either if they (1) themselves violate the right through the actions of their agents or (2) fail to protect against "acts committed by private persons or entities that would impair the enjoyment" of the right, then each time a state fails to protect against such acts by privates it will be in breach of human rights obligations.[100] Neither does the author object to such reasoning, it seems:

"In other words, torture (or trafficking) by the State, or failure to take appropriate measures to address it, is a violation of human rights; torture (or trafficking) committed by a private individual is a crime."[101]

However he is not quite consistent with this statement above when he asserts: "Accountability for THB therefore must lie primarily with the individual. The State is not responsible because it is not at fault."[102]

The question the author asks is not whether traffickers are to be held responsible under international human rights, it is whether THB is a breach of human rights. And we have preliminarily established that it is and the state may be held accountable for it. Moreover, the state is under a human rights obligation to effectively investigate the crime and punish the perpetrator (as part of his obligation to protect). This fact defines the relationship

[98] CCPR Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 24, 2006), quoted in Quoted in Piotrowicz, "The Legal Nature of Trafficking", 192.
[99] Pati, "States' Positive Obligations", 138.
[100] That is not to say that a degree criterion, as due diligence may not be applied.
[101] Piotrowicz, "The Legal Nature of Trafficking," 193.
[102] Ibid., 194.

between the two types of accountability – that of the criminal derives from that of the state.

Now, to answer the author's question: "Nobody complains about a violation of their human rights when their car is stolen (although the right to private property is recognized as a human right at international law); how, conceptually, is THB any different?"[103] There is indeed no essential difference *from criminal law perspective* – and this is the big problem. Conceptually, criminal law functions to protect the society as a whole ("restore the safety of public life")[104] and only indirectly the individual: here terrorism, murder and theft are conceptually similar and the purpose is to punish the perpetrator, restore justice and deter crime. The difference is seen precisely when a human rights perspective is adopted – the causes and consequences are seen as part of the problem, a part that should be addressed. Compared to a trafficking victim, the victim of car theft has not been harmed because of being a young, uneducated, poor, unemployed woman from rural area, systematically subjected to domestic violence, who has to go abroad to support her family[105]. Nor is the one who loses his car frightened to death or suffering of Stockholm syndrome so as to be unable to properly participate in criminal proceedings and claim reparation.[106] That is to say, this argument by the state - "it is *they* who are guilty and responsible not *us*" - certainly misconceives the true nature, roots and consequences of THB.

[103] Ibid.
[104] Lenzerini, "International Legal Instruments", 236.
[105] See for example, United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners*. Module 2: indicators of trafficking in persons, UN (2009), available at http://www.unodc.org/documents/human-trafficking/TIP_module2_Ebook.pdf
[106] United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners*. Module 4: Control methods in trafficking in persons, UN (2009), 9 available online http://www.unodc.org/documents/human-trafficking/TIP_module4_Ebook.pdf

It can be said thus, that human rights framework permeate even the measures primarily concerned with crime control, determining an international regime of human rights protection in the domain of preventing and combating THB.[107] Only seen in this way, the problem is given the attention it deserves. Isolating the fact of trafficking from the domain of human rights is neither correct under the international law in force, nor appropriate in dealing with THB.

2.2 How does European human rights law address trafficking?

After establishing that THB is indeed a human rights issue and that states may be held accountable for it, the next question to be resolved in this chapter is to establish whether THB, by itself, violates Human rights law or, which is the same thing, whether international human rights law prohibits THB.[108] If this was true, it would be possible that THB would trigger state responsibility under the secondary rules of international law – those (arguably, customary) rules that define the accountability of states for breaches of their obligations under international law[109] - in this case international human right law.

There is a multitude of human rights that are affected in one way or another by THB. Among them: right to equality and non-discrimination; right to life; right to liberty and security of the person; access to justice and fair trial; right to freedom from slavery, servitude, forced labour or bonded labour; right to freedom from torture and other cruel, inhuman or degrading treatment or punishment; right to freedom from violence

[107] Tom Obokata, *Trafficking in Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, (Leiden: Martinus Nijhoff, 2006) (Tom Obokata, *Towards a Holistic Approach)*, 35. The author argues that there is a need for 'human rights framework' to deal with trafficking. This framework operates on two dimensions – as a framework of analysis for exploring and identifying norms and principles connected to THB and a framework of action that articulates the legal obligations imposed upon states and puts pressure upon government.
[108] OHCHR, *Commentary on Recommended Principles and Guidelines,* 38.
[109] ibid

(including gender-based); right to freedom of movement; right to the highest attainable standard of health; right to just and favourable conditions of work; right to an adequate standard of living etc.[110]

Based on the evident connection between THB and these human rights, some authors are tempted to formulate this link as one of species and genus, e.g. "trafficking *as a form* of slavery" or "trafficking *as a form of* torture, inhuman or degrading treatment".[111]

However based on the analysis in the previous chapter we have established that trafficking has a formal content – general criteria that may be fit or not by concrete facts. On the other hand, the nature of human rights has been widely given a substantive content. Without finding in THB a common denominator in terms of content with the other human rights, it would be hard to argue the conclusions of the cited authors.

Putting the sign of equality between THB and a concrete human rights violation is, therefore, too simplistic an approach – first of all because it ignores the distinction made in Chapter One between the formal three-tier (or two-tier in the case of children) definition of THB and the factual situations that make up its content by fitting into the formal criteria. It is not straightforward that THB *is* slavery or torture or discrimination, but rather that different human rights may be involved or not in a given situation qualified as trafficking. Moreover, such an approach fails to identify the causality connections between certain breaches of human rights and the crime of trafficking.

I will try to base my analysis on a more refined and differentiated approach, which would take into account the fact that human rights are concerned in different ways with

[110] OHCHR, *Commentary on Recommended Principles and Guidelines*, 52
[111] Anna Gekht, "Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings", *Denver Journal of International Law and Policy* 37 (2008) (Gekht, "Shared but Differentiated Responsibility"): 30-31

the crime of trafficking. Such an approach has been aptly described in the Commentary to the UN OHCHR Recommended Guidelines and Principles on Human Rights and Human Trafficking. According to the Commentary "some rights will be especially relevant to the causes of trafficking (for example, the right to an adequate standard of living); others to the actual process of trafficking (for example, the right to be free from slavery);[112] and still others to the response (for example, the right of suspects to a fair trial) [while] [s]ome rights are broadly applicable to each of these aspects."[113] The following section will concentrate on this links between human rights and THB.

2.2.1 Human rights and causes of THB

Addressing the violations of human rights that cause trafficking is part of the *prevention* dimension of counter-trafficking effort.[114] While prevention efforts may focus on different levels, it is the *structural factors* that seem to deserve most of the attention – economic deprivation, effects of globalization, attitudes to gender, the demand side of the trafficking market.[115] Indeed, it was suggested that, compared to its historical predecessor "[m]odern slavery revolves around economic and social vulnerability, rather than race or ethnic background."[116]

[112] To elaborate on this frame, one could further look into the different elements of the crime of THB, so as to identify rights that are specifically relevant for the action, means or purpose elements.
[113] OHCHR, *Commentary on Recommended Principles and Guidelines,* 52
[114] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, para. 103
[115] Sally Cameron and Edward Newman, "Trafficking in humans: Structural factors," in *Trafficking in humans: Social, cultural and political dimensions*, (Tokyo: United Nations University Press, 2008), 21. On the other hand, the authors mention among the proximate factors: lax national and international legal regimes, poor law enforcement, corruption, organized criminal entrepreneurship and weak education campaigns.
[116] David Boucher, *The Limit of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition,* (Oxford: Oxford University Press, 2009)

Social and economic rights are deemed to be of primary importance for addressing such vulnerabilities,[117] hence social and economic initiatives oriented at ensuring the fulfilment of these rights are considered the most effective prevention measures.[118] In the counter-trafficking literature, this is called addressing the root-causes of THB.[119] For the counter-trafficking sphere, ensuring the proper fulfilment of these rights not only means preventing vulnerable groups from falling into trafficking but also ensuring that former victims are prevented from repeating the THB experience.[120] This conclusion is usually based on the statistical profiles of victims, who often come from poor environments, with limited opportunities, are usually unemployed, uneducated and are outside official social security networks etc.

The range of the international instruments dealing with social and economic rights is vast, besides the main international instrument on the topic – the International Covenant on Economic, Social and Cultural Rights[121] – social and economic rights are addressed in more specific provisions of the International Human Rights Law.[122] The Covenant sets a range of standards, compliance with which would deprive THB of its social roots. The most relevant of these standards are: the right to work, including technical and vocational guidance and training (Article 6); just and favourable conditions of work (Article 7); social security, including social insurance (Article 9); adequate standard of living for the

[117] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings for example notes that the vulnerability that may lead to trafficking "might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health.", para 83.
[118] ibid., para 103.
[119] Gekht, "Shared but Differentiated Responsibility".
[120] See generally, Alison Jobe, *The Causes and Consequences of Re-trafficking: Evidence from the IOM Human Trafficking Database* (Geneva: International Organization for Migration, 2010).
[121] International Covenant on Economic, Social and Cultural Rights, adopted through UN General Assembly resolution 2200A (XXI) of 16 December 1966.
[122] Convention on the Rights of the Child, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, the ILO Conventions.

individual and his family including adequate food, clothing and housing, and to the continuous improvement of living conditions (Article 11); the highest attainable standard of physical and mental health (Article 12) and the right to education (Article 13).

These standards are further developed in the European context in the European Social Charter considered to complement the European Convention of Human Rights (ECHR),[123] by guaranteeing social and economic human rights. The Charter was adopted in 1961[124] and then revised in 1996[125] (ratified by 32 states).[126] The Charter, particularly its revised version, builds on and expands the protections of the ICESCR. Thus besides a clearer regulation of social and economic rights already mentioned in the context of the Covenant, the revised charter provides for: right of anyone without adequate resources to social and medical assistance; the right to benefit from social welfare services; disabled persons' right to independence, social integration and participation in the life of the community; right to be employed in other state parties to the Charter on equal footing the nationals; migrant workers' right to protection and assistance; right to be informed; right of the elderly person to social protection; right to protection against poverty and social exclusion. Needless to say that the fulfilment of these standards is crucial to effectively address the root systemic factors that condition THB and that states obligations with this regard are mostly relevant for the topic of this thesis.

However, this category of rights are considered "context dependent" and subject to "progressive realisation", meaning that their fulfilment is gradual and conditioned by the

[123] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5
[124] Council of Europe, *European Social Charter*, 18 October 1961, ETS 35
[125] Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163
[126] http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=163&CM=8&DF=&CL=ENG

capacity of the states to provide for them,[127] thus being restrained by the availability of resources.[128] Thus, the Covenant provides in its Article 3 that states parties undertake "to take steps, […] *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." Moreover, developing countries, according to the third paragraph of this article, "with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." The Revised Charter uses a stronger language – by becoming part of it "accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the […] rights and principles may be effectively realised" and further, in Part 2 "undertake to consider themselves bound by the obligations laid down" in the Charter. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights also explain:

> "As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights."[129]

Thus, despite the context dependency of this category of rights it may still be said that when the state can predict and has the capacity to prevent trafficking, it is under duty to do so, under the threat of its breach of its international obligation. As I will show in the

[127] UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, 8 January 1987, E/CN.4/1987/17
[128] Gekht, "Shared but Differentiated Responsibility", 48
[129] "Limburg Principles"

next chapter, given the present European context minimum standards of fulfilment of these rights to prevent trafficking are possible to be set and applied. Existing National Referral Mechanisms for victims and potential victims of trafficking implemented in a range of European states, including Europe's poorest countries, indicate that states are generally capable of setting effective measures and identifying resources to address social and economic concerns that lead to trafficking and therefore have the obligation to prevent trafficking by fulfilling social and economic rights.

That is not to say that violations of other categories of rights cannot serve as a cause of trafficking. Besides poverty, unemployment and lack of education and other social and economic factors, it is increasingly recognized that violence, particularly domestic violence is a most significant push-factor for victims to fall in the criminal networks of trafficking.[130] Discrimination, intrusion in the person's private and family life, restrictions in movement and other violations of civil and political rights, particularly systematic ones, are often direct feeding-sources for trafficking, while lack of access to justice and to government assistance generally makes prevention even harder.

2.2.2 Human rights and the crime of trafficking

The human rights that are involved in the very crime of trafficking form the most conceptual difficulties and attracted the most of the attention from professionals and researchers providing a vast ground for analysis. At the European level the most comprehensive and authoritative version of this analysis is the judgment of the ECHR in the case of *Rantsev v Cyprus and Russia.* This is why this judgment will be at the centre of further investigation on the topic.

[130] La Strada International, *Violation of Women's Rights: A cause and consequence of trafficking in women*, (Amsterdam, 2008), 15.

A. Prohibition of torture, inhuman and degrading treatment

The human right addressed in the present section are absolute – it being recognized that "the prohibition of torture is a peremptory norm of international law and that international, regional and domestic courts have held the prohibition of cruel, inhuman or degrading treatment or punishment to be customary international law."[131] The prohibition has been specifically rendered non-derogable by the international and regional human rights instruments.[132] Thus, defining the relationship between this standard and the crime of THB would mean a significant progress in determining concrete non-derogable obligations under international law for state in the domain of THB but also the application of certain principles that are directly relevant for the situation of victims of trafficking, particularly the rule of *non-refoulement*. Since this relationship was given attention in the European context under ECHR in the European Court's Decision on *Rantsev*, I will directly move to this analysis.

In the case, the applicant claimed that Cyprus has failed to protect his daughter from ill-treatment by her alleged traffickers/exploiters. The facts of the case indicated that Oxana Rantseva might have been subjected to violence before dying during an attempt to escape the apartment were she was allegedly held against her will. The court concluded that it is not necessary to consider separately the applicant's complaint on the violation of article 3 of the convention, that reads "[n]o one shall be subjected to torture or inhuman and degrading treatment or punishment". However the Court made an important dictum.

[131] United States submission to the UN General Assembly on the question of Torture and other cruel, inhuman or degrading treatment or punishment (2008)

[132] Universal Declaration of Human Rights (article 5); International Covenant on Civil and Political Rights, (article 7); Convention against Torture; Convention on the Rights of the Child (article 37); Migrant Workers Convention (article 10); Convention on the Rights of Persons with Disabilities (article 15); European Convention on Human Rights (article 3); American Convention on Human Rights (article 5); African Charter on Human and Peoples' Rights (article 5); Protocol on the Rights of Women in Africa (article 4).

Although it found that there is no evidence to sustain Mr Rantsev's claim that his daughter might have been subjected to ill-treatment prior to her death, it nevertheless considered it necessary to mention that "it is clear that the use of violence and the ill-treatment of victims are *common features* of trafficking" (italics added) and, specifically to the facts of the case that "any inhuman or degrading treatment suffered by Ms Rantseva prior to her death was *inherently linked* to the alleged trafficking and exploitation".[133] To support these points the Court made reference to the report of the Cypriot Ombudsman on the working conditions of artistes in Cyprus (particularly to the fact that disobedience of victims is punished violently by the traffickers or exploiters[134] while the victims are forced to prostitution in cruel conditions[135]). The Court also referred to a report prepared by the Council of Europe Commissioner for Human Rights on his visit to Cyprus on 7-10 July 2008.[136]

A first observation is that, in the two passages quoted above, the court uses different phrasing to define the link between THB and Article 3. In the first quote, referring to THB in general it says violence and ill-treatment are *common features* of THB, while in the second referring to the case concretely, that the inhuman and degrading treatment was *inherently linked* to the alleged trafficking and exploitation. Should we read *common* in the first statement to mean *frequent, prevalent or widespread* or rather as *"belonging equally to or shared equally by two or more"*?[137] And does the second sentence refer to "alleged trafficking and exploitation" in the sense of particular treatment that Oxana Rantseva could have underwent or does it mean a *category* of trafficking and

[133] *Rantsev v Cyprus and Rússia,* para 252.
[134] para 85.
[135] para 89.
[136] para 101-104.
[137] http://www.thefreedictionary.com/common

exploitation, that the victim's situation might have belonged to? In other words does the court imply that Article 3 conduct is always present where THB occurs, does it say that it is concerned in some categories of THB and types of exploitation or that it was linked to the circumstances of this concrete case?

Clearly, in answering these questions we should first resort once again to the trafficking definition and its constitutive elements. The methods – recruitment, transportation, transfer, harbouring or receipt may obviously often involve practices that could fall within the ambit of Article 3, even where means are not employed (i.e. in the case of trafficking in children). Transportation, for example, may involve so much pain and suffering as to amount to inhuman or degrading treatment, without this treatment being linked to the purpose to overcome victims will.[138] But methods cannot be said to always involve a conduct that is in breach of the human right in question. The same could be said about the means element, which, being specifically aimed at breaking the will of the victim, is the most linked to the behaviour envisaged by article 3. Yet, here as well, besides violence and ill-treatment, the definition lists certain categories of means that do not necessarily require violent conduct - fraud, deception, abuse of power or of the position of vulnerability. With regards to the purpose element, here the conclusion is even more straightforward – the purpose of exploitation does not have to be realized in order for the behaviour to be classified as THB and it obviously would not provoke the degree of suffering and distress necessary for engaging article 3 unless realized.

Another possibility would be that, while taken separately the elements of the crime do not amount to violations of article 3, the combination of this elements attain such a

[138] Tom Obokata brings the example of a situation where a victim is travelling in an overcrowded truck or container for a period of time. Tom Obokata, *Towards a Holistic Approach*, 124.

degree of severity that this would amount to a violation. However it is unlikely that such a conclusion may be reached *in abstracto* without considering the concrete circumstances of the crime.

Thus it doesn't seem that the Court wanted to say that THB *always* involves conduct proscribed by Article 3.

The second hypothesis however, that article 3 is automatically concerned in *certain categories* of THB has a more reliable support. Thus, the 2002 Recommendation of the Committee of Ministers of the Council of Europe to member states on the protection of women against violence specifically mentions trafficking in women for the purpose of sexual exploitation as a form of violence against women,[139] while the explanatory report to the European Convention, speaking about gender discrimination and gender-based violence, lists among practices which qualify as torture or inhuman or degrading treatment – physical violence, rape, genital and sexual mutilation, trafficking for the purpose of sexual exploitation.[140] It should be noted that this explanation does not say that exploitation has to occur in order for the behaviour to qualify as torture or inhuman or degrading treatment, although such a proviso would be more convincing. Moreover, the facts in Rantseva do not show that in her case exploitation has in fact occurred,[141] therefore supporting the language of the explanatory report.

A strong presumption can therefore be made for the fact that trafficking in women for sexual exploitation contains elements of the behaviour that is proscribed by the Article 3

[139]Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence *(Adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers' Deputies)*

[140] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, paras 54 and 211

[141] Based on this Russia argued that the complaint under article 4 is inadmissible *ratione materiae.*

of the ECHR. And the analysis shows that the short statement of the Court on the issues is to be interpreted this way. It could be argued that this conclusion may be extended also to the sexual exploitation of men. In the other cases, however, the concrete circumstances of THB should be established to reach a conclusion on the involvement of Article 3.

This tentative conclusion has important implications on the application of state obligations originating in article 3 of ECHR and special instruments dedicated to torture, inhuman and degrading treatment, as, for example non-extradition or non-refoulement. Setting a strong presumption of torture or inhuman or degrading treatment in certain THB cases may indeed be crucial for the fate of victims. At the same time this finding shows the Court's inclination to consider THB by itself, *in abstracto,* a human rights violation distinct from the particular conduct that is concerned in the situation. This inclination is even more obvious in the ECtHR's examination of the case under article 4.

B. Prohibition of slavery

It has already been noted that THB is often referred to as modern day slavery or as *form* of slavery. Yet defining THB as slavery would have important legal consequences – prohibition of slavery is part of the *jus cogens*, i.e. of that range of norms tat are universal in character and from which no derogation is allowed.[142]

While not defining exploitation itself, both the Palermo Protocol and the European Anti-Trafficking Convention provide an open-ended list of its forms, and slavery, practices similar to slavery, servitude and forced labour or services are among them. As is evident from the definition, the purpose does not have to be realized (i.e. the exploitation does not necessarily need to occur) in order for the conduct to be qualified as THB. Thus

[142] Pati, "State's Positive Obligations", 81.

it can be said that, in line with the formal definition of THB under the international law, the characterisation of THB as modern slavery and the actual definition of slavery do not quite fit together so that, at most THB seems to overlap with slavery, practices similar to slavery, servitude and forced labour rather than coincide with them.

The international law itself, however, seems to be changing so as to approach the two notions. Rosa Pati notes that the "classic" interpretation of slavery is being replaced by a new "enlarged" definition, which is particularly based on the relatively recent instruments and jurisprudence of international criminal law bodies.[143] In particular the new reading of slavery is mentioned, including by ECtHR[144] in connection to the ICTY's decision in the *Kunarac case*.

> "the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery' has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree"[145]

In the context of ECHR, state obligations with regards to THB were specifically addressed as requirements under Article 4 – prohibition of slavery, servitude and of forced or compulsory labour".

In the European human rights system this change is exemplified by the shift from the "classic" interpretation applied by the ECtHR in the case of *Siliadin v France*[146] to the

[143] Pati, "State's Positive Obligations", 81.
[144] *Rantsev*, para 142.
[145] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, available at: http://www.unhcr.org/refworld/docid/3ae6b7560.html [accessed 20 November 2012]
[146] *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005

expansive one, employed in *Rantsev v Cyprus and Russia.* In *Siliadin* where the facts of the case denoted a situation of THB, the court found that the treatment to which the victim was exposed amounted to servitude and forced labour but did not reach the severity of slavery. Pati sees the ECtHR's judgment in *Rantsev* as bringing closer the notions of THB and slavery.

An application submitted by Nicolay Rantsev, a Russian citizen, to the ECtHR based on the facts of his daughter's alleged trafficking and subsequent mysterious death in Cyprus in 2001, has launched what became the most extensive analysis by the ECtHR of the THB from a human rights perspective. The application was lodged on the basis of articles 2, 3, 4 and 5 of the convention against both the alleged country of origin (Russian Federation) and destination (Cyprus), so that the Court had to inquire into the obligation of both this category of states in the context of THB. The Russian Government's objection as to the incompatibility *ratione materiae* has required the analysis of the relationship between THB and Article 4 of the Convention, which resulted in one of the most important findings of the Court – that trafficking falls within the ambit of Article 4.

Thus, the first question that the Court had to consider, under Article 4, was whether THB falls within the scope of this article, which, on the face of it, makes no reference to trafficking, but expressly prohibits "slavery", "servitude" and "forced and compulsory labour".[147] To do this, the Court has set to interpret the Article 4, according to the rules of interpretation found in the Vienna Convention on the Law of Treaties 1969[148] and in line with its established standards. Thus the court has placed a particular emphasis on

[147] *Rantsev v Cyprus and Russia*, para 272.
[148] The general rule is that the "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

promoting the Convention's provisions consistency and harmony, on the context of the existing international law applicable in relations between the parties to the Convention[149] and interpreting the Convention "in the light of its object and purpose", which in the Court's jurisprudence means a "dynamic or evolutive interpretation"[150] taking into account that the Convention is "a living instrument" that is to be interpreted "in the light of the present day conditions".[151] Finally the Court adopted an "effective interpretation" approach,[152] which means the Convention should be read "so as to make its safeguards practical and effective"[153]

The application of these rules in the case made it clear that as an emerging global phenomenon, recognized in international and European law, THB requires firmness in its assessment as a breach of fundamental values.[154] The court has therefore departed from its approach in *Siliadin* – where it found that the treatment of the applicant (which allegedly fitted the THB definition) amounted to servitude and forced and compulsory labour – so as to consider it to be a case of trafficking and analyze whether "trafficking itself" was a breach of article 4, without assessing which of the three types of proscribed conduct has taken place.[155] It has analyzed the characteristics of the phenomenon of THB in the light of the ICTY's conclusion on the evolution of slavery and concluded that THB "by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership".[156] Yet the court did not go as far as concluding that THB

[149] *Rantsev v Cyprus and Russia*, para 274
[150] David J Harris, Michael O'Boyle, Edward P. Bates and Carla M. Buckley, *Harris, O'Boyle and Warbick – Law of the European Convention of Human Rights*. 2nd ed. (Oxford: Oxford University Press, 2009), p. 7
[151] ibid.
[152] ibid., 15.
[153] *Rantsev v Cyprus and Russia*, para 275
[154] para 277-278.
[155] para 279.
[156] para 281.

amounts to slavery, but rather considered it "unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". The court concluded "trafficking itself, within the meaning of Article 3 (a) of the Palermo Protocol and Article 4(a) of the [European] Anti-Trafficking Convention, falls within the scope of Article 4".[157]

This conclusion is indeed a huge leap forward in conceiving human trafficking under the ECHR, especially in the light of Court's finding of a breach, despite the fact that it was not proved that exploitation has in fact occurred. Through this decision, the Court in fact, inserts trafficking within the scope of Article 4 (as result of its functional interpretation) without however linking it to one of the expressly proscribed conducts.

In other words, according to the ECtHR's reading, each time trafficking is found, an infringement of Article 4 will also be found, without having to consider how do the means or the realization of the purpose affect the individual. One of the interpretations of the Court's approach could be that the formal definition of trafficking has been granted substantive value in terms of human rights, without having to resort to a traditional concept as its content (such as slavery, servitude or forced labour, as it had to happen in *Siliadin*), which approaches the recognition of a right to be free from trafficking.

C. A right not to be trafficked?

But does the conclusion reached by the court in Rantsev mean that there exists, under the Council of Europe human rights regime a right "not to be trafficked" or to be "free from trafficking"? Finding such a right may solve the issue of the connection between

[157] para 282.

THB and human rights law and ease the conceptual difficulties related to conceiving of THB in human rights terms.

In her appraisal of the *Rantsev* judgment, Rosa Pati pleads for the recognition of such a right:

> "If these provisions [right to safety; privacy; information; legal representation etc.] can be legitimately called rights and a part of the human rights universe, then it is scarcely comprehensible why the more fundamental right underlying all human trafficking instruments, the right to be free from being trafficked, can only be part of the criminal law"[158]

Indeed, the preamble of the European Convention specifically recognizes THB as a Human rights violation, which reinforces the ECtHR's conclusion in *Rantsev* that not only separate elements of THB are characterized as violating human rights law, but also the very phenomenon is an affront to human rights. The Explanatory report to the Convention shows that this characterization of THB in the preamble by itself may have legal consequences "in some legal systems which had introduced special protection measures in cases of infringement of fundamental rights."[159]

The legitimacy of the notion of a right to be free from trafficking can be further drawn from the international standards currently in force, namely the express prohibition of the practice of trafficking by basic international human rights instruments – Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW)[160] and article 35 of the Child Right Convention (CRC)[161] in line with other prohibitions set out as guarantees of human rights.

[158] Pati, "State's Positive Obligations", 138
[159] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, para 141
[160] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, 13. Article 35 provides that "States Parties

While Pati's pledge has certain grounding in the ECtHR's judgment, and the relevant international human rights regulation, it does not give due account to the nature of the definition of trafficking. What is characteristic of this definition is its formal character – it contains certain indicators that shall be fulfilled in order for a given situation to qualify as THB, but it does not directly refer to a certain fundamental value that is protected by it and that would individualize it as a human rights. What it is able to do, is to address a whole range of such values including the freedom from torture, inhuman and degrading treatment, the right to liberty and security and so on, when they are violated within a pattern of conduct that fits the definition of trafficking. If we stick to this latter interpretation of the notion of trafficking, the ECtHR's conclusion can be read as recognition that whenever trafficking occurs, one of the three types of conducts proscribed by Article 4 is involved. I believe that such a restrictive interpretation is the most appropriate under the European human rights regime as it stands now.

2.3. Conclusion

This chapter has attempted to answer to two main questions – (1) whether trafficking is indeed a human rights issue (and consequently can and should be addressed under a human-rights paradigm that would render states responsible for violations) and (2) how do human rights relate to THB.

By addressing the critiques brought to a human-rights framework of dealing with trafficking under international law, I showed that the human rights law has evolved to

shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."

[161] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3. Article 35 reads: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form"

comprise also obligations of states that originate in third parties' conduct. A consequence of this conclusion is that the conflict between the criminal law and the human rights approaches is only apparent, since a human rights perspective can be accommodated with the interests in law enforcement as long as the value of the human being is kept at the core of all efforts.

In the second part of this chapter I approached the connections that exist between human rights and THB. By differentiating between violations of rights that cause trafficking and those that are implicated in the very process of THB, I was able to make a step further into understanding state obligations in the sphere. Namely

Finally a close analysis of the ECtHR ruling on THB and its relation to Articles 2 and 3 of the ECHR, has elucidated new aspects of trafficking from a human rights perspective. The first conclusion with this regard is that the Court is likely to find a violation of Article 3 when THB is concerned, but an especially strong presumption exists in cases of trafficking for sexual exploitation. Secondly, while the *Rantsev* judgment marked an important shift in conceiving of THB under the international prohibition of slavery, servitude and forced labour, it did not create an autonomous right not to be trafficked but rather created a presumption that whenever trafficking occurs, one of the three conducts is present and therefore state's responsibility under Article 4 is engaged.

Chapter 3: European states' human rights obligations in relation to trafficking in human beings

As shown in the previous chapter, action against THB is inextricably linked with human rights and, increasingly, determined by the human rights law on all levels – addressing its causes (prevention), its elements and consequences. Furthermore it was shown, that while some of the human rights duties of the European states may stem from the THB as a human rights violation by itself, others are engaged due to infringements of particular rights in the context of this crime.

In this chapter, I will provide an analysis of the legal consequence of the process of embedding THB law with human rights content, namely the obligations that the states are bound with under the European Regime of Human Rights and Counter-Trafficking.

A general approach to the state obligations to counteract THB would be the internationally recognized 3P approach – prosecution, prevention and protection. Some also add the 4th "P" – partnership. Article 1 of the European Anti-Trafficking Conventions reflects this approach by setting the four Ps as the purposes of the Convention. However the drawback of analysis of state obligations under this approach is that it does not tell much about the nature of such obligations, but rather focus on their content.

In order to have a more comprehensive analysis from the human rights perspective, a more general human rights framework will be used – the paradigm of the due diligence standard – to identify the respective obligations to respect, protect and fulfil the rights that are violated through trafficking. The conclusions of the ECtHR as to the nature of

THB as a human rights violation, discussed in the previous chapter indicate that the obligations of states are best analysed within this paradigm.

At the same time, in order to illustrate the main implications of de-facto challenges in implementing a human rights approach to counter-trafficking work, the chapter will provide a detailed analysis of one of the core obligations that states have – the obligation to identify a victim of trafficking. This obligation is examined separately both because of its crucial importance but also because it is an illustrative example of the complications that states have to deal with in carrying out their obligations with regards to trafficking and how the challenges themselves extend the perspective on the obligations states have.

3.1 The due diligence standard

Article 2 of the ICCPR provides that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant[…]".[162] At the same time the, ECHR's Article 1 provides that states "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".[163] These provisions are considered to formulate the way state obligations with regards to human rights are to be conceived and to give rise to what has become increasingly acknowledged as the paradigm of state responsibility under the international human rights law.

In the THB context, the Principle no. 2 of the OHCHR's Recommended Principles and Guidelines on Human Rights and Human Trafficking provides that "[s]tates have a

[162] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

[163] Alastair Mowbray notes that the ECtHR "uses the combination of Article 1 and a substantive Article of the Convention to create the jurisprudential foundations of another discrete positive obligation upon states". Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Oxford: Hart Publishing, 2004), 44.

responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons".[164] As established in the analysis in Chapter 1, in the case of human rights this responsibility is engaged even where the primary wrong is associated with the act of a third person.[165] The evolution of state's responsibility from violations committed by the state's agents or while acting in their public role to a paradigm whereby states are also held responsible where they fail to protect those within their jurisdiction from violations inflicted by third parties is well documented and supported.[166]

According to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, considered to be the expression of customary international law,[167] To engage the responsibility of states for the violation of an international rule, it should be proven that a certain conduct is attributable to the state and that that conduct constitutes a breach of an international obligation.[168] In the case of certain human rights, where the responsibility of states is triggered for the acts of third persons, the "due diligence" standard applies, whereby the state does not respond for the acts of others, but rather for its own failure in preventing, investigating, prosecuting or compensating for the commission of the act.[169] The standard presupposes that the violation has occurred with the support, acquiescence or knowledge of the state,[170] so that it should be aware of a

[164] OHCHR, *Commentary on Recommended Principles and Guidelines*, 76.
[165] ibid.
[166] Viviana Waisman, "Human Trafficking: State Obligations to Protect Victims' Rights, The Current Framework And A New Due Diligence Standard", *33 Hastings International and Comparative Law Review*, (2010)(Waisman, "Human Trafficking: State Obligations") : 406.
[167] Gallagher, *International Law of Human Trafficking*, 220-221.
[168] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1
[169] OHCHR, *Commentary on Recommended Principles and Guidelines*, 78.
[170] Viviana Waisman, "Human Trafficking: State Obligations", 419, quoting the Inter-American Commission on Human Rights: "decisive is whether a violation of the rights recognized by the Convention

certain pattern of violations[171] and show "pervasive non-action".[172] The standard is applicable to article 4 and therefore to obligations arising from THB, as confirmed by the ECtHR in *Rantsev*.[173]

Moreover, the Draft Articles provide that in the case of breaches of peremptory norms[174] of the general international law the circumstances that preclude wrongfulness do not apply.[175] Also in the case of a serious breach by a State of an obligation arising under a peremptory norm of general international law, meaning the gross or systematic failure by the responsible State to fulfil the obligation,[176] states are under a duty to cooperate to bring to an end such a violation and abstain from recognizing the situation as lawful, or aiding the states in maintaining the situation.[177]

3.2 The duty to respect

The duty to respect means, first of all, that the state has a negative obligation to abstain from infringing individual rights.[178] It originates in the article 2(1) of the ICCPR, according to which a state is obliged "to respect […] to all individuals within its territory and subject to its jurisdiction the right recognized in the […] Covenant, without distinction of any kind".

has occurred with the support or the acquiescence of the government", Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para 173.
[171] ibid., 420.
[172] ibid., 419.
[173] *Rantsev v Cyprus and Russia*, para 286.
[174] Defined under the Viena Convention on the Law of Treaties as "a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (article 53)
[175] Article 26.
[176] 4Article 40.
[177] Article 41
[178] Pati, "State's Positive Obligations", 131-132.

This duty therefore functions in the classical vertical manner of human rights obligations, imposing the state to refrain from interference with the person's rights. Under the Draft Articles on the Responsibility of States, it means that states will be held responsible for violations of their human rights obligation to respect where the breach has been made through the conduct of its organs,[179] of persons or entities exercising elements of governmental authority,[180] of organs placed at its disposal by another state,[181] even by excess of authority or contravention of instructions.[182] At the same time the state will be found responsible for breaches of human rights obligations through the conduct directed or controlled by it,[183] or in the absence or default of the official authorities,[184] conduct of an insurrectional or other movement[185] as well as where the conduct has been acknowledged and adopted by the state as its own.[186] This is not to say that that these situations define the attribution of the unlawful conduct to the state only with regards to the duty to respect (attribution of breach for any other duty should follow similar rules), however the diversity of this rules are particularly important with regards to this duty.

In the context of trafficking, this means, among others, that the state should prevent and counteract the complicity of its officials in the trafficking crime (e.g. corruption and resulting impunity).[187] Several of the obligations provided for in the European Anti-Trafficking Convention are relevant for the duty to respect. Article 21 requires criminalisation of aiding or abetting trafficking, while Article 24 requires that

[179] Article 4
[180] Article 5
[181] Article 6
[182] Article 7
[183] Article 8
[184] Article 9
[185] Article 10
[186] Article 11
[187] Viviana Waisman, "Human Trafficking: State Obligations", 406.

commission of THB by a public official in performance of her/his duties shall constitute an aggravating circumstance to the crime. Obviously these requirements are intended to address the instances of collusion and corruption, where state representatives can be involved in the crime of trafficking. The explanatory report to the convention explains that because "[t]rafficking in human beings may be engaged in by organised criminal groups – which frequently use corruption to circumvent the law", the counter-trafficking measures should give proper attention to, among others, the international instruments on fighting corruption,[188] particularly Criminal Law Convention on Corruption of 27 January 1999 (ETS No 173) and the Civil Law Convention on Corruption of 4 November 1999 (ETS No 174).

In this context, ECtHR has identified in *Rantsev* an obligation of Cyprus to investigate indicia of alleged corruption that might have led to the victim's handing over by a police officer to the perpetrators.[189] Obviously this obligation would not limit itself to corruption and would cover any other instances of collusion of state bodies.

The duty to respect also extends to the situations were the legal and administrative structures set by the government effectively encourage or facilitate trafficking in human beings. The ECtHR has also addressed implicitly the duty to respect when it found that the general legal and administrative framework in force in Cyprus, including immigration policy, particularly the regime of the artistes' visas "encouraged the trafficking of women to Cyprus".[190]

[188] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, para 23.
[189] para 238.
[190] para 291-293.

In the same context it is important to note some more refined ways in which states may fail to discharge their duty to respect. The violation of this duty may be due not as much to the collusion of the authorities as to their passivity or other interests. Due to the challenging mission to investigate THB and proving its constitutive elements, law enforcers may tend to prefer to charge the acts of traffickers as other, milder crimes – e.g. (organization of) illegal migration, pimping, forced labour, etc. Since the penalties for THB are very serious, while main perpetrators are usually members of wealthy criminal organizations, this can lead to arbitrariness and abuse on the part of state officials, especially in jurisdiction where corruption is dominant.[191] Since such practices often overlap with corruption and other forms of aiding and abetting of trafficking by authorities, they should also be addressed under the obligation to respect.

Finally it is often the case that once victims come into the attention of the authorities, they may be susceptible to a wide range of abuse – from unlawful detention and prosecution, to harassment and ill-treatment.

Often trafficking victims are put into detention by authorities, where violations (for example of immigration laws permit arrest of illegal migrants).[192] Although misidentification accounts for the bulk of such cases, sometimes even identified victims are limited in their freedom by authorities – either because their non-prosecution was dependent on their cooperation with police or under the paternalistic pretext of providing assistance and protection to the victims.[193] In his recent report, the UN Special

[191] See for example, US Department of State, *Trafficking in persons report*, issue of 2011: "in many countries […] due to an incomplete understanding of Palermo provisions or of human trafficking as modern slavery, victims are blamed for being trafficked, and prosecutions fall apart." available online at http://www.state.gov/g/tip/rls/tiprpt/2011/166772.htm
[192] Gallagher, *International Law of Human Trafficking*, 288.
[193] ibid

Rapporteur on Trafficking in Persons has specifically criticized the practice of detention in shelters.[194] While neither the Palermo Protocol nor the European Anti-Trafficking convention expressly talk about an obligation not to detain victims of trafficking (although the latter implicitly recognizes that victims cannot be detained for their own good contrary to their will),[195] such an obligation is resulting from the human rights standards relating to liberty and security of the person and freedom of movement. Under these standards, the detention of victims will be unlawful, if this measure is not provided for in the law, where detention is arbitrary, imposed in a discriminatory manner, without appropriate judicial or administrative review, or disproportionate.[196] An obligation not to detain victims, under the duty to respect, can thus be identified.

All of the above, indicate that, if state is to have a due diligence approach respecting the rights of (potential) THB victims, it is to review its policies, particularly the ones relating to immigration and prosecution of THB so as to make them immune to THB or, to the very minimum, to make sure they do not facilitate trafficking. Also, states are required to establish efficient corruption-control mechanisms, which would take into account the peculiarities of the crime of trafficking, and distribute appropriate resources to fight such corruption in line with the weigh of the crime and its impact on human rights. The assistance of external monitoring bodies, such as the findings of Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) could be of enormous use with this regard. At the same time, the state should efficiently train its officials to prevent issues of collusion, unlawful detention and mistreatment of victims.

[194] UN Human Rights Council, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi*, 6 June 2012, A/HRC/20/18/, para 43.
[195] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings,para 289.
[196] Gallagher, *International Law of Human Trafficking*, 293.

3.3 Duty to protect

This duty defines the obligation of states with regards to violations by third parties of the protected rights and is only partly overlapping in scope with the notion of "protection" as it is used by counter-trafficking community and is regulated in articles 6 to 8 of the Palermo Protocol. It is this duty that has as its core the state's responsibility for the acts of third parties, and requires that it prevents infringements, protects the right-holder or remedy the violation.

To address this duty appropriately, the states should set a protective legislative and administrative framework. This would include, criminalization of trafficking and related offences in a manner that would deter crime, but also measures that would address systemic and proximate factors that lead to trafficking, including :

> "administrative and legislative measures to ensure fair labor standards, minimum wages, adequate working conditions, access to health care and standards of health care services, prohibition of child labor, access to food and fair food pricing, access to decent shelter and a healthy environment, access to movement without improper restrictions, fair and non-discriminatory immigration policy and law…"[197]

This extension of the duty to protect from criminal law to other legislative and administrative spheres is a logical result of the ECtHR's conclusion that "[i]n assessing whether there has been a violation of Article 4, the relevant legal or regulatory framework in place must be taken into account […]the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking."[198] Since the Court found that THB as such falls within the ambit of Article 4, this obligation will apply in all cases.

[197] Pati, "States' Positive Obligations", 134.
[198] *Rantsev v Cyprus and Russia,* para 284.

Since the proper functioning of such administrative and legislative measures can only be ensured through coordination, states have an implied obligation to coordinate the response to trafficking. At the same time, given that the appropriateness of such measures should be properly assessed and monitored, another implied duty is for states to systematically monitor and evaluate the legislative and administrative framework from the point of view of THB response. The two implied duties could be addressed by the functions of national coordination bodies on THB, such as existent in many of the European states.[199]

The protection of victims of trafficking is rightfully addressed in the main Counter-Trafficking instruments. The Palermo Protocol requires that states "protect victims of trafficking in persons, especially women and children, from revictimization"[200] and provide training for the law-enforcement on "protecting the rights of the victims, including protecting the victims from the traffickers."[201] The European Anti-Trafficking Convention establishes that states "shall take due account of the victim's safety and protection needs" as well as provides detailed regulations and requirements on the obligation to assist victims (Article 12) as well as on protection of victims, witnesses and collaborators with the judicial authorities (Article 28).

One first problematic area, where human rights concerns confront criminal law interests is the issue of whether states are allowed to condition protection and assistance on the victim's cooperation in criminal proceedings or whether they are required to separate the two. While the European Anti-Trafficking convention is clear on the point that the latter

[199] See generally, OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Efforts to Combat Trafficking in Human Beings in the OSCE Area: Coordination and Reporting Mechanisms (Vienna: OSCE, 2008)
[200] Article 9.
[201] Article 10.

should be the case,[202] it was asserted that this area remains however problematic especially since under the legislation of some countries it is compulsory to provide evidence on crimes.[203] However, while such a rule would affect directly the right of the victim to the mandatory "recovery and reflection period", it cannot be used to refuse assistance.

Another problematic area is the one of the legal stay of the victim in the country of destination. The legally-binding obligation to protect also includes, under the European regional instruments at least, the obligation to provide the victims with the possibility to remain in its territory, temporarily or permanently, especially in cases were there is a risk of re-trafficking, or other human rights violations, in the country of origin. Since, as established in Chapter 2 of the present thesis, the ECtHR has created a strong presumption that THB involves violations of Article 3 of the ECHR, states are required to abstain from deporting victims to their countries of origin were the risk of trafficking persists.

The obligation to carry out efficient investigation and prosecution of trafficking can also be located under the concept of the duty to protect.[204] Among the main challenges in implementing this obligation are the transnational character of THB, the dynamics of its trends and differences in investigation and prosecution standards and capacities among different states. THB by definition should require higher investigation standards, given the gravity of the crime, its complexity and peculiarities. This will involve, among others the duty to establish cooperation mechanisms with other states in effectively prosecuting

[202] Article 12 (6).
[203] Gallagher, *International Law of Human Trafficking*, 299.
[204] Pati, "State's Positive Obligations", 134.

traffickers as well as to guarantee the right of the victim to participate in criminal proceedings and receive compensation.

3.4 The duty to fulfil

The duty to fulfil relevant human rights is especially important for the prevention and protection elements of the '4P' approach. From the THB point of view, the duty to fulfil consists in complying with the social and economic rights in order to address the root causes of THB in a way that would ensure effective prevention of the phenomenon. From the prevention point of view, the state is required, under the increasingly recognized approach,[205] to address the push factors that lead vulnerable groups into the hands of traffickers including economic constraints, discrimination and violence.

The European Anti-Trafficking Convention itself recognizes that states shall "establish and/or strengthen effective policies and programmes to prevent trafficking in human beings [through] social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking"[206]. The Explanatory Report to the Convention recognizes that, while such measures require long-term investment, the "improvement of economic and social conditions in countries of origin and measures to deal with extreme poverty would be the most effective way of preventing trafficking".[207]

The same should be true for the state's obligation to progressively heighten the standards of protection and assistance available to survivors of THB in order to ensure

[205] See, for example the United Nations Global Plan of Action to Combat Trafficking in Persons, A/RES/64/293, para 12: "Address the social, economic, cultural, political and other factors that make people vulnerable to trafficking in persons, such as poverty, unemployment, inequality, humanitarian emergencies […], sexual violence, gender discrimination, social exclusion and marginalization, as well as a culture of tolerance towards violence against women, youth and children."

[206] Article 5

[207] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, para.103

the most complete recovery. This is particularly important for avoiding re-victimization and is crucially linked to the prevention aspect of counter-trafficking activities.

A model that would properly fulfil the obligation to prevent trafficking by addressing its socio-economic roots, would be based on proper knowledge about the groups that are at most risk of being trafficked and would target these groups' situation in order to ensure their safety. This may mean engaging social protection, medical, educational systems in countries of destination to work together in order to identify and assist both victims of trafficking and those who are most vulnerable and are at high risk of being subjected to THB, as a matter of priority. Proper budgetary allocation or, where these are scarce, prioritisation of these allocation are a necessary precondition for this.

3.5. An overarching obligation - the duty to identify and challenges to identification

Identification of victims can be regarding as an overarching obligation because it conditions the fulfilment of all the other duties. This is why I chose to discuss its implications in more detail and in a separate section.

From a law-enforcement perspective, victim identification serves as a basis for determining the concrete dimension of the crime and securing evidence against perpetrators. However, while often essential for the proper prosecution of THB, identification of victims is first of all a precondition for the implementation of the human-rights dimension of the counter-trafficking work. The rights that attach to the status of the victim depend on the proper attribution of this status.[208] In other words, failure to identify a victim means failure to provide him or her with protection and assistance, failure to

[208] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, para 127.

have her cooperation in prosecuting the trafficking and, most importantly, a persisting risk of re-trafficking.[209] The inevitability of this conclusion led to the recognition of a general obligation to identify as the object of an emerging consensus[210] on the international arena, as well as of a right of the victim to be identified as such, given that without this prerogative the other rights that are conferred to this category "would be purely theoretical and illusory".[211]

Incidentally, the facts of the ECtHR's most important trafficking case – *Rantsev v Cyprus and Russia* - provide a most illustrative example of the potential consequences of failure to identify a victim of trafficking. The failure of the authorities to identify Ms. Rantseva as a (potential) victim of trafficking, when they should have – she was handed by the police to her alleged exploiters – may have resulted in her death while attempting an escape. Misidentification can also lead to prosecution of victims instead of their protection[212] or to the perpetuation of exploitation, as is most often the case. If not properly identified, including after returning to their home countries, victims may further risk re-trafficking, social exclusion and violence. Furthermore, misidentification means less reports on the crime and less evidence for the prosecution, which leads to impunity and perpetuation of human rights violations through THB. This last point links identification to the procedural obligation to investigate cases of THB.

[209] Meredith Flowe, "The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation: Analyzing Current Treatment of Supply And Demand," *North Carolina Journal of International Law and Commercial Regulation*, 35 (2010).
[210] Gallagher, *International Law of Human Trafficking*, 276.
[211] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, para 131. See also OHCHR, *Commentary on Recommended Principles and Guidelines*, 73.
[212] One such case is analysed in the Eliot, Jessica, "(Mis)Identification of Victims of Human Trafficking: The Case of R v. O", *International Journal of Refugee Law,* 21(4) (2009) (Eliot, "(Mis)Identification of Victims"): 724-741. The Case of R v. O, a minor Nigerian girl was arrested for possession of false identity documents, tried and convicted to 8 months of imprisonment, to be later discovered that she was trafficked for sexual exploitation. The appellate court reversed the conviction in R v. O.

3.5.1 Legal requirements

There is no consensus on a definition of the identification of victims of THB in international law. Unfortunately, even academic material on the issue is scarce. Still, where identification is regulated it is possible to deduce to some extent the essential elements that this concept should contain. The UNODC Legislative Guides refers to a "specific requirement or process […] whereby the status of victims as such can be established".[213] On the other hand, some of the national instruments provide definitions. For example, the Moldovan Law on Preventing and Combating Trafficking uses the following definition: "the process of verification of persons presumed to be victims of trafficking in human beings".[214] The Law's provisions on identification are further detailed in the Guidelines on the identification of victims and potential victims of trafficking in human beings, adopted by the Moldovan Minister of Labour, Social Protection and Family, which provide for a two-tier procedure of identification – preliminary and final.[215]

The bits and pieces gathered above do in fact hint to the necessary elements of identification – (1) the procedure by which certain facts are established about the person; (2) the comparison of these facts with the definition of the victim of THB and (3) the decision to grant or to deny the status of victim. In practical terms it means, the application of a set of indicators to a factual situation in order to produce a decision. States have certain latitude in establishing what these indicators are as long as they

[213] UNODC, *Legilsative Guides*, 289, para 64.
[214] Law No. 241-XVI on Preventing and Combating of Trafficking in Human Beings (2005) (Republic of Moldova), Article 2.
[215] Moldovan Minister of Labour, Social Protection and Family of Moldova, *Guidelines on the Identification of Victims and Potential Victims of Trafficking in Human Beings,* adopted through Minister Order no. 33 of 20 February 2012.

properly relate to the definition of trafficking, but they are also encouraged to draw upon the indicators developed by ILO, IOM and UNODC, whose procedures are considered to be best practices.[216]

Palermo Protocol

The Palermo Protocol does not contain express provisions on the identification of THB victims. However, a requirement of identification was read into the text of the Protocol on the ground that, in the words of Anne Gallagher, "any rights accorded to the trafficked persons amount to nothing without a corresponding obligation on the competent authorities to identify them as such".[217] Yet the provisions of the Protocol on the issue are formulated in a recommendatory manner. In other words, given that the rights themselves contained in Articles 6 and 7 are provided for in soft-law language, the requirement to identify deduced by Gallagher may be applied only as a recommendation to states. At the same time, while the Protocol does not expressly define the victim of trafficking, it was argued that the notion is subsumed under the definition of THB.[218]

While the Palermo Protocol itself is silent on the issue of identification, the UNODC Legislative Guide proposes three alternative processes by which the VoT status might be granted: empowering courts dealing with THB to grant such status; allowing judicial/administrative determination of such status based on application by state officials or judicial/administrative determination based on alleged victim's application.[219]

Council of Europe framework

[216] UN Human Rights Council, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi*, 6 June 2012, A/HRC/20/18/, para 33.
[217] Gallagher, *International Law of Human Trafficking*,, 282.
[218] OHCHR, *Commentary on Recommended Principles and Guidelines*, 33.
[219] UNODC, *Legilsative Guides*, 289, para. 64.

The European standards are more specific in their treatment of identification. First of all, the convention provides for a definition of victim of trafficking in its article 4. A victim of THB is "any natural person who is subject to trafficking in human beings", as defined in the convention. Moreover, the convention contains a separate article on the identification of victims of THB. In it's Article 10 the Convention provides that states "shall provide [their] competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims". In doing this, states "shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims." When required by the situation the Convention provides that states shall issue residence permits for victims. Identification is to be supported by "legislative or other measures as may be necessary" as well as by the collaboration with other states and support organisations.

Most importantly, Article 10 establishes the standard that, whenever authorities have reasonable grounds to believe that a person is a victim, they shall complete the identification, without removing the person from the country. At the same time, even before identification is completed, when those grounds are present, alleged victims should receive assistance and protection. Special protections are provided for children and those who due to uncertainty of their age should be treated as children.

It has been argued that in the light of the Council of Europe system of human rights (particularly the requirements of the ECHR), in order for a victim to be identified, it is not necessary that the trafficking experience is recent. Thus despite some states'

reluctance to grant the victim status and the rights attached to it to "historical victims", these states should nevertheless be bound by the obligation to identify and protect even where trafficking has occurred in the distant past.[220] This results both from the language of the definition and the purpose of the Convention.[221]

Finally, the language of the European Convention allows for distinguishing two stages or forms of identification – an initial (provisional) stage whereby, if there are 'reasonable grounds' to believe the person is a victim, he or she is granted a recovery/reflection period, and the 'final' identification, whereby the victim is granted this status. It is important to see which rights are attributed to victims at which stages of the procedure of identification. This "twin-track" approach puts protection of victims first, in line with the human rights approach to trafficking.[222] It also ensures the fulfilment, in the first stage of those rights that are necessary for the identification to be completed.

3.5.2 Challenges and areas for intervention

As argued elsewhere in the present work, the extent of the state obligations in the field should go hand in had with a proper understanding of the *status quo* to which these obligations respond. That the process of identification of THB is cumbersome is acknowledged even in the documents accompanying main international instruments in the domain.[223] Since it "is never a default position",[224] identification depends on active participation of different stakeholders – first of all the victim him/herself, the relevant

[220] Adam Weiss and Saadiya Chaudary, "Assessing victim status under the Council of Europe Convention on Action against Trafficking in Human Beings: the situation of "historical" victims," *Journal of Imigration Asylum and Nationality Law* 2, no. 25 (2011): 168-178.
[221] ibid., 171.
[222] Elliott, "(Mis)Identification of Victims".
[223] Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, para 127.
[224] Gallagher, *International Law of Human Trafficking*, 282.

authorities, NGOs, service providers, prostitute users[225] etc; on the circumstances of each THB situation and, therefore on the trends of THB in a certain region at a certain period, the behaviour of traffickers, the social environment, culture etc.

Based on the premise above, the researchers and organizations active in the domain have identified a series of challenges to be faced, when carrying out the identification of THB victims. A first series of such challenges is related to **low self-identification** or self-reporting (i.e. the willingness or possibility for the person to identify him/herself as a victim of trafficking). This may be caused by the fact that the victim doesn't even recognize that he or she has been victimized,[226] because he or she depends psychologically on the trafficker or identifies with him (a condition close to Stockholm Syndrome), fears violent retribution by traffickers or prosecution by authorities because of their precarious status in the country, is generally distrustful of the authorities because of past experiences, corruption etc.[227] Such behaviour is often used and reinforced by traffickers, who manipulate victims into obedience and hopelessness. Finally, this challenge is expressly addressed by the ECtHR in *Rantsev*: "victims of trafficking often suffer sever physical and psychological consequences which render them too traumatised to present themselves as victims"[228]

All these factors indicate certain areas where states should concentrate their efforts to improve self-identification, and, still better, prevention – better education and information on THB (including means employed by traffickers) and on the rights of

[225] Elliott, "(Mis)Identification of Victims"., 730.
[226] Jacqueline Bhabha and Vhristina Alfirev, *Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs* (United Nations High Commissioner for Refugees,2009), 10.
[227] Elliott, "(Mis)Identification of Victims".
[228] *Rantsev v Cyprus and Russia,* 320.

victims including protection and safety measures, counteracting corruption and appearance of corruption, training of officials and, generally, taking a victim-centred approach etc.

On the other hand, such behaviour of the victim and the trafficker can result in **failures on behalf of other actors** to identify them. If the victim returns to the abusers, lacks signs of physical violence, is provided by traffickers with relative freedom of movement or does not himself/herself a victim, the authorities are less likely to see the reality of exploitation behind the veil of wellbeing. This is especially the case where authorities lack knowledge about the THB phenomenon and skills for identifying victims – noticing, approaching, interviewing, informing them of their rights. The most relevant authorities, mentioned in this context are immigration officials, law enforcement and service providers (in the educational, social or healthcare domains).[229] Yet, if we assume the existence of the state's obligation to identify, this means that, while the activity of other actors may be optional or complementary, the duty of the state to take positive measures to a certain point is always there – training of relevant actors, establishment of clear identification and referral rules are only some of the solutions that are required to address these issues. These will be addressed below in this section.

Another factor that brings down identification is, what has been termed "inadequate general **public ability to pick up signs of victimization**",[230] in other words, the unlikelihood that ordinary citizens would notice and/or report THB when they encounter such a case (this includes clients of prostitutes, but also of other forced services, those

[229] E. Gozdziak and M. MacDonnell, "Closing the Gaps: The Need to Improve Identification and Services to Trafficked Children", *Human Organisation 66* (2007), 179

[230] Jacqueline Bhabha and Vhristina Alfirev, *Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs* (United Nations High Commissioner for Refugees,2009), 10.

who encounter beggars on streets etc). This may be due to poor information but also social stigma and stereotypes. These often have a discouraging effect on the first area of problems identified – victim self-identification.[231]

Finally, it is important to notice that identification also depends on the stage to which the crime of trafficking is realized and the form of exploitation that serves as the purpose of trafficking. It was thus suggested that, despite the fact that it is not necessary for exploitation to take place for trafficking to occur, it is tremendously difficult to identify a victim before he or she is exploited, making identification in most of the cases an "**ex post facto exercise**".[232] On the other hand, it is believed that victims of certain forms of exploitation are more likely to be identified than others. Thus, those exploited in begging or subjected to labour exploitation are often left out of the identification/referral/protection mechanisms. In terms of potential solutions, the first issue may be addressed by identifying 'potential victims of trafficking' based on a evidence-based profile of the victim and carrying out measures to prevent exploitation, while the second one necessitates, at least, adaptation of identification procedures to cover all forms of trafficking, and involving relevant authorities.

3.6 A differentiated approach to state obligations

A last point to be made in this chapter relates comes back to the overall purpose of this thesis – to establish a link that would connect the definition of human trafficking to the relevant human rights standards and the resulting obligations of states to ensure human

[231] International Centre for Migration Policy Development (ICMPD), *Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member States* (Vienna: ICMPD, 2009), 125. As one respondent noted: "Although many trafficked women have initially consented to work in prostitution, unaware of the actual working conditions, this factor is not sufficiently considered […]. Sometimes it seems like a woman as soon as she consented to work in prostitution gave up all her rights."

[232] Gallagher, *International Law of Human Trafficking*,, 282.

rights in the context of THB so as to establish a paradigm that, on the one hand, is legally consistent and, on the other hand, is efficient. One consequence of such an analysis is distinguishing a differentiated approach to state obligations that would be based both on the actions covered by the definition of trafficking and the relevant human rights involved. The methodological framework for such an analysis was provided by Anna Gekht in her recent article. Her thesis is that different countries in the trafficking cycle are to focus on different roles in addressing THB. The criteria based on which, according to Gekht a differentiations should be drawn is the distinction between the recruitment phase of trafficking, the methods by which victims are brought into exploitation and the exploitation itself.[233] The distinction to be drawn here is based on the fact that at different stages of trafficking different though overlapping violations of rights may be involved as different actors.[234]

Among the methods of trafficking, the first stage to be addressed is recruitment. With regards to this stage, states are required to provide preventive measures (as discussed in the section on fulfilment of state human rights duties with regards to THB), including addressing root causes by protecting the at-risk categories of the population and prosecute recruiters.[235] It may be added that states of origin would also have the duty to properly identify potential victims as well as provide protection and assistance to returning victims, including their reintegration into the society. In order to achieve this, states of origin could design specific national referral mechanisms that would be based on the peculiarities of their place in the trafficking cycle. One example of such a mechanism is

[233] Gekht, "Shared but Differentiated Responsibility", 56.
[234] ibid.
[235] ibid.

the National Referral System implemented in Moldova[236] (a country of origin for victims of trafficking). The system is a framework of cooperation between governmental and non-governmental organisations active in the sphere of preventing THB and protecting and assisting victims. The system is being coordinated by the Ministry of Labour, Social Protection and Family and implemented in line with a national counter-trafficking strategy and has two major areas of intervention. On the one hand, the organisations and public bodies active within its framework protect and assist victims of trafficking to ensure their rehabilitation and reintegration into the society, through provision of social, health and legal services, assistance in training and employment etc. On the other hand it focuses on the needs of the most vulnerable categories of population – those who may be at-risk of being trafficked.[237] Thus protection and prevention go hand in hand under such an approach.

At the latter stages of the crime of THB - transit of other states and reaching the state of destination where exploitation is supposed to occur – the focus of states should shift to operational measures to identify, rescue and protect victims, punish the trafficker and prevent exploitation. Here states are required to properly address demand, investigate and prosecute networks of criminals and, even, criminalize specific forms of exploitation, depending on the trafficking patterns.[238]

[236] For a description of the system see International Organisation for Migration, *Best Practices in the Implementation of National Referral Mechanisms/Systems for Protection and Assistance of Victims of Human Trafficking*, Report on the International Conference (28-30 June, 2011) (Chisinau: IOM)
[237] Strategy of the National Referral System for protection and assistance to victims and potential victims of human trafficking and Action Plan on its implementation for 2009-2011, adopted by Parliament Decision No. 257 of 5 December 2008 (Republic of Moldova)
[238] Gekht, "Shared but Differentiated Responsibility", 58.

3.7 Conclusion

In this chapter I have discussed the due diligence standard approach in assessing the extent of state human rights obligations in dealing with trafficking. As shown, this approach holds states responsible even if the original crime of trafficking was committed by privates, whenever support, acquiescence or knowledge of the state and its persistent lack of action is present.

The chapter further discussed three general duties resulting from the human rights that are implicated in THB – the duty to respect, protect and fulfil. In line, with the duty to fulfil, states are required to address socio-economic rights so as to address root causes of THB. As shown in the respective section, given the seriousness of the crime of THB addressing vulnerabilities associated with trafficking should be a matter of priority even where resources are limited. The duty to respect presupposes that the state takes effective measure to prevent its own complicity and fault in the crime of THB, by establishing THB-immune legal and administrative frameworks and policies, fighting corruption and impunity and preventing mistreatment of victims. Finally, a duty to protect comprises measures that are meant to counter-act infringements of human rights through trafficking, protect the victims and remedy any violations.

The obligation to identify victims is discussed separately, both because it is an overarching issue and because it is very illustrative of the challenges that impede the respect, protection and fulfilment of human rights in the context of trafficking. The example of the obligation to identify also shows that in order to properly discharge their obligations, states should adapt their measures to the challenging realities.

The last part of the chapter argues for a differentiated approach to the fulfilment of human rights obligations by states, whereby states of origin, transit and destination should place focus on specific areas of intervention within a paradigm of "separation of labour" in the counter-trafficking domain.

Final conclusion

In the words of the UN High Commissioner for Human Rights, a human-rights based approach to human trafficking should aim to "identify and redress the discriminatory practices and unequal distribution of power that underline trafficking, which maintain impunity for traffickers and deny justice to their victims."[239] Framed as a power imbalance, THB is to be addressed by empowering the victim while countering those circumstances that had led to victimization: individual criminal actions that have to be prosecuted, but also systemic issues – such as discrimination, extreme poverty, flawed institutional and legislative frameworks – that have to be alleviated.

This way a situation of *justice* can be restored, "a conception of justice not as a wining percentage of court cases but instead as a process that recognizes and reinstates the power of the survivor".[240] The crucial role in restoring this balance lies with the State as the bearer of international human rights obligations.

In the present work I examined some of the theoretical challenges that I find the most important for understanding the extent of human rights obligations of states with regard to THB, under the human-rights protection and counter-trafficking systems established by the Council of Europe. My premise was that by eliminating theoretical inconsistencies, it would be easier to conceive a notion of human rights obligations in the sphere of THB.

[239] OHCHR, *Commentary on Recommended Principles and Guidelines*, 49.
[240] Luis CdeBaca, "Successes and Failures in International Human Trafficking Law", Special Symposium Feature Successes and Failures in International Human Trafficking Law, *Michigan Journal of International Law* 33 (2011): 47

The first step was to show the roots of the regulation of THB and the progress marked by the adoption of an international definition that is identical for the Palermo Protocol and the European Anti-Trafficking Convention. The analysis showed that the THB definition is comprehensive and flexible enough to justify the enormous attention to it in terms of efforts and resources. This analysis also established some implications as to the scope and meaning of the definition with regards to human rights obligations owed by states. However, as it was shown, although allowing an all-encompassing approach to a major international problem, the formal nature of the definition and its open-ended elements are susceptible to many interpretations and, therefore, may produce theoretical inconsistencies. This character of the definition was kept in mind in the further analysis.

One such area, where clarification is needed is the relationship between THB and human rights. While, as shown in the beginning of Chapter 2, trafficking can and should be addressed as a human rights issue. However, in order to define a consistent approach to it through states' human rights obligations, account should be taken of the latest legal developments in conceiving THB as a human rights violation. This is why the same chapter scrutinized the main conclusions of the ECtHR judgment in *Rantsev v Cyprus and Russia* to establish that an important conceptual shift was marked by this decision in conceiving of THB as a human rights violation, whereby the formal definition that directly addresses a whole range of human rights violation, was itself given weigh under the European human rights law, by creating a presumption of torture, inhuman or degrading treatment in at least one category of THB cases and placing THB in all its forms within the ambit of the prohibition of slavery, servitude and forced labour. Another

important focus of the chapter was the importance of social and economic rights, which are directly related to the root causes of trafficking.

The last chapter builds on the conclusions of the previous two and discusses a theoretical model of conceiving human rights obligations owed by the state in the domain of THB - as a duties to respect, protect and fulfil under a general due diligence standard. This standard makes states responsible even, despite the fact that the original crime of trafficking is usually committed by privates. The three general duties discussed in the chapter help understand the different approaches states should adopt in dealing with THB from a human right perspective – abstaining from violations, taking action when violations are committed by others and effectively preventing any violations by addressing their root causes. At the same time, on the example of the obligation to identify victims, the chapter shows that *de facto* challenges in carrying out states obligations should be addressed in the shape these obligations take.

The overall conclusion of the thesis is that, at the current stage of development of the regional human rights law in Europe, it is possible to identify a consistent framework of human rights obligations owed by the states in the domain of THB. This thesis should therefore be regarded rather as a point of departure than a solution.

A final point to make is that whatever the theoretical underpinnings of the anti-trafficking law what matters the most is its effects on real humans. Or, as put by Ambassador Luis CdeBaca:

> "Victims neither know, nor care, whether what happened to them is slavery, servitude, practices similar to, forced labor, bonded labor, trafficking, or any other concept in international or domestic parlance, no matter how in vogue it may be. They know they can't leave, and think that no one is there to help them."[241]

[241] ibid., 43.

Bibliography

Books:

- David Boucher, The Limit of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition, (Oxford: Oxford University Press, 2009)
- Gallagher, Anne T., *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010)
- Harris, David J.; O'Boyle, Michael; Bates, Edward P. and Buckley, Carla, M., *Harris, O'Boyle and Warbick – Law of the European Convention of Human Rights*. 2nd ed. (Oxford: Oxford University Press, 2009)
- Laczko, Frank and Gozdziak, Elzbieta (ed.), *Data and Research on Human Trafficking: A Global Survey*, (Geneva: International Organization for Migration, 2005)
- Letschert, Rianne and Van Dijk, Jan (eds.), *The New Faces of Victimhood: Globalization, Transnational Crimes and Victim Rights*, (Heidelberg, London New York: Springer Drodrecht, 2011)
- Malarek, Victor, *The Natashas: The New Global Sex Trade*, (Canada: Viking, 2004)
- Mowbray, Alastair, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Oxford: Hart Publishing, 2004)
- Obokata, Tom, *Trafficking in Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, (Leiden: Martinus Nijhoff, 2006)
- Rijken, Conny (ed.), *Combating Trafficking in Human Beings for Labour Exploitation*, (Nijmegen: Wolf Legal Publishers, 2011)
- Tomuschat, Christian, *Human Right - Between Idealism and Realism*, (Oxford: Oxford University Press, 2003)

Articles:

- Allain, Jean, "Mobilisation of International Law to Address Trafficking and Slavery", presented at the 11th Joint Stanford-University of California Law and Colonialism in Africa Symposium, 19-21 March, 2009, available at lawvideolibrary.com/docs/mobilization.pdf (last accessed – 15 March, 2012)
- Bravo, Karen E., "Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade", *Boston University International Law Journal* 25 (2007)
- CdeBaca, Luis, "Successes and Failures in International Human Trafficking Law", Special Symposium Feature Successes and Failures in International Human Trafficking Law, *Michigan Journal of International Law* 33 (2011): 37-51
- Chuang, Janie A., "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy", *University of Pennsylvania Law Review* 158 (2010)
- Eliot, Jessica, "(Mis)Identification of Victims of Human Trafficking: The Case of R v. O", *International Journal of Refugee Law*, 21(4) (2009): 724-741
- Flowe, Meredith "The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation: Analyzing Current Treatment of Supply And Demand," *North Carolina Journal of International Law and Commercial Regulation*, 35 (2010)
- Gallagher, Anne T., "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway," *Virginia Journal of International Law*, 49, no. 4 (2009)
- Hathaway, James C., "The Human Rights Quagmire of "Human Trafficking"," *Virginia Journal of International Law*, 49, no. 1 (2008)
- Gekht, Anna, "Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings", *Denver Journal of International Law and Policy* 37 (2008): 29

- Jordan, Ann, “Fact or Fiction: What Do We Really Know about Human Trafficking?”, *Issue Paper 3, Washington College of Law Center for Human Rights & Humanitarian Law* (May 2011)
- Lenzerini, Federico, "International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: Which Gaps are to be Filled?," *Intercultural Human Rights Law Review*, 4 (2009)
- Pati, Roza, "States' Positive Obligations with Respect to Human Trafficking: the European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia,"*Boston University International Law Journal*, 29 (2011)
- Piotrowicz, Ryszard, "The Legal Nature of Trafficking in Human Beings," *Intercultural Human Rights Law Review*, 4 (2009): 175-203
- Waisman, Viviana, “Human Trafficking: State Obligations to Protect Victims' Rights, The Current Framework And A New Due Diligence Standard”, *33 Hastings International and Comparative Law Review,* (2010): 385-430
- Weiss, Adam and Chaudary, Saadiya, "Assessing victim status under the Council of Europe Convention on Action against Trafficking in Human Beings: the situation of "historical" victims," *Journal of Imigration Asylum and Nationality Law* 2, no. 25 (2011): 168-178

Reports/Guidelines:

- Bhabha, Jacqueline and Alfirev,Vhristina, Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs (United Nations High Commissioner for Refugees, 2009)
- CCPR Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 24, 2006)
- Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings
- La Strada International, *Violation of Women’s Rights: A cause and consequence of trafficking in women,* (Amsterdam, 2008)

- Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights
- OSCE/ODIHR, *National Referral Mechanisms. Joining Efforts to Protect the Rights of Trafficked Persons: A Practical Handbook*, (2004) available online at http://www.osce.org/odihr/13967
- OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Efforts to Combat Trafficking in Human Beings in the OSCE Area: Coordination and Reporting Mechanisms* (Vienna: OSCE, 2008)
- UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Right and Human Trafficking, Commentary* (Geneva and New York: United Nations, 2010)
- United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (New York, 2004)
- United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners*, available at http://www.unodc.org/documents/human-trafficking/TIP_module2_Ebook.pdf
- US Department of State, *Trafficking in persons report*, issues of 2003, 2008 and 2010