

## 2. INTERNATIONAL LEGAL FRAMEWORK

In its adjudication on the matter of trafficking in human beings the ECtHR, refers to the international legal framework concerning the matter. It does so not only to determine the scope of article 4 but also to establish the positive obligations that stem from it. The Court takes this approach in accordance with and on the basis of the Vienna Convention on the Law of Treaties (VCLT 1969), which provides that an international treaty shall be interpreted by considering other sources of applicable international law.<sup>9</sup> Thus, to understand the adjudication of the Court regarding article 4 of the ECHR, it is first necessary to examine the international legal framework covering the issue. Therefore, this chapter presents a broad overview of the relevant international agreements. Definitions of key terms are given, and the level of protection offered in relevant treaties is specified. Considering that human trafficking is closely connected to the issues of slavery, servitude, and forced labour, international treaties addressing these exploitation forms will also be discussed.

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9 Article 31 of the Vienna Convention on the Law of Treaties (1969) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), 273–275.

### 2.1. 1926 Slavery Convention and Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, 1956<sup>10</sup>

The Slavery Convention was adopted in September 1926 and is heavily based on the output of the expert body ‘Temporary Slavery Commission’ that was established by the League of Nations to investigate the issue of slavery.<sup>11</sup> The convention’s main relevance for today concerns its definition of the term slavery in article 1(1) which provides that: “*Slavery is the status or condition of a person over whom any or all of the powers attaching, to the right of ownership are exercised*”.

When reading the ECtHR interpretation of the definition in its judgement *Siliadin v France* (2005), where it basically limits the term slavery to the legal institution of ownership, one could conclude that the convention is outdated, considering that the legal institution of slavery has been abolished worldwide.<sup>12</sup> However, the convention’s phrasing already suggests that slavery is meant to also cover situations that amount to *de facto* ownership.<sup>13</sup> Furthermore, reiterations of the convention’s definition in other treaties, such as the Rome Statute of the International Criminal Court and decisions of criminal courts, confirm its continuing relevance.<sup>14</sup>

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10 Slavery Convention (adopted 25 September 1926, entered into force 09 March 1927) 60 LNTS 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 07 September 1956, entered into force 30 April 1957) 266 UNTS 3.

11 Jean Allain, ‘Contemporary Slavery and its Definition in Law’ in Annie Bunting and Joel Quirk (eds), *Contemporary Slavery: The Rhetoric of Global Human Rights Campaigns* (Cornell University Press 2018), 54 f.

12 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 122; Vladislava Stoyanova, ‘United Nations against Slavery: Unravelling Concepts, Institutions and Obligations’ [2017] Michigan Journal of International Law, 418.

13 Jean Allain, ‘Contemporary Slavery and its Definition in Law’ in Annie Bunting and Joel Quirk (eds), *Contemporary Slavery: The Rhetoric of Global Human Rights Campaigns* (Cornell University Press 2018), 47 ff.

14 Vladislava Stoyanova, ‘United Nations against Slavery: Unravelling Concepts, Institutions and Obligations’ [2017] Michigan Journal of International Law, 418; Jean Allain, ‘Contemporary Slavery and its Definition in Law’ in Annie Bunting and

## 2.1. 1926 Slavery Convention

So when it comes to interpreting the definition's inclusion of *de facto* ownership, it is important to understand that aforementioned powers only exist in conjunction with the essential element of a type of control that “*deprive[s] that person of his or her individual liberty*”<sup>15</sup>, and which therefore, basically amounts to possession.<sup>16</sup> This type of control consequently enables the slaveholder to exercise over an enslaved individual the powers to buy, sell, use or manage the use thereof, transfer through inheritance, and destroy.<sup>17</sup>

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was drafted in response to the uncertainty concerning whether certain types of servile status would be covered by the definition of the 1926 Slavery Convention.<sup>18</sup> Consequently, it aimed to abolish, and therefore, defined the following practices similar to slavery: debt bondage, serfdom, forced marriage, and the transfer of children for the purpose of exploitation.<sup>19</sup> These practices involve forms of servitude, and thus, by definition, they have a lower threshold than slavery, which requires ‘powers attaching to the right of ownership’.<sup>20</sup>

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Joel Quirk (eds), *Contemporary Slavery: The Rhetoric of Global Human Rights Campaigns* (Cornell University Press 2018), 36 ff, 46.

15 Research Network on the Legal Parameters of Slavery, ‘Bellagio–Harvard Guidelines on the Legal Parameters of Slavery’ (3 March 2012).

16 Jean Allain, ‘Contemporary Slavery and its Definition in Law’ in Annie Bunting and Joel Quirk (eds), *Contemporary Slavery: The Rhetoric of Global Human Rights Campaigns* (Cornell University Press 2018), 39.

17 *Ibid*, 39 ff.

18 Economic and Social Council, ‘Report of the Ad Hoc Committee on Slavery (2nd session)’ (4 May 1951) E/1988, para 13; Vladislava Stoyanova, ‘United Nations against Slavery: Unravelling Concepts, Institutions and Obligations’ [2017] *Michigan Journal of International Law*, 376 f.

19 Article 1 of the Supplementary Convention on the Abolition of Slavery.

20 Jean Allain, ‘Contemporary Slavery and its Definition in Law’ in Annie Bunting and Joel Quirk (eds), *Contemporary Slavery: The Rhetoric of Global Human Rights Campaigns* (Cornell University Press 2018), 43, 57; Jean Allain, ‘Servitude or Institutions or Practices Similar to Slavery’ in Jean Allain (ed), *Slavery in International Law: Of Human Exploitation and Trafficking* (Brill 2013), 144.

## 2.2. Forced Labour Convention, 1930<sup>21</sup>

The reason for drafting the Forced Labour Convention, 1930 (ILO Convention No. 29) was to prevent unrest among indigenous workers and to protect western labourers.<sup>22</sup> The initial objective was thus not to completely eradicate forced labour but to limit labour exploitation in the colonies and to improve the labour rights of indigenous people.<sup>23</sup> Therefore, in its original version, allowances were made for exploitation under certain circumstances.<sup>24</sup> However, two relevant follow-up documents, one being the Abolition of Forced Labour Convention, 1957 (ILO Convention No. 105), clarify that forced labour for the purposes of political coercion, economic development, discrimination, or punishment for political views and strike participation is forbidden.<sup>25</sup> The Protocol of 2014 to the Forced Labour Convention, 1930 (P29) finally eliminated the transitional provisions that allowed certain forced labour practices and explicitly linked forced labour and human trafficking for the purpose of forced labour.<sup>26</sup> Moreover, it includes not only obligatory preventative measures but also a number of positive obligations that require state parties to identify, protect, and support victims of forced labour and to pursue the option of non-punishment.<sup>27</sup>

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21 Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932).

22 Natalia Ollus, 'Regulating forced labour and combating human trafficking: the relevance of historical definitions in a contemporary perspective' (2015) 63 *Crime, Law and Social Change* 221, 238.

23 *Van der Musselle v Belgium* App no 8919/80 (ECtHR, 23 November 1983), para 32; Natalia Ollus, 'Regulating forced labour and combating human trafficking: the relevance of historical definitions in a contemporary perspective' (2015) 63 *Crime, Law and Social Change* 221, 227.

24 Article 1 (2) of the ILO Convention No. 29, 1930 allowed forced labour for public purposes under certain circumstances, which were described in detail in articles 3–24 of the ILO Convention No. 29, 1930.

25 Article 1 of the Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959).

26 Preamble, Article 7 of the Protocol of 2014 to the Forced Labour Convention, 1930 (adopted 28 May 2014, entered into force 9 November 2016).

27 Articles 2-4 of the Protocol of 2014 to the Forced Labour Convention, 1930 (adopted 28 May 2014, entered into force 9 November 2016).

With regard to article 4 of the ECHR, the most relevant provision is article 2 of the Forced Labour Convention, 1930, which provides a commonly accepted definition of ‘forced labour’ that has been cited by the ECtHR as the applicable legal definition when interpreting the material scope regarding the element of ‘forced labour’ in article 4 of the ECHR.<sup>28</sup> It reads as follows:

*“For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”<sup>29</sup>.*

In paragraph 2 certain situations are explicitly excluded from the definition, such as compulsory military service, civic obligations, and certain court-ordered compulsory work as well as in situations of public emergency.

The element of ‘menace of any penalty’ encompasses any form of coercion, non-payment of wages, penal sanctions, and the loss of privileges.<sup>30</sup> The exact meaning of ‘not voluntarily’ remains subject to debate. Situations where a worker initially voluntarily takes up work but subsequently cannot leave employment were intended to be covered by the definition when it was first introduced.<sup>31</sup> *Ollus* argues for a more flexible interpretation.<sup>32</sup> Nowadays, forced labour mostly occurs in the context where someone migrates, initially willingly, but then is subjected to forced labour in the country of immigration.<sup>33</sup> Accordingly, forced labour should not be defined by a migrant worker’s

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28 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 281; *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 115; *Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983), para 32.

29 Article 2 Forced Labour Convention, 1930.

30 International Labour Office, ‘ILO Standards on Forced Labour – The new Protocol and Recommendation at a Glance’ (2016), 5.

31 Natalia Ollus, ‘Regulating forced labour and combating human trafficking: the relevance of historical definitions in a contemporary perspective’ (2015) 63 *Crime, Law and Social Change* 221, 229.

32 *Ibid*, 240.

33 *Ibid*.

consent, that is based on wrong expectations but rather by the actual circumstances of the employment itself.<sup>34</sup> The ILO also argues that only freely given informed consent is relevant in this context, with the additional criterion of being able to leave at any time.<sup>35</sup>

### 2.3. Palermo Protocol, 2000<sup>36</sup>

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) is a supplementary document to the Convention against Transnational Organized Crime (UNTOC), and thus, is understood with reference to the UNTOC.<sup>37</sup> To date, 180 states are parties to the Palermo Protocol, and it is the first document to provide an extensive and comprehensive international legal regime on the matter of human trafficking.

The objectives listed in article 2 of the Palermo Protocol are to prevent and combat trafficking in persons, to protect and assist the victims thereof, and to promote cooperation among the parties. In article 3(a), a definition of ‘trafficking in persons’ is offered:

*“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of [inter alia] the threat or use of force or other forms of coercion (...) for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (...)*”

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34 Ibid.

35 International Labour Office, ‘ILO Standards on Forced Labour – The new Protocol and Recommendation at a Glance’ (2016), 5.

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

37 Article 1 of the Palermo Protocol.

Notably, the provision further states that consent given by a victim is of no consequence if it was obtained by exerting one of the ‘means’; in addition, trafficking in children does not require the element of ‘means’, which is a crucial difference from the definition established for adults.<sup>38</sup>

Article 4 of the Palermo Protocol delineates the scope of the protocol, stating that it shall only apply to prevent, investigate, and prosecute the established criminal offences concerning trafficking “(...) *where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.*” This wording has led to the opinion of some that the elements of transnationality and organised crime are essential to the definition of ‘trafficking’ under the Palermo Protocol.<sup>39</sup> However, if understood in light of article 34 of the UNTOC and the UN legislative guide for the implementation of the protocol, this is not the case. Solely domestic instances of trafficking are also covered by the protocol.<sup>40</sup> The transnational element is only of relevance for the obligation to cooperate with other states.<sup>41</sup> The argument, namely that transnationality and organised crime involvement are integral parts of the definition, also contradicts the protocol’s aim of effective victim protection, as such limitation would result in a situation where the protocol would only apply to a fraction of the existing cases of trafficking.

Article 5 contains the central obligation of the protocol, requiring all parties to criminalise trafficking in persons – including attempt, partic-

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38 Article 3(b), (d) of the Palermo Protocol.

39 James C Hathaway, ‘The Human Rights Quagmire of Human Trafficking’ (2008) 49 *Virginia Journal of International Law* 1, 11; Marika McAdam, ‘The International Legal Framework on Human Trafficking: Contemporary Understandings and Continuing Confusions’ in Jennifer B Clark and Sasha Poucki (eds), *The SAGE Handbook of Human Trafficking and Modern Day Slavery* (SAGE Publications Ltd 2019), 10 f.

40 United Nations Office on Drugs and Crime, ‘Legislative Guide: for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’ (2020), para 178; Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 79.

41 *Ibid.*

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ipation, organisation, or direction of others to engage in trafficking – in their respective domestic legal system.

The next part of the protocol (articles 6–9) specifies victim related measures. However, most of these are formulated as suggestions rather than concrete obligatory measures. Finally, the protocol contains measures that are aimed at improving prevention and cooperation regarding this matter and serve to supplement the already detailed list of measures set out in article 31 of the UNTOC.<sup>42</sup>

The protocol's most significant aspect is the provision of a more comprehensive and widely accepted definition for the term 'human trafficking', which is not only replicated in article 4(a) of the Council of Europe Convention on Action against Human Trafficking (CoE Trafficking Convention), but has also repeatedly been cited by the ECtHR, which relies heavily on it in its adjudication.<sup>43</sup> Additionally, it facilitated the introduction of national legal frameworks criminalising trafficking, with over 90% of UN member states now having a specific criminal offence for trafficking in persons.<sup>44</sup>

However, the definition of article 3 exhibits considerable ambiguity due to the lack of explicit definitions for the terms used to describe the acts and means of trafficking. This offers a certain amount of flexibility concerning the scope of the protocol that, hence, varies greatly in domestic legal frameworks.<sup>45</sup> Moreover, due to the protocol being attached to a criminal justice convention, some argue that too much emphasis is being placed on policing trafficking and not enough focus

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42 Ibid, 87.

43 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 149. See also: *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 41.

44 United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2020* (United Nations 2021), 23.

45 Marika McAdam, 'The International Legal Framework on Human Trafficking: Contemporary Understandings and Continuing Confusions' in Jennifer B Clark and Sasha Poucki (eds), *The SAGE Handbook of Human Trafficking and Modern Day Slavery* (SAGE Publications Ltd 2019), 13–14.

## 2.4. Council of Europe Convention on Action against Trafficking

is being given to victim protection and support.<sup>46</sup> Additionally, the effectiveness of the protocol remains to be questioned due to the lack of an effective reviewing mechanism concerning its implementation in the past 20 years.<sup>47</sup>

Overall, the Palermo Protocol has certainly encouraged progress in dealing with the issue of trafficking in persons. Nevertheless, as is common with international frameworks, there is room for improvement.

## 2.4. Council of Europe Convention on Action against Trafficking<sup>48</sup>

The CoE Trafficking Convention currently has 48 parties, including Belarus and Israel as it is also open to non-CoE members.

The proposal and development of the convention emerged from efforts to improve the protection of women from violence and exploitation.<sup>49</sup> After two recommendations in 2000 and 2001 that focused on the sexual exploitation of women and children, the Parliamentary Assembly of the CoE recommended drafting a convention addressing the issue; it broadened the scope to human trafficking in its various forms at a later stage.<sup>50</sup> Thus, evidently, the CoE did not deem the existing international legal framework to be sufficient. However, the purpose of the convention is not to replace existing international provisions but to build upon them with a legally binding instrument that focuses on

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46 Jacqueline Bhabha, 'Editorial: Looking Back, Looking Forward: The UN Trafficking Protocol at fifteen' (2015) 4 *Anti Trafficking Review* 3.

47 Although a peer review mechanism was established in Resolution 9/1 in 2018, its effectiveness waits to be proven. In a recent paper analysing the mechanism, it is, however, described as a "(...) *safe space for the State Parties to engage with each other without having to worry too much about outside pressure*". See: Ian Tennant and Prem Mahadevan, 'The Implementation Review Mechanism of the UN Convention against Transnational Organized Crime (UNTOC)' in Serena Forlati (ed), *The Palermo Convention at Twenty: Institutional and Substantive Challenges* (Brill Research Perspectives in International Law Series. Brill 2021), 40.

48 Convention on Action against Trafficking in Human Beings (adopted 15 May 2005, entered into force 1 February 2008) CETS No. 197.

49 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, 14 ff.

50 *Ibid*, 24 ff.

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victim protection, raises minimum standards, and offers more specific provisions.<sup>51</sup>

Therefore, next to preventing, combating, and prosecuting trafficking in human beings, article 1 of the CoE Trafficking Convention also specifically declares that the protection of the human rights of victims of trafficking is an objective of the convention. Consequently, article 3 contains a specific prohibition against any form of discrimination concerning the granting of victims' rights.

Article 4 of the CoE Trafficking Convention adopts the definition of 'trafficking in human beings' from the Palermo Protocol, but situates it in the specific context of protecting human rights and prioritising victims.<sup>52</sup> These different backgrounds are of importance when interpreting the definitions – in particular, the respective elements of the trafficking definition – provided in article 4 of the CoE Trafficking Convention.<sup>53</sup> Unlike the Palermo Protocol, article 4 of the CoE Trafficking Convention also includes a definition of the term 'victim', that is “*any natural person who is subject to trafficking in human beings as defined in this article*”<sup>54</sup>, to ensure a uniform application of all victim related measures in the convention.<sup>55</sup> Yet, different concepts can be observed with regard to the threshold of proof that is necessary for a person to be considered as a victim throughout the convention – in some articles definite identification is required (e.g article 10 of the CoE Trafficking Convention) whereas in others, reasonable grounds are sufficient (e.g article 13 of the CoE Trafficking Convention).<sup>56</sup> However,

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51 Ibid, 29 f, 36.

52 Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.29.

53 Ibid, 4.30.

54 Article 4(e) of the CoE Trafficking Convention.

55 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 99; Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.26.

56 Ibid.

## 2.4. Council of Europe Convention on Action against Trafficking

given the explicit definition of ‘victim’ as well as a thorough debate on the matter during the drafting process, a low threshold, of ‘reasonable grounds’, may be intended.<sup>57</sup>

Articles 10–17 list the concrete victims’ rights, which can be summarized as follows: The parties are obligated to ensure that victims are officially identified as such by competent authorities; to have measures in place to protect the private lives of victims; to implement a list of assistance measures for identified victims; to grant identified victims a minimum 30-day reflection period to enable them to make an informed decision concerning cooperation with the competent authorities; to provide a residence permit under certain circumstances; to ensure that the victim can seek compensation from the trafficker; to ensure the safety and enable the return of citizens who have become victims abroad; and finally, to ensure gender equality.

This set of measures undoubtedly constitutes a major step forward in the protection of the human rights of victims of trafficking compared to previous legal documents.<sup>58</sup> For one, all these provisions are legally binding, which is a substantial improvement over, for instance, victim protection provisions in the Palermo Protocol.<sup>59</sup> In addition, the list of assistance measures are to be provided regardless of the willingness of the victim to act as a witness.<sup>60</sup> Furthermore, article 13 includes a 30-day reflection period during which expulsion of the victim is forbidden, which gives the victim some time to heal, to withdraw from the trafficker’s influence, and to make an informed decision about cooperating with law-enforcement.

The next part of the convention contains criminal justice provisions that generally replicate the criminal justice provisions of the Palermo Protocol, but here again, the CoE Trafficking Convention goes further

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57 Ibid, 4.61.

58 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 126.

59 With the sole exception of article 11(3), which suggests the introduction of measures that encourage the media to protect a victim’s private life.

60 Article 12(6) of the CoE Trafficking Convention.

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and into more detail regarding mandatory provisions.<sup>61</sup> Particularly noteworthy are the provisions of article 19, that extend criminalisation to the knowing use of the services of a victim, and to attempting, aiding, and abetting the aforementioned offences (article 21); that provide corporate liability for such criminal offences (article 22); and that mandate consideration of aggravating circumstances (article 24). Article 26 also includes a non-punishment provision for trafficking victims who were compelled to become involved in unlawful activities. However, due to its wording, state parties are only required to adopt laws that provide for the possibility of non-punishment, leaving open the alternative that victims are charged with and convicted of crimes. The convention also establishes a broad jurisdictional reach that covers trafficking offences that occur in a state party's territory, are committed by its citizens, or against its citizens.<sup>62</sup>

Articles 32–35 include measures for cooperation among parties and with the civil society. The last part of the convention (articles 36–38) dictates the establishment of an independent monitoring mechanism called 'GRETA', which comprises up to 15 experts who review the implementation of the convention by the parties in evaluation cycles. It is currently in its third round of evaluations, which will be completed by the end of 2023.

As of today, the convention is the only human rights treaty that explicitly concerns the issue of trafficking in human beings. It set and established new minimum standards concerning the protection of victims. Further, with its unique monitoring mechanisms, it can be considered a comparably effective international treaty. What is more, the ECtHR has explicitly identified the CoE Trafficking Convention as a relevant source for determining the scope of the positive state

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61 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 122 ff.

62 Article 31 of the CoE Trafficking Convention; Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 122.

## 2.5. EU Trafficking Directive (2011)

obligations under article 4 of the ECHR.<sup>63</sup> Hence, the ECtHR has continuously and extensively drawn from the CoE Trafficking Convention in its adjudication on victim rights under article 4 of the ECHR. Additionally, in this context, the Court regards the interpretative work of GRETA regarding the CoE Trafficking Convention as authoritative and relevant.

Overall, the convention is undoubtedly of substantial relevance within the international legal framework to combat trafficking in human beings and provides a more comprehensive and extensive level of protection compared to the Palermo Protocol.

## 2.5. EU Trafficking Directive (2011)<sup>64</sup>

The European Parliament and Council Directive 2011/36/EU (EU Trafficking Directive) is not an international treaty but secondary legislation of the supranational organisation, the European Union, that builds upon the existing international legal framework and replaces the framework decision 2002/629/JHA to recognize and address developments in this field.<sup>65</sup>

Accordingly, the EU Trafficking Directive provides a broader definition of the term ‘trafficking in human beings’ compared to the Palermo Protocol and CoE Trafficking Convention: It includes the ‘exchange or transfer of control over those persons’ as a form of action of trafficking, and also introduces forced begging and exploitation for the purpose of criminal activities as additional forms of exploitation.<sup>66</sup> Further, article 2(2) of the EU Trafficking Directive defines the term ‘position of

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63 *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 150. See also: *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 105.

64 European Parliament and Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1, EU Trafficking Directive.

65 Preamble para 9, 11 of the EU Trafficking Directive.

66 Article 2 (3) of the EU Trafficking Directive.

vulnerability’ as “*a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.*”

Additionally, in article 4, it stipulates maximum penalties of at least 5 years for normal circumstances and 10 years for aggravated circumstances; serious violence and cases of especially vulnerable victims are regarded as such aggravated circumstances. Moreover, article 10 establishes mandatory jurisdiction for cases of traffickers, who are EU-citizens irrespective of the fact, whether human trafficking is criminalised in the state where the offence was committed.<sup>67</sup>

In most instances, the provisions concerning victim protection are similar to the ones found in the CoE Trafficking Convention, but the EU Trafficking Directive further includes a detailed and comprehensive set of protective measures concerning child victims of trafficking, and thus focuses specifically on the child’s interest.<sup>68</sup>

It is noteworthy to mention, that the Commission has published a proposal for the amendment of the EU Trafficking Directive in December 2022. The Commission suggests, inter alia, to explicitly name illegal adoption and forced marriage as forms of exploitation and to include information and communication technologies as forms of means.<sup>69</sup> Also, it proposes criminalising “*the use of services which are the object of exploitation with knowledge that the person is a victim (...).*”<sup>70</sup>

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67 In contrast, article 31 of the CoE Trafficking Convention only establishes jurisdiction for citizens, if the particular action is also criminalised in the respective state where the trafficking offence was committed. Besides, this provision may be subject to reservations.

68 Articles 13–17 of the EU Trafficking Directive.

69 European Commission, ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims’ COM (2022) 732 final, articles 1(1), 2a.

70 Ibid, article 18a.

### 2.6. Conclusion

Although, the problems of slavery and forced labour had already been dealt with for some decades, a detailed and explicit international legal framework targeting human trafficking only emerged in the past 20 years. The Palermo Protocol introduced an accepted and established definition for the term ‘trafficking in human beings’. However, there is no uniform or definite interpretation of the three elements – action, means, purpose of exploitation – that make up the definition. The protection offered to victims under the international legal framework also differs across documents but continues to improve. The victim protective measures of the Palermo Protocol are kept vague and optional, leaving it to the state parties to implement an effective and comprehensive protection system. By contrast, the CoE Trafficking Convention specifies mandatory victim protective measures, introducing, for instance, a 30-day reflection period for the victim. The EU Trafficking Directive contains most of the provisions of the CoE Trafficking Convention but also focuses on children as a vulnerable group, putting the interests of the child at the centre. However, overall, the mandatory protection provisions in these documents do not confer subjective rights upon the victims, which leaves them reliant on the state to deliver the mandated level of protection.<sup>71</sup>

Given the ambiguity of the terms used in the generally accepted definition of human trafficking and the range of victim protection levels found, the next chapter focuses on the perspective of human rights law by examining the definition of human trafficking and positive state obligations under the ECHR.

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71 With the exception of the EU Trafficking Directive, which could become directly applicable law in EU member states under certain circumstances.

